PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

No. 10- 10-174 AUG 02 2010

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY INC., *et al.*,
Petitioners,

v.

STATE OF CONNECTICUT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

F. WILLIAM BROWNELL
NORMAN W. FICHTHORN
ALLISON D. WOOD
HUNTON & WILLIAMS LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 955-1500

Counsel for Petitioner Southern Company

PETER D. KEISLER*
CARTER G. PHILLIPS
DAVID T. BUENTE JR.
QUIN M. SORENSON
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
pkeisler@sidley.com
(202) 736-8000

Counsel for Petitioners

* Counsel of Record
[Additional Counsel Listed On Inside Cover]

August 2, 2010

WILSON-EPES PRINTING CO., INC – (202) 789-0096 – WASHINGTON, D.C. 20002

SHAWN PATRICK REGAN
HUNTON & WILLIAMS LLP
200 Park Avenue
52nd Floor
New York, N.Y. 10166
(212) 309-1000

Counsel for Petitioner Southern Company

MARTIN H. REDISH
NORTHWESTERN UNIVERSITY SCHOOL OF LAW
375 East Chicago Avenue
Chicago, Illinois 60611
(312) 503-8545

Counsel for Petitioners

DONALD B. AYER
KEVIN P. HOLEWINSKI
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

THOMAS E. FENNELL
MICHAEL L. RICE
JONES DAY
2727 North Harwood Street
Dallas, Texas 75201
(214) 220-3939

Counsel for Petitioner Xcel Energy Inc.

QUESTIONS PRESENTED

The court of appeals held that States and private plaintiffs may maintain actions under federal common law alleging that defendants—in this case, five electric utilities—have created a "public nuisance" by contributing to global warming, and may seek injunctive relief capping defendants' carbon dioxide emissions at judicially-determined levels. The questions presented are:

1. Whether States and private parties have standing to seek judicially-fashioned emissions caps on five utilities for their alleged contribution to harms claimed to arise from global climate change caused by more than a century of emissions by billions of independent sources.

2. Whether a cause of action to cap carbon dioxide emissions can be implied under federal common law where no statute creates such a cause of action, and the Clean Air Act speaks directly to the same subject matter and assigns federal responsibility for regulating such emissions to the Environmental Protection Agency.

3. Whether claims seeking to cap defendants' carbon dioxide emissions at "reasonable" levels, based on a court's weighing of the potential risks of climate change against the socioeconomic utility of defendants' conduct, would be governed by "judicially discoverable and manageable standards" or could be resolved without "initial policy determination[s] of a kind clearly for nonjudicial discretion." *Baker* v. *Carr*, 369 U.S. 186, 217 (1962).

PARTIES TO THE PROCEEDINGS

Defendant-appellees below were American Electric Power Company, Inc.; American Electric Power Service Corporation; Cinergy Corporation (merged into Duke Energy Corporation); Southern Company; Xcel Energy Inc.; and the Tennessee Valley Authority.

Plaintiff-appellants below were State of Connecticut; State of New York; People of the State of California; State of Iowa; State of New Jersey; State of Rhode Island; State of Vermont; State of Wisconsin; City of New York; Open Space Institute, Inc.; Open Space Conservancy, Inc.; and Audubon Society of New Hampshire.

RULE 29.6 STATEMENT

American Electric Power Company, Inc. is a publicly traded company. There is no publicly traded company owning 10% or more of its stock.

American Electric Power Service Corporation is a wholly-owned subsidiary of American Electric Power Company, Inc.

Cinergy Corporation merged into Duke Energy Corporation. Duke Energy Corporation is a publicly traded company. There is no publicly traded company owning 10% or more of its stock.

Southern Company has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Xcel Energy Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
RULE 29.6 STATEMENT	iii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
INTRODUCTION	2
STATEMENT OF THE CASE	6
REASONS FOR GRANTING THE PETITION	12
I. THE DECISION BELOW IS ERRONEOUS AND CONFLICTS WITH DECISIONS OF THIS AND OTHER COURTS REGARDING STANDING, FEDERAL COMMON LAW, AND THE POLITICAL QUESTION DOCTRINE.	13
A. The Plaintiffs Cannot Show "Global Warming" Injuries Traceable To The Actions Of, Or Redressable By Injunctions Against, The Five Defendants	13
B. Federal Common Law Does Not Support A Climate Change Nuisance Cause Of Action	20
C. This Case Presents Non-Justiciable Political Questions	26

TABLE OF CONTENTS—continued

Page

II. THE JUSTICIABILITY OF CLIMATE CHANGE LAWSUITS UNDER FEDERAL COMMON LAW IS OF EXTRAORDINARY NATIONAL IMPORTANCE. 31

CONCLUSION 35

APPENDIX A: *Connecticut* v. *Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009) 1a

APPENDIX B: *Connecticut* v. *Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005) 171a

APPENDIX C: *State of Conn., et al.* v. *Am. Elec. Power Co., et al.*, No. 05-5104 (2d Cir. Mar. 5, 2010) 188a

APPENDIX D: *Open Space Inst., et al.* v. *Am. Elec. Power Co., et al.*, No. 05-5119 (2d Cir. Mar. 10, 2010) 190a

APPENDIX E: Federal Statutes 192a

TABLE OF AUTHORITIES

CASES Page

California v. *Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), *appeal dismissed*, No. 07-16908 (9th Cir. June 24, 2009) 5, 9
Baker v. *Carr*, 369 U.S. 186 (1962)..... 26, 27, 28
Cipollone v. *Liggett Group, Inc.*, 505 U.S. 504 (1992) 33
City of Milwaukee v. *Illinois*, 451 U.S. 304 (1981) 2, 20, 21, 22
Comer v. *Murphy Oil USA*, No. 05-436, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007 4
Comer v. *Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *reh'g granted*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010) 10
Ctr. for Bio. Diversity v. *Dep't of Interior*, 563 F.3d 466 (D.C. Cir. 2009) 13
Elk Grove Unified Sch. Dist. v. *Newdow*, 542 U.S. 1 (2004) 14
Friends of the Earth, Inc. v. *Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000) 18
Gen. Motors Corp. v. *United States*, 496 U.S. 530 (1990) 10
Georgia v. *Tenn. Copper Co.*, 206 U.S. 230 (1907) 24
Illinois v. *Outboard Marine Corp.*, 680 F.2d 473 (7th Cir. 1982) 22, 23
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 13, 17
Massachusetts v. *EPA*, 549 U.S. 497 (2007) ..... *passim*

TABLE OF AUTHORITIES—continued

Page

Mattoon v. *City of Pittsfield*, 980 F.2d 1 (1st Cir. 1992) 22, 23
Middlesex County Sewage Auth. v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981) 21
Missouri v. *Illinois*, 180 U.S. 208 (1901) 24
Native Vill. of Kivalina v. *ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal pending*, No. 09-17490 (9th Cir. Nov. 5, 2009) ..... *passim*
North Carolina v. *TVA*, No. 09-1623, 2010 WL 2891572 (4th Cir. July 26, 2010) .... *passim*
North Dakota v. *Minnesota*, 263 U.S. 365 (1923) 24
O'Melveny & Myers v. *FDIC*, 512 U.S. 79 (1994) 25
PIRG v. *Powell Duffryn Terminals Inc.*, 913 F.2d 64 (3d Cir. 1990) 15, 18, 19
Sierra Club v. *Cedar Point Oil Co.*, 73 F.3d 546 (5th Cir. 1996) 18, 19
Simon v. *E. Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) 14
Sosa v. *Alvarez-Machain*, 542 U.S. 692 (2004) 24
Tex. Indus. v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981) 25
United States v. *E.C. Knight Co.*, 156 U.S. 1 (1895) 24
Vieth v. *Jubelirer*, 541 U.S. 267 (2004) 29, 30

CONSTITUTION AND STATUTES

U.S. Const. art. III, § 2, cl. 1 2
Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (1963) 10

TABLE OF AUTHORITIES—continued

Page

Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 10
Clean Air Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 10
National Climate Program Act, Pub. L. No. 95-367, 92 Stat. 601 (1978) 11
Energy Security Act, Pub. L. No. 96-294, 94 Stat. 611 (1980) 11
Global Climate Protection Act of 1987, Pub. L. No. 100-204, 101 Stat. 1407 11
Pub. L. No. 101-549, 104 Stat. 2399 (1990) 10
Global Change Research Act of 1990, Pub. L. No. 101-606, 104 Stat. 3096 12
Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 12
42 U.S.C §§ 300f *et seq.* 22
42 U.S.C. §§ 7401 *et seq.* 2

REGULATIONS

Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496 (Dec. 15, 2009) 11
Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25324 (May 7, 2010) 11, 23
Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31514 (June 3, 2010). 4, 11, 21, 23

TABLE OF AUTHORITIES—continued

OTHER AUTHORITIES

Page

Climate Talks Continued: Son of Copenhagen, Economist, June 17, 2010 12

Key Judge Downplays Prospects For Successful Climate Damages Suits, Clean Air Report, Mar. 2, 2010, http://carboncontrolnews.com/20100302102610/Carbon-Control-Daily-News/News/key-judge-downplays-prospects-for-successful-climate-damages-suits/menu-id-202.html 5

Restatement (Second) of Torts (1979) 3, 26

Daniel Hays, *Climate Claims Are the 'New Asbestos,' Swiss Re Suggests*, Nat'l Underwriter Property & Casualty, May 29, 2009 2

Vanessa Holder, *Climate Change Could Be the Next Legal Battlefield*, Fin. Times (London), July 14, 2003 2

Anthony Lacey, *GHG Ruling Boosts Push for 'Intense' New Environmental Tort Claims*, Inside EPA Weekly Report (Inside Wash. Publ'rs., Arlington Va.), Oct. 2, 2009 5

Laurence H. Tribe et al., Wash. Legal Found., Critical Legal Issues Series No. 169, *Too Hot for Courts To Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* (Jan. 2010) 28

White House, *Presidential Memorandum Regarding Fuel Efficiency Standards* (May 21, 2010) 11

PETITION FOR A WRIT OF CERTIORARI

American Electric Power Company Inc., American Electric Power Service Corp., Cinergy Corp., Southern Company, and Xcel Energy Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Second Circuit is reported at 582 F.3d 309, and reproduced at Petition Appendix ("Pet. App.") 1a-170a. The Second Circuit's orders denying rehearing or rehearing en banc are reproduced at Pet. App. 188a-191a. The opinion of the United States District Court for the Southern District of New York is published at 406 F. Supp. 2d 265, and reproduced at Pet. App. 171a-187a.

JURISDICTION

The court of appeals entered judgment on September 21, 2009, Pet. App. 1a, and denied timely petitions for rehearing or rehearing en banc on March 5 and 10, 2010, Pet. App. 188a-191a. On June 28, 2010, Justice Ginsburg granted an extension to and including August 2, 2010, of the time for filing a petition for a writ of certiorari. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution provides, in pertinent part, that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their

Authority ... [and] to Controversies ... between a State and Citizens of another State [or] between Citizens of different States." U.S. Const. art. III, § 2, cl. 1.

Relevant provisions of the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, are reproduced at Pet. App. 192a-214a.

INTRODUCTION

This petition raises the important, recurring question whether States and private plaintiffs have standing to seek, and whether federal common law provides authority for courts to impose, a *non-statutory*, judicially-created regime for setting caps on greenhouse gas emissions based on "vague and indeterminate nuisance concepts." *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 317 (1981) ("*Milwaukee II*"). This Court recognized "the unusual importance of the underlying issue" in granting review in *Massachusetts* v. *EPA*, 549 U.S. 497, 506 (2007), and construing the *statutory* scheme authorizing the Environmental Protection Agency (EPA) to regulate greenhouse gases. This petition asks this Court to decide whether judges, too, may regulate greenhouse gas emissions at the behest of States and private parties and, if so, under what standards. At stake is the financial health and security of numerous sectors of the economy. See Vanessa Holder, *Climate Change Could Be the Next Legal Battlefield*, Fin. Times (London), July 14, 2003, at 10 ("The potential compensation for climate change impacts would make the tobacco pay-outs look like peanuts."); Daniel Hays, *Climate Claims Are The 'New Asbestos,' Swiss Re Suggests*, Nat'l Underwriter Prop. & Cas., May 29, 2009 ("[C]limate change-related liability will develop more quickly than asbestos-related claims ....").

The importance of this Court's intervention in this case flows directly from the extraordinary breadth and consequences of the Second Circuit's decision. It permits federal common law claims seeking to hold companies that emit carbon dioxide liable for the alleged consequences of global climate change and authorizes federal courts to impose prospective caps on their emissions. Those caps would be based not on any statute or regulation, such as those that govern the parallel administrative proceedings at EPA in response to *Massachusetts*, but instead would depend on each court's own assessment of what is "reasonable" in light of its "weighing of the gravity of the harm against the utility of the conduct." Restatement (Second) of Torts § 821B cmt. e (1979).

The ramifications of this holding, if it is allowed to stand, are staggering. A single judge could set emissions standards for regulated utilities across the country—or, as here, for just that subset of utilities that the plaintiffs have arbitrarily chosen to sue. Judges in subsequent cases could set standards for other utilities or industries, or conflicting standards for these same utilities. See *North Carolina* v. *TVA*, No. 09-1623, 2010 WL 2891572, at *6 (4th Cir. July 26, 2010) (cautioning that allowing judges to impose emissions caps based on common law nuisance standards, "whose content must await the uncertain twists and turns of litigation[,] will leave whole states and industries at sea and potentially expose them to a welter of conflicting court orders across the country").

Furthermore, because virtually every entity and industry in the world is responsible for some emissions of carbon dioxide and is thus a potential defendant in climate change nuisance actions under the theory of this case, the issues presented are

certain to recur. See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31514, 31597 (June 3, 2010) (explaining that, unless permitting obligations are deferred by the agency, "over six million [stationary] sources" of greenhouse gas emissions would be subject to permitting requirements under the Clean Air Act—in "[s]ectors ... includ[ing] electricity, industrial, energy, waste treatment, agriculture, commercial and residential"). Each case gives rise to a new opportunity for federal judges to make regulatory judgments that conflict with those of the political branches and eventually with regimes imposed by other judges.

In this case, the named defendants—four private utilities and the Tennessee Valley Authority ('TVA)—operate facilities in 21 States and provide electricity to millions of individuals and enterprises. If they must limit their output or shut down facilities to comply with court-mandated emissions caps, such judicial directives could transform the way the United States produces and obtains energy, limit its supply, dramatically raise its cost, and jeopardize reliable service to the public.

Cases seeking relief under similar common law theories have been filed in the Second, Fifth, and Ninth Circuits against defendants from the electric utility, oil, automotive, coal, and chemical industries. As these cases illustrate, the scope of potential allegations of injuries caused by global warming is limitless—ranging from severe weather-related events such as Hurricane Katrina, see *Comer* v. *Murphy Oil USA*, No. 05-436, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007), to the relocation of entire villages, see *Native Vill. of Kivalina* v. *ExxonMobil Corp.*, 663 F. Supp. 2d 863, 879-80 (N.D. Cal. 2009),

to flooding, erosion, wildfires, see *California* v. *Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), and beyond. The threat of such litigation and the indeterminate exposure to monetary and injunctive relief that it entails will substantially impede and alter the future investment decisions and employment levels of all affected industries, and ultimately every sector of the economy.

The Second Circuit called this an "ordinary tort suit," see Pet. App. 34a, but it plainly is not. Advocacy groups have responded to the decision below by stating they now intend to "ramp up" their litigation efforts whenever the legislative process is "mired down." Anthony Lacey, *GHG Ruling Boosts Push for 'Intense' New Environmental Tort Claims*, Inside EPA Weekly Report (Inside Wash. Publ'rs., Arlington Va.), Oct. 2, 2009. The author of the Second Circuit's opinion himself acknowledged (in subsequent public remarks) his hope that, even if the plaintiffs cannot ultimately succeed in their legal claims, their "nuisance action by nuisance action" approach to seeking emissions reductions may "help in a political sense" by providing an "impetus" for further regulatory and legislative action. *Key Judge Downplays Prospects for Successful Climate Damages Suits*, Clean Air Report, Mar. 2, 2010, http://carboncontrolnews.com/20100302102610/Carbon-Control-Daily-News/News/key-judge-downplays-prospects-for-successful-climate-damages-suits/menu-id-202.html.

Thus, far from "ordinary," this litigation seeks to transfer to the judiciary standardless authority for some of the most important and sensitive economic, energy, and social policy issues presently before the country. Indeed, climate change has received such

intense focus by the political branches, and has been the subject of long and contentious international negotiation, precisely because the issues it presents will reverberate through both the national and world economies. This Court should grant certiorari to address the important and highly consequential separation of powers issues this case presents.

STATEMENT OF THE CASE

This is one of several "climate change" lawsuits that have been brought in federal courts across the country. These common law actions seek to restrict the greenhouse gas emissions of certain enterprises, or to impose monetary liability on those entities, as claimed relief for effects of global warming, notwithstanding existing federal legislation and regulation in this field and ongoing legislative and executive actions to address these issues.

1. The complaints in this case, brought by eight States, three nonprofit land trusts, and a municipality, seek to hold the five named defendants "jointly and severally liable for ... global warming." Pet. App. 178a. They assert that these defendants emit carbon dioxide, which contributes to elevated atmospheric levels of greenhouse gases, which in turn contributes to climate change, which in turn contributes to a wide range of alleged future risks, including "increase[s] in ... respiratory problems," "more droughts and floods," "wildfires," and "widespread disruption of ecosystems [and] reduce[d] biodiversity." *Id.* at 11a. The plaintiffs describe climate change as a "public nuisance," purportedly actionable under federal common law, and demand an order "enjoining each of the defendants to ... cap[] its emissions of carbon dioxide and ... reduc[e] those emissions by a specified percentage each year for at

least a decade." *Id.* at 178a. They note that several of the State plaintiffs have adopted legislative restrictions on emissions of carbon dioxide by facilities within their borders, and claim that, through federal judicial decree, they can force facilities nationwide to reduce their emissions. See Br. for Appellants at 10, No. 05-5104 (2d Cir. Dec. 16, 2005).

The district court dismissed the claims as presenting non-justiciable political questions. Pet. App. 187a. It reasoned that, because climate change is a global phenomenon attributed to global greenhouse gas emissions, a court could not resolve the claims without first determining an acceptable global level of greenhouse gas emissions and then determining which particular sectors and industries, and individual entities, should be held responsible for reducing their emissions and by what amounts to achieve that global level. *Id.* at 183a-185a. These decisions, the district court found, necessarily involve a number of "policy determination[s]" of the type properly reserved for Congress, including "the implications of [emissions reductions] on the United States' ongoing negotiations with other nations concerning global climate change ... [and] on the United States' energy sufficiency and thus its national security." *Id.* at 182a-184a. In light of this conclusion, the district court found it unnecessary to address whether the plaintiffs had standing or whether federal common law provided a valid basis for their claims. *Id.* at 180a n.6, 187a.

A two-judge panel of the Second Circuit reversed. Pet. App. 3a.[1] Characterizing this as an "ordinary tort suit," it held that courts could rely on the Restatement's "reasonableness" standard to adjudicate the claims and that, because the case involved only "six domestic coal-fired electricity plants,"[2] judges would not have to address the broader "policy" issues identified by the district court. *Id.* at 26a, 34a, 119a. The panel further held that, in light of the transboundary effects of carbon dioxide emissions and climate change, federal common law should supply the rule of decision. *Id.* at 88a. Finally, addressing standing, the panel found the allegation that these defendants "contribute[d]" to climate change was adequate to satisfy constitutional requirements. *Id.* at 67a-73a.

The Second Circuit denied timely petitions for rehearing or rehearing en banc. Pet. App. 188a-191a.

2. This case is one of four brought thus far asserting common law claims based on allegations that particular defendants "contributed" to climate change. In each case, the district court dismissed the claims as presenting non-justiciable political questions and in two of the cases dismissed for lack of standing as well.

California v. *General Motors Corp.* (N.D. Cal.) involved a claim for monetary damages by the State of California (also a plaintiff here) against six large

---

[1] The original panel included then-Judge Sotomayor, who was appointed to the Supreme Court on August 8, 2009, before the panel opinion issued. Pet. App. 2a n.*.

[2] In fact, the complaints identify dozens of facilities owned or operated by the defendants in more than 20 States. See Compl ¶¶ 167-186, No. 04-5669 (S.D.N.Y. July 21, 2004); Compl. ¶¶ 107-126, No. 04-5670 (S.D.N.Y. July 21, 2004).

automakers. 2007 WL 2726871, at *1-2. The State alleged that climate change constituted a "public nuisance" under federal and state common law, and demanded a declaratory judgment "for future monetary expenses and damages incurred by the State of California in connection with the nuisance of global warming." *Id.* The district court found that resolution of the claims would require an initial policy determination "as to what is unreasonable in the context of carbon dioxide emissions," and therefore dismissed the claims as presenting non-justiciable political questions. *Id.* at *6-16. An appeal was filed, but voluntarily dismissed on June 24, 2009. See No. 07-16908 (9th Cir.).

In *Native Village of Kivalina* v. *ExxonMobil Corp.* (N.D. Cal.), the governing bodies of an Alaskan tribal village brought suit against 24 oil, energy, and utility companies seeking compensation for costs to be incurred in relocating their village. 663 F. Supp. 2d at 868-69. They alleged that climate change has reduced sea ice around the village, threatening the village with imminent destruction from storms that erode the coastline. *Id.* As in *General Motors*, the plaintiffs in *Kivalina* styled their case as a "nuisance" cause of action. *Id.* The district court held the claims presented non-justiciable political questions and the plaintiffs lacked standing because they could not trace their alleged injuries to any of the named defendants' emissions. *Id.* at 871-82. An appeal, filed on November 5, 2009, is pending. See No. 09-17490 (9th Cir.).

Finally, in *Comer* v. *Murphy Oil USA* (S.D. Miss.), a group of Mississippi residents and property owners (on behalf of a similarly situated putative class) sought compensatory and punitive damages from dozens of oil, coal, chemical, and utility companies for

harms caused by Hurricane Katrina. 585 F.3d 855, 857-60 (5th Cir. 2009). They alleged that Katrina was "fueled and intensified" by higher temperatures attributable to climate change, that the defendants had contributed to climate change through their greenhouse gas emissions, and that those entities should be held responsible for Katrina's effects. *Id.* The district court dismissed the claims as presenting political questions and for lack of standing. *Id.* A three-judge panel of the Fifth Circuit initially reversed, see *id.*, but a grant of rehearing en banc subsequently vacated the panel opinion, see 598 F.3d 208 (5th Cir. 2010). Thereafter, due to an intervening recusal, the Fifth Circuit concluded it had lost its quorum and dismissed the appeal, leaving the district court's decision (dismissing the lawsuit) to stand. See 607 F.3d 1049 (5th Cir. 2010).

3. These common law claims are being pursued against a backdrop of existing and expanding legislation and federal regulation. The Clean Air Act, passed by Congress in 1963 and amended several times thereafter,[3] created a "comprehensive national program" to address air pollution in the United States. *Gen. Motors Corp.* v. *United States*, 496 U.S. 530, 532 (1990). In *Massachusetts* v. *EPA*, this Court held that greenhouse gases, including carbon dioxide, qualify as "air pollutants" under the Act, and directed EPA to consider whether they should be regulated. 549 U.S. at 528-29 (citing 42 U.S.C. § 7602(g)).

In 2009, EPA found that greenhouse gas emissions from motor vehicles "endanger public health or welfare" and should be regulated under the Clean Air

---

[3] Pub. L. No. 88-206, 77 Stat. 392 (1963); Pub. L. No. 91-604, 84 Stat. 1676 (1970); Pub. L No. 95-95, 91 Stat. 685 (1977); Pub. L. No. 101-549, 104 Stat. 2399 (1990).

Act. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496 (Dec. 15, 2009). It thereafter issued a final rule establishing emissions standards for motor vehicles, requiring (among other mandates) that new models meet an estimated combined average emissions level of 250 grams of carbon dioxide per mile. Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25324 (May 7, 2010); see also White House, *Presidential Memorandum Regarding Fuel Efficiency Standards* (May 21, 2010) (directing EPA to consider greenhouse gas restrictions on "heavy-duty" vehicles).

EPA has since issued rules addressing greenhouse gas emissions by "stationary sources," like facilities operated by the defendants in this case. See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31514 (June 3, 2010). Those rules establish the contours of a permitting program that will require facilities emitting threshold quantities of greenhouse gases to secure a permit from EPA or an approved local regulatory authority when constructed or substantially modified and to meet permitting prerequisites such as emissions limits. *Id.* The program will later be extended to additional sources that emit lower levels of greenhouse gases. *Id.*

Other legislative and executive efforts to address greenhouse gas emissions and climate change have occurred both before and after *Massachusetts*,[4]

---

[4] *E.g.*, National Climate Program Act of 1978, Pub. L. No. 95-367, 92 Stat. 601; Energy Security Act of 1980, Pub. L. No. 96-294, tit. VII, § 711, 94 Stat. 611, 774-75; Global Climate Protection Act of 1987, Pub. L. No. 100-204, tit. XI, 101 Stat.

including diplomatic discussions concerning international limits on greenhouse gas emissions. See *Climate Talks Continued: Son of Copenhagen*, Economist, June 17, 2010, at 48.

REASONS FOR GRANTING THE PETITION

The questions presented by this case are recurring and of exceptional importance to the Nation, and warrant review by this Court. The Second Circuit relied on federal common law to create an unprecedented new cause of action—to impose caps on greenhouse gas emissions of individual enterprises as relief for alleged future risks of global climate change—without any supporting statutory authority and despite the fact that the Clean Air Act addresses the same subject matter. This holding expands the judiciary's role far beyond constitutional bounds, directing courts to adjudicate claims where no causal connection exists between the challenged conduct and alleged harm, where the relief requested would not redress the alleged harm, and where adjudicating the claims would implicate fundamental policy issues reserved for the political branches.

All district courts that have considered these extraordinary common law claims have properly rejected them, see *supra* pp. 8-10, but the Second Circuit's decision opens the door for more litigation against an endlessly expanding group of defendants, as these and other plaintiffs attempt to set national climate change policy through federal judicial policymaking. This Court should intervene now to address the demonstrable conflicts between the opinion below and the decisions of this and other

---

1407; Global Change Research Act of 1990, Pub. L. No. 101-606, 104 Stat. 3096, Energy Policy Act of 1992, Pub. L. No. 102-486, tit. XVI, § 1601, 106 Stat. 2776, 2999.

Courts, and to prevent the unquestionably harmful consequences that further litigation in this case and others may bring.

I. THE DECISION BELOW IS ERRONEOUS AND CONFLICTS WITH DECISIONS OF THIS AND OTHER COURTS REGARDING STANDING, FEDERAL COMMON LAW, AND THE POLITICAL QUESTION DOCTRINE.

Three sets of legal doctrines—those that define the scope of federal standing (encompassing both "core" constitutional and "prudential" considerations), the limits of federal common law, and the categories of non-justiciable political questions—foreclose use of the judicial power to adjudicate the plaintiffs' claims and to grant their requested relief. The decision below would establish a policymaking role for the judiciary of extraordinary breadth, transgressing each of these vital constitutional boundaries.

A. The Plaintiffs Cannot Show "Global Warming" Injuries Traceable To The Actions Of, Or Redressable By Injunctions Against, The Five Defendants.

To establish standing to bring a claim in federal court, a plaintiff must show an "injury in fact" attributable to the defendant and redressable by relief against that defendant. *E.g.*, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The plaintiffs in this case cannot meet this standard. Climate change is not traceable to any of these defendants, and would not be redressed by the imposition of carbon dioxide emissions caps on them. See, *e.g.*, *Ctr. for Bio. Diversity* v. *Dep't of Interior*, 563 F.3d 466, 478-79 (D.C. Cir. 2009); *Kivalina*, 663 F. Supp. 2d at 879-80. Rather, according to the

plaintiffs' allegations, climate change results from greenhouse gas emissions from billions of independent sources over centuries—emissions that have mixed in undifferentiated fashion in the atmosphere to gradually increase average global temperatures. See Pet. App. 9a-10a, 174a-175a. Indeed, according to the plaintiffs, the injunction they seek would merely "achieve the [defendants'] *share* of the ... reductions necessary to significantly slow the rate and magnitude of warming." Compl. ¶ 148, No. 04-5669 (S.D.N.Y. July 21, 2004) (emphasis added); see Pet. App. 178a. In other words, under the plaintiffs' own theory, the relief they request would not by itself redress the harms alleged in the complaint.

Where, as here, the claimed injuries result from the actions of third parties—the innumerable others that have emitted carbon dioxide and other greenhouse gases over centuries—and redressing those injuries would depend upon reaching those third parties, there is no standing. See *Simon* v. *E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976) ("the 'case or controversy' limitation of Art. III ... requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court"); see also, *e.g.*, *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 12 (2004) ("[P]rudential standing encompasses ... 'the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches ....'") (quoting *Allen* v. *Wright*, 468 U.S. 737, 751 (1984)).

The Second Circuit nonetheless allowed the claims to proceed, holding that a party asserting harms relating to climate change need allege only that the

defendant "contribute[d]" to global warming. Pet. App. 69a-70a. The consequence of that holding is to permit any plaintiff claiming global-warming injuries to sue virtually any entity in the world, limited only by the reach of personal jurisdiction. The court of appeals reached that erroneous conclusion by misapplying both the standing analysis of *Massachusetts* v. *EPA* and the "contributor" standing theory developed in circuit cases in the context of the Clean Water Act, following *PIRG* v. *Powell Duffryn Terminals Inc.*, 913 F.2d 64 (3d Cir. 1990). These opinions, by their terms, do not support standing here, and their unwarranted extension to climate change nuisance cases merits this Court's review.

1. The Second Circuit held that *Massachusetts* supported the plaintiffs' standing in this case because that decision upheld claims regarding reductions in carbon dioxide emissions to address future risks of climate change. *E.g.*, Pet. App. 75a (concluding that "*Massachusetts* disposed of [the] argument" that the lack of redressability in this case defeats standing); *id.* at 72a-73a (finding it "[t]elling" that *Massachusetts* upheld standing even though the State in that case, like the States here, "[could not] allege that [defendants'] emissions would alone cause *any* future harms") (emphasis in original). But, whatever similarities may exist between the climate change allegations in this case and those in *Massachusetts*, the court of appeals ignored the fundamental difference between the *statutory* cause of action to challenge agency decisions at issue in *Massachusetts* and the *non-statutory* cause of action asserted here.

The petitioners in *Massachusetts*, which included States as well as private parties, sought judicial review of EPA's denial of a rulemaking petition

seeking regulatory restrictions on carbon dioxide emissions from motor vehicles. 549 U.S. at 516-21. They relied on a provision of the Clean Air Act that granted them an express "right to challenge agency action unlawfully withheld." *Id.* at 517 (citing 42 U.S.C. § 7607(b)(1) (authorizing "[a] petition for review of action of the Administrator ... under this chapter")).

This Court held that, because the claims were brought by a State pursuant to a right of judicial review expressly conferred by Congress in the Clean Air Act, a less rigorous standing analysis applied and Massachusetts could bring the claims "without meeting all the normal standards for redressability and immediacy." *Id.* at 515-18.[5] Indeed, the Court described that provision as being "of critical importance to the standing inquiry." *Id.* at 516. "Congress," it explained, "has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Id.* at 516 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring)). By contrast, no statute grants any right to bring the action here, and the rationale of *Massachusetts* is inapplicable.

By extending *Massachusetts* to this common law nuisance case, the Second Circuit also ignored the fundamental difference between claims challenging governmental regulatory decisions and those seeking

---

[5] Even under these relaxed standing requirements, *Massachusetts* upheld standing only as to the State and did not apply those standards to the private plaintiffs, citing the "special solicitude" owed to States. 549 U.S. at 518, 520. By contrast, the Second Circuit here held that the private as well as State plaintiffs have standing to maintain their lawsuits, thus defining a potentially limitless set of potential plaintiffs in such cases. Pet. App. 97a-112a.

to impose individual liability on a particular defendant. Responding to EPA's argument in *Massachusetts* that the emissions of the entire domestic motor-vehicle sector were too small a fraction of total greenhouse gas emissions to show traceability and redressability, the Court observed that regulation generally proceeds through a series of "incremental step[s]" with which an agency may "whittle away" at a "massive problem[]" "over time." *Id.* at 524-26. It would "doom most challenges to regulatory action[s]," the Court explained, if their incremental nature itself foreclosed judicial review. *Id.*

Claims seeking to impose individual liability, however, stand on an entirely different footing. A court is not a regulator and may not enter relief against a particular defendant where the plaintiff's injury is not traceable to that defendant and where relief against the defendant would not redress that injury. Where, as here, the plaintiffs are instead seeking each defendant's "share" of a set of broader reductions they desire from a larger category of entities, including non-parties, *supra* p. 14, and the claimed injuries cannot plausibly be redressed by relief against any of these defendants individually (or even collectively), the plaintiffs have no standing. See *Lujan*, 504 U.S. at 560-61.

2. The Second Circuit's decision also is inconsistent with cases from other circuits addressing the "contributor" standing theory in the context of the Clean Water Act. These cases, although relied upon by the Second Circuit, see Pet. App. 69a-72a, actually confirm that the plaintiffs lack standing.

The Clean Water Act cases, drawing on the Third Circuit's opinion in *Powell Duffryn*, hold that, when a defendant has discharged a pollutant "in

concentrations greater than allowed by its permit," a court can presume for purposes of standing that the defendant's emissions likely contributed to any harms of a type generally attributed to that pollutant that occur in the same waterway. 913 F.2d at 71-72. In particular, the cases establish a threshold three-part test for standing in a "contributor" case, requiring a plaintiff to "show[] that a defendant has (1) discharged some pollutant in concentrations greater than allowed by its permit (2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that (3) the pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs." *Id.*; see also, *e.g.*, *Friends of the Earth, Inc.* v. *Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000) (en banc) (adopting *Powell Duffryn*); *Sierra Club* v. *Cedar Point Oil Co.*, 73 F.3d 546, 558 & n.24 (5th Cir. 1996) (same).

The Second Circuit acknowledged that the defendants' emissions here do not exceed levels set by federal permit—federal law currently imposes no relevant restrictions on their emissions—and therefore the first prong of the *Powell Duffryn* test could not be met. Pet. App. 70a-71a. Nevertheless, it held that *Powell Duffryn* still supported standing because "[t]he first prong is inapplicable [when] there is no statute governing carbon dioxide emissions." *Id.* at 71a.

This conclusion is plainly inconsistent with *Powell Duffryn* and other Clean Water Act opinions. Those opinions explained that they were defining the outer bounds of standing under Article III, see *Gaston Copper*, 204 F.3d at 152 (noting that the Clean Water Act confers standing "to the full extent allowed by the Constitution"), and found standing in those cases

only *because* the defendant's alleged discharge exceeded federally mandated limits, allowing the courts to presume that the challenged discharge could have "caused" related injuries in the relevant area. *E.g.*, *Cedar Point*, 73 F.3d at 557; *Powell Duffryn*, 913 F.2d at 72. The lack of an emissions limit does not render the prerequisite *inapplicable*, as the Second Circuit suggested, but rather means that the prerequisite *is not satisfied* and that standing therefore cannot be established based on mere "contribution." See, *e.g.*, *Powell Duffryn*, 913 F.2d at 72-73; see also *Kivalina*, 663 F. Supp. 2d at 879-80 & n.7 ("The tripartite test articulated in *Powell Duffryn* ... is stated in the conjunctive, not the disjunctive as concluded by the *AEP* court.... [I]t is illogical to conclude that the mere contribution of greenhouse gases into the atmosphere is sufficient to establish that a plaintiff's injury is fairly traceable to a defendant's conduct."). Indeed, to interpret *Powell Duffryn* to support standing in the absence of an alleged statutory violation ignores that the fundamental basis for the presumption of causation applied in that opinion—indeed, the *sole* basis—was that Congress had defined certain levels of discharge as harmful, allowing courts to infer that discharges above that level "cause" any harms that are associated with that pollutant and that are suffered by entities in the relevant geographic area. 913 F.2d at 68-72; accord *Massachusetts*, 549 U.S. at 516 (noting that Congress can affect constitutional standing analysis in particular classes of cases by exercising its "power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before").

The decision by the court of appeals to extend contributor standing to the claims at issue

dramatically expands the availability of private litigation asserting claims based on any alleged "contribution" to global warming and seeking imposition of a judicially-fashioned series of piecemeal regulatory regimes. This Court should review this unprecedented extension of standing in this exceptionally important area of law and policy.

B. Federal Common Law Does Not Support A Climate Change Nuisance Cause Of Action.

The Second Circuit upheld the claims in this case under federal common law even though they have no basis in any federal statute and, indeed, address a subject—carbon dioxide regulation—that is separately addressed by the comprehensive legislative scheme of the Clean Air Act. The consequence of this holding is that, while EPA is actively exercising its authority to regulate greenhouse gas emissions under the Clean Air Act, courts will be addressing precisely the same questions "through application of vague and indeterminate nuisance concepts and maxims of equity jurisprudence." *Milwaukee II*, 451 U.S. at 317. This approach conflicts with *Milwaukee II* and recent decisions of this Court and other courts delineating the narrowly circumscribed scope of federal common law.

1. In *Milwaukee II*, this Court held that a federal common law "nuisance" claim to enjoin transboundary water pollution had been displaced by the "comprehensive legislative scheme" of the Clean Water Act. The Court emphasized that federal common law may be invoked only in "'few and restricted' instances," and only where "the Court is compelled to consider federal questions 'which cannot be answered from federal statutes alone.'" *Id.* at 313-14 (citations omitted); see also *id.* at 314 ("[W]hen

Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears."). The Court noted that "[t]he invocation of federal common law ... in the face of congressional legislation ... is peculiarly inappropriate in areas as complex as water pollution control," the problems of which are "particularly unsuited to the [ad hoc adjudicative] approach inevitable under a regime of federal common law." *Id.* at 325.

The same is true of the claims in this case. Carbon dioxide is an "air pollutant" within the meaning of the Clean Air Act, see *Massachusetts*, 549 U.S. at 532 (citing 42 U.S.C. § 7602(g)), and the Act has been interpreted to provide EPA with authority to consider restrictions on greenhouse gas emissions from new and existing sources, including "stationary sources" in categories that include those of these defendants. See 75 Fed. Reg. 31514. Accordingly, through the Clean Air Act, Congress has established a legislative scheme that "speaks directly" to the alleged problem identified in the complaint, rendering resort to federal common law not only unnecessary but improper. See *Milwaukee II*, 451 U.S. at 314, 325; see also *Middlesex County Sewage Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 10, 21 (1981).

The Second Circuit recognized that the Clean Air Act provides EPA with authority to regulate carbon dioxide emissions, but held that the Act does not displace federal common law claims because EPA had not fully exercised that authority. Pet. App. 137a-142a. The relevant question in assessing displacement, however, is not whether or to what extent an agency has exercised its regulatory authority but whether Congress has addressed the subject in a legislative scheme. See *Milwaukee II*, 451 U.S. at

314, 325. Once Congress legislates on the subject and delegates authority to an agency to make regulatory decisions implementing Congress's basic policy choices, federal common law claims are displaced regardless of whether and how the agency chooses to exercise its authority. *Id.* As this Court explained in *Milwaukee II*, "[d]emanding specific regulations of general applicability before concluding that Congress has addressed the problem to the exclusion of federal common law asks the wrong question. The question is whether the field has been occupied, not whether it has been occupied in a particular manner." *Id.* at 324.

Likewise here, the Clean Air Act delegates regulatory authority over carbon dioxide emissions to EPA, and thus displaces federal common law claims addressing those emissions without regard to whether or how the agency has exercised its authority. To hold, as the Second Circuit did, that there are still "interstices" for courts to "fill," Pet. App. 37a, is "no different from holding that the solution Congress chose is not adequate. This [a court] cannot do." *Illinois* v. *Outboard Marine Corp.*, 680 F.2d 473, 478 (7th Cir. 1982).

Indeed, the First Circuit previously rejected precisely the theory that the Second Circuit embraced here. In *Mattoon* v. *City of Pittsfield*, 980 F.2d 1 (1st Cir. 1992), the First Circuit held that federal common law nuisance claims by city residents who had allegedly become ill from drinking contaminated water were displaced by the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300f *et seq.* 980 F.2d at 2-5. Relying on *Milwaukee II*, the court found that the SDWA "indicates that Congress meant to reserve the governance of public drinking water standards to federal administrative regulation rather than [nui-

sance law]." *Id.* at 4-5. The First Circuit expressly rejected the argument—the same presented by the plaintiffs in this case—that their common law actions were not displaced because "EPA did not regulate [the pertinent type of] contamination," *id.* at 5, explaining that "[t]he comprehensiveness of the legislative grant is not diminished, nor is the congressional intent to occupy the field rendered unclear, merely by reason of the regulatory agency's discretionary decision to exercise less than the total spectrum of regulatory power with which it was invested." *Id.*; accord *Illinois*, 680 F.2d at 478.

Moreover, while the displacement inquiry turns on Congress's decisions—and not EPA's—EPA's actions confirm there is no room here for judge-made common law. EPA has formally found that carbon dioxide emissions "endanger" the public and has promulgated regulations under the Clean Air Act. It has imposed limits on greenhouse gas emissions by motor vehicles, see 75 Fed. Reg. 25324 (effective Jan. 2, 2011), and established a permitting program for construction or modification of "stationary sources" of greenhouse gas emissions, including facilities in categories of sources that encompass those owned or operated by these defendants, see 75 Fed. Reg. 31514. Those regulations are subject to judicial review under the Clean Air Act, and there is no basis for a court to make separate, competing assessments under tort law.

This was, in fact, the holding of the Fourth Circuit in a recent decision. In *North Carolina* v. *TVA*, the court held that common law nuisance claims brought by a State seeking to limit emissions of certain air pollutants by facilities operated by TVA (also a defendant here) were preempted by the "comprehensive" scheme of the Clean Air Act. 2010 WL

2891572, at *3. Noting that "[t]he contrast between the defined standards of the Clean Air Act and an ill-defined omnibus tort of last resort could not be more stark," the court concluded that "Congress in the Clean Air Act opted rather emphatically for the benefits of agency expertise in setting standards of emissions controls, especially in comparison with ... judicially managed nuisance decrees," and thus the common law claims (in that case, brought under state law) were preempted. *Id.* at *7, *9. These considerations, which supported preemption of the state common law claims in *North Carolina*, confirm displacement of the federal common law claims here.

2. To imply a new common law cause of action to address climate change, when no statute supports that claim, also reflects a fundamental misunderstanding of the nature of federal common law. The precedent on which the Second Circuit relied originated more than a century ago; see, *e.g.*, *Missouri* v. *Illinois*, 180 U.S. 208 (1901), when the Constitution was thought to preclude any branch of government other than the judiciary from addressing interstate pollution and federal common law remained a "brooding omnipresence," see, *e.g.*, *United States* v. *E.C. Knight Co.*, 156 U.S. 1 (1895); see also *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 722 (2004). Even then, the Court stressed that such claims must be examined with "caution," *Georgia* v. *Tenn. Copper Co.* 206 U.S. 230, 237 (1907), and that it would recognize only "*some* such demands," *id.* (emphasis added). Indeed, it was only "a public nuisance of simple type" that could be the subject of such common law actions. *North Dakota* v. *Minnesota*, 263 U.S. 365, 374 (1923).

Thus, all of those cases involved immediately noxious or harmful substances that caused severe,

localized harms directly traceable to an out-of-state source. The claims here—which allege that the defendants' emissions of carbon dioxide combine with emissions from countless other activities around the globe that have been accumulating for centuries to create a worldwide problem—bear no resemblance to those cases or any other previous tort claim. To state the obvious, they are not of a "simple type."

The Court's more recent jurisprudence underscores that any federal common law authority over "nuisance" that may remain is tightly constrained, and that courts may not use that "limited" and "restricted" authority to make significant policy decisions. *Tex. Indus.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981). Federal courts therefore cannot, for example, create a federal common law right to contribution in antitrust actions because such a right is "a matter of high policy for resolution within the legislative process." *Id.* at 647. Nor may courts design federal common law tort standards for advisers to federally-insured thrift institutions, because weighing the relevant factors is "for those who write the laws, rather than for those who interpret them." *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 89 (1994).

The Second Circuit's holding that wherever "regulatory gaps exist ... common law fills the interstices," Pet. App. 37a, and that courts may therefore create federal common law to govern resolution of the sweeping and consequential policy issues raised by global climate change, departs dramatically from this jurisprudence. Cf. *Massachusetts*, 549 U.S. at 532-34 (upholding right of action when claims were brought pursuant to statutory cause of action created by Congress). Review by this Court is necessary to clarify the

limited nature of federal common law, and to confirm that, where Congress has addressed a subject by delegating responsibility to an administrative agency, a court may not assume common law authority over the same subject matter, regardless of whether it may view the agency's execution of that responsibility as incomplete or inadequate.

C. This Case Presents Non-Justiciable Political Questions.

A claim presents non-justiciable political questions if its adjudication would not be governed by "judicially discoverable and manageable standards" or would require "an initial policy determination of a kind clearly for non-judicial discretion." *Baker* v. *Carr*, 369 U.S. 186, 217 (1962). The Second Circuit held that the claims in this case, premised on the allegations that these defendants' emissions are "unreasonable," are justiciable because courts could determine the "reasonable" level of emissions by applying the Restatement (Second) of Torts.

But invoking the Restatement serves only to highlight the problem rather than solve it. The Restatement provides that courts in nuisance actions are to "weigh[] ... the gravity of the harm against the utility of the conduct." Restatement (Second) of Torts, § 821B cmt. e. To apply such a standard to a climate change case and define a "reasonable" emissions level for these five utilities, a court would need not only to assess any potential environmental benefits that might result from imposing caps, but also to compare the social and economic value of the services these defendants provide, as well as services provided by all the other pertinent industry sectors that allegedly contribute to global climate change (including manufacturing, transportation, agriculture, petroleum, chemical, and many others).

The law provides no "right answer" to these questions: they involve policy tradeoffs that turn on how the public values different potential economic, social, and environmental risks and benefits.[6] *North Carolina*, 2010 WL 2891572, at *7 ("[W]hile public nuisance law doubtless encompasses environmental concerns, it does so at such a level of generality as to provide almost no standard of application."). These are precisely the kinds of decisions that are reserved for the political branches and that cannot legitimately be made by the judiciary in the first instance.

1. The Second Circuit found that this case did not present a political question because the claims are framed as common law "nuisance" actions, which traditionally have been adjudicated by courts under the "reasonableness" standard. Pet. App. 27a-34a. This conclusion—that the justiciability of a claim may be judged by its title—conflicts with this Court's approach to the political question doctrine.

Baker recognized that, to assess whether a claim presents a political question, courts must engage in a "discriminating inquiry into the precise facts and posture of the particular [claim]." 369 U.S. at 217. The relevant question is not whether the suit relies superficially on commonly recognized causes of action or standards, but whether one or more of the particular *issues* that must be resolved would involve the judiciary in matters properly reserved for the political branches. The Second Circuit, in concluding

---

[6] Indeed, the fundamental importance and sensitivity of those tradeoffs are among the many reasons Congress has properly considered adopting new legislation on climate change, rather than relying upon the existing provisions of the Clean Air Act and the EPA.

that the claims in this case were justiciable because they are framed as "nuisance" claims and "nuisance" claims are generally justiciable, "essentially confus[ed] a label with an argument." Laurence H. Tribe, et al., Wash. Legal Found., Critical Legal Issues Series No. 169, *Too Hot for Courts To Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* 13-14 (Jan. 2010) (noting that "the political question doctrine is about more than wordplay").

It is clear, when one conducts the "discriminating inquiry" required by *Baker*, that the claims in this case would be governed not by "judicially discoverable and manageable standards" but instead by "policy determination[s] of a kind clearly for non-judicial discretion." 369 U.S. at 216-17; see *Kivalina*, 663 F. Supp. 2d at 874-77. Because climate change is a *global* phenomenon, allegedly caused by centuries of global accumulations of carbon dioxide and other greenhouse gases, to determine a "reasonable" emissions level for a single defendant, a court would first need to determine the globally "reasonable" level of emissions in light of the global risks of climate change, and the global costs and benefits of emissions-producing activities and associated reduction measures. Moreover, even if the court could determine a "reasonable" global emissions level, it would then need to decide the "reasonable" emissions level for these particular defendants, requiring it to tailor emissions levels on a nation-by-nation, industry-by-industry (if not entity-by-entity and facility-by-facility) basis by weighing the gravity of harm to the plaintiffs against the utility of each defendant's conduct. With no "principled" or "reasoned" standards to guide its decision, the court would necessarily rely on "ad hoc" and therefore

inherently arbitrary policy judgments. See *Vieth* v. *Jubelirer*, 541 U.S. 267, 278 (2004) (plurality); *North Carolina*, 2010 WL 2891572, at *7 ("If we are to regulate smokestack emissions by the same [nuisance] principles we use to regulate prostitution, obstacles in highways, and bullfights, we will be hard pressed to derive any manageable criteria.") (citation omitted).

The decision in *Massachusetts* confirms that these claims present non-justiciable political questions. *Massachusetts* addressed a provision in the Clean Air Act requiring EPA to set "standards applicable to the emission of any air pollutant" which in EPA's "judgment cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare." 549 U.S. at 532-34 (quoting 42 U.S.C. § 7521(a)(1)). Because at that time EPA had not yet undertaken to evaluate the statutory "endangerment" criterion in the context of greenhouse gases, and had failed to ground its decision to deny the rulemaking petition at issue in considerations established by the statute, this Court remanded the decision to EPA for further consideration in light of the Court's construction of the governing statute. *Id.* at 534-35.

The claim in *Massachusetts* was justiciable only because Congress had established a statutory standard governing the agency's conduct, by which the Court could gauge the agency's compliance with the statute without itself weighing and resolving the merits of the policy considerations that necessarily underlie that statutory standard. *Id.* at 516. Indeed, with respect to the policy considerations identified by EPA as counseling against regulation, the Court acknowledged that it had "neither the expertise nor the authority to evaluate these policy judgments." *Id.*

at 533-34 (referring to a "laundry list" of policy judgments that would be involved in assessing such a claim). These are the very sorts of policy considerations that would have to be addressed if the claims in this case were adjudicated.

2. The Second Circuit also held that, because Congress could displace through legislation any judicially-imposed restrictions on carbon dioxide emissions, "there is no need for the protections of the political question doctrine." Pet. App. 41a. As discussed above, see *supra* pp. 20-24, Congress already has done precisely that. In any case, the Second Circuit's holding is not only unprecedented, but conflicts with this Court's decision in *Vieth*.

In *Vieth*, this Court held that courts could not adjudicate claims challenging a State legislature's "political gerrymandering" in the drawing of congressional legislative districts due to the absence of "judicially discoverable and manageable standards." 541 U.S. at 278-80; see also *id.* at 307-08 (Kennedy, J., concurring in the judgment). The plurality opinion noted that it was "significant" that the Constitution provides Congress with authority to "make or alter" legislative districts, meaning that Congress could by legislation displace a district drawn by a State (or one re-drawn by a court in response to litigation) if it disagreed with the district's contours or purpose. *Id.* at 275. Congress's authority to address this issue further confirmed that it was properly reserved for the political branches. See *id.* at 285.

The Second Circuit turned this principle on its head. It found that, because Congress is empowered to address carbon dioxide emissions, and could overturn any limit established by the judiciary in a particular case, the political question doctrine *could*

not apply. See Pet. App. 36a-41a. In other words, according to the Second Circuit, an issue that *can* be addressed by the political branches *cannot* be a political question.

Neither this Court nor any other has ever suggested that the political question doctrine is inapplicable simply because Congress could reverse a judicially-adopted policy, or that federal courts have license to exercise full legislative and political authority unless "vetoed" by Congress. The Second Circuit's re-formulation of the political question doctrine warrants this Court's review.

II. THE JUSTICIABILITY OF CLIMATE CHANGE LAWSUITS UNDER FEDERAL COMMON LAW IS OF EXTRAORDINARY NATIONAL IMPORTANCE.

Review is warranted in light of the extraordinary significance of these issues. The Court granted certiorari in *Massachusetts* v. *EPA* because of those issues' "unusual impc ance." 549 U.S. at 506. Its decision then defined the standards and the process through which federal policy in this area would be developed. Under *Massachusetts*, EPA is charged with making regulatory decisions addressing the matter under the Clean Air Act, and parties may then obtain judicial review of its actions pursuant to settled standards of administrative law. The decision below, however, establishes a separate, parallel track for *judges* to decide how to regulate greenhouse gases under the most general and open-ended tort principles, at the behest of virtually any public or private plaintiff claiming injury relating to climate change. That parallel track would bypass entirely the procedural and substantive requirements of the Clean Air Act, relying instead on judge-made common law to impose liability and set emissions levels. The

court of appeals' decision, if allowed to stand, "would encourage courts to use vague public nuisance standards to scuttle the nation's carefully created system for accommodating the need for energy production and the need for clean air," resulting in a "balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike." *North Carolina*, 2010 WL 2891572, at *1; see also *id.* at *16 ("[W]e are unwilling to sanction the least predictable and the most problematic method for resolving interstate emissions disputes, a method which would chaotically upend an entire body of clean air law ....").

The court of appeals acknowledged that "fashion[ing] a comprehensive and far-reaching solution to global climate change" would at least "arguably" fall "within the purview of the political branches." Pet. App. 25a-26a. It downplayed the impact of its own decision, however, as involving only "six ... plants." *Id.* at 26a. But the complaint actually identified dozens of facilities operated by these defendants in more than 20 States. See *supra* note 2. An order directing emissions reductions would affect the entire electricity generating industry throughout multiple regions of the country and transform the manner and cost of supplying electricity to millions of individuals and businesses. Even if the defendants in this case were the only parties whose economic activities were at issue, the potential impact on them and their customers alone would justify this Court's review of the lower court's decision.

Further, there is nothing in the Second Circuit's analysis that limits its impact to these particular defendants. Under the plaintiffs' theory, *all* enterprises on the planet are contributors to, and

therefore share responsibility for, global climate change, and thus all are potential defendants in this or any future climate change lawsuit. The three other such cases that were filed after this one named dozens of defendants from the oil, transportation, chemical, and coal industries; the range of other potential industrial, commercial, and agricultural defendants is virtually limitless. The Second Circuit's decision thus sets a precedent that threatens the basic operations of the broadest possible spectrum of the nation's businesses.

The prospect of claims seeking damages for past emissions heightens the risks and uncertainties for those businesses even further, and increases the lure for plaintiffs to bring more such cases. Each of the other climate change cases, see *supra* pp. 8-10, demands substantial damages. And each would require, as here, that a court (or jury) determine a "reasonable" emissions level in the absence of any statutory standard. Indeed, while the ostensible focus of those other cases is upon compensation for alleged past harms rather than regulatory injunctions of the type sought by the plaintiffs below, "regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (plurality) (citation omitted).

The growing number of cases invoking common law tort theories that seek to impose liability for climate change further demonstrates the urgency of certiorari. Such cases will only expand and multiply if the Second Circuit's decision is allowed to stand. And, there are a host of policy and advocacy organizations

that are or may become dissatisfied with the pace or content of action by Congress or EPA, and that will see common law litigation in this and other contexts as a way to circumvent political or legal constraints on the legislative and administrative processes. Others will perceive industry defendants as "deep pockets" to pursue for damages under the same theories. The prospect of federal courts setting nationwide emissions policy—indeed, of different federal courts setting conflicting emissions policies—on an *ad hoc*, case-by-case basis under the aegis of federal common law, at the same time that administrative processes and diplomatic negotiations by the political branches are addressing the same issues, necessitates this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

F. WILLIAM BROWNELL
NORMAN W. FICHTHORN
ALLISON D. WOOD
HUNTON & WILLIAMS LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 955-1500

Counsel for Petitioner Southern Company

PETER D. KEISLER*
CARTER G. PHILLIPS
DAVID T. BUENTE JR.
QUIN M. SORENSON
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
pkeisler@sidley.com
(202) 736-8000

Counsel for Petitioners

SHAWN PATRICK REGAN
HUNTON & WILLIAMS LLP
200 Park Avenue
52nd Floor
New York, N.Y. 10166
(212) 309-1000

Counsel for Petitioner Southern Company

MARTIN H. REDISH
NORTHWESTERN UNIVERSITY SCHOOL OF LAW
375 East Chicago Avenue
Chicago, Illinois 60611
(312) 503-8545

Counsel for Petitioners

DONALD B. AYER
KEVIN P. HOLEWINSKI
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

THOMAS E. FENNELL
MICHAEL L. RICE
JONES DAY
2727 North Harwood Street
Dallas, Texas 75201
(214) 220-3939

Counsel for Petitioner Xcel Energy Inc.

* Counsel of Record

August 2, 2010

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

Docket Nos. 05-5104-cv, 05-5119-cv

STATE OF CONNECTICUT, STATE OF NEW YORK, PEOPLE OF THE STATE OF CALIFORNIA EX REL. ATTORNEY GENERAL BILL LOCKYER, STATE OF IOWA, STATE OF NEW JERSEY, STATE OF RHODE ISLAND, STATE OF VERMONT, STATE OF WISCONSIN, AND CITY OF NEW YORK,

Plaintiffs-Appellants,

v.

AMERICAN ELECTRIC POWER COMPANY INC., AMERICAN ELECTRIC POWER SERVICE CORPORATION, SOUTHERN COMPANY, TENNESSEE VALLEY AUTHORITY, XCEL ENERGY, INC., AND CINERGY CORPORATION,

Defendants-Appellees.

OPEN SPACE INSTITUTE, INC., OPEN SPACE CONSERVANCY, INC., AUDUBON SOCIETY OF NEW HAMPSHIRE,

Plaintiffs-Appellants,

v.

AMERICAN ELECTRIC POWER COMPANY INC., AMERICAN ELECTRIC POWER SERVICE CORPORATION, SOUTHERN COMPANY, TENNESSEE VALLEY AUTHORITY, XCEL ENERGY, INC., AND CINERGY CORPORATION,

Defendants-Appellees.

Argued: June 7, 2006
Decided: Sept. 21, 2009

Before: McLAUGHLIN and HALL, *Circuit Judges*.*

PETER W. HALL, *Circuit Judge*:

In 2004, two groups of Plaintiffs, one consisting of eight States and New York City, and the other consisting of three land trusts (collectively "Plaintiffs"), separately sued the same six electric power corporations that own and operate fossil-fuel-fired power plants in twenty states (collectively "Defendants"), seeking abatement of Defendants' ongoing contributions to the public nuisance of global warming. Plaintiffs claim that global warming, to which Defendants contribute as the "five largest emitters of carbon dioxide in the United States and . . . among the largest in the world," *Connecticut v. American Electric Power Co.*, 406 F.Supp.2d 265, 268 (S.D.N.Y.2005), by emitting 650 million tons per year of carbon dioxide, is causing and will continue to cause serious harms affecting human health and natural resources. They explain that carbon dioxide acts as a greenhouse gas that traps heat in the earth's atmosphere, and that as a result of this trapped heat, the earth's temperature has risen over the years and will continue to rise in the future. Pointing to a "clear scientific consensus" that global warming has already begun to alter the natural world, Plaintiffs predict that it "will accelerate over the coming decades unless action is taken to reduce emissions of carbon dioxide."

Plaintiffs brought these actions under the federal common law of nuisance or, in the alternative, state

---

* The Honorable Sonia Sotomayor, originally a member of the panel, was elevated to the Supreme Court on August 8, 2009. The two remaining members of the panel, who are in agreement, have determined the matter. *See* 28 U.S.C. § 46(d); Local Rule 0.14(2); *United States v. Desimone*, 140 F.3d 457 (2d Cir.1998).

nuisance law, to force Defendants to cap and then reduce their carbon dioxide emissions. Defendants moved to dismiss on a number of grounds. The district court held that Plaintiffs' claims presented a non-justiciable political question and dismissed the complaints. *See id.*

On appeal, Plaintiffs argue that the political question doctrine does not bar adjudication of their claims; that they have standing to assert their claims; that they have properly stated claims under the federal common law of nuisance; and that their claims are not displaced by federal statutes. Defendants respond that the district court's judgment should be upheld, either because the complaints present non-justiciable political questions or on a number of alternate grounds: lack of standing; failure to state a claim; and displacement of federal common law. In addition, Defendant Tennessee Valley Authority ("TVA") asserts that the complaints should be dismissed against it on the basis of the discretionary function exception.

We hold that the district court erred in dismissing the complaints on political question grounds; that all of Plaintiffs have standing; that the federal common law of nuisance governs their claims; that Plaintiffs have stated claims under the federal common law of nuisance; that their claims are not displaced; and that TVA's alternate grounds for dismissal are without merit. We therefore vacate the judgment of the district court and remand for further proceedings.

Given the number of issues involved, we set out the following table of contents.

Background 316

I. The States' Complaint 316

II. The Land Trusts' Complaint 318

III. The District Court's Amended Opinion and Order 319

Discussion 320

I. Standard of Review 320

II. The Political Question Doctrine 321

A. Overview of the Political Question Doctrine 321

B. Application of the *Baker* Factors 323

1. The First *Baker* Factor 324

2. The Second *Baker* Factor 326

3. The Third *Baker* Factor 330

4. The Fourth, Fifth, and Sixth *Baker* Factors 331

III. Standing 332

A. The States' *Parens Patriae* Standing 334

1. Background 334

2. *Parens Patriae* as a Species of Article III Standing 335

3. Effect of *Massachusetts v. EPA* 336

4. States' Allegations Satisfy the *Snapp* Test 338

B. The States' and the Trusts' Article III Proprietary Standing 339

1. Have Plaintiffs Sufficiently Alleged Injury-in-Fact? 340

a. Current Injury 341

b. Future Injury 342

2. Causation 345

3. Redressability 347

IV. Stating a Claim under the Federal Common Law of Nuisance 349

A. Standard of Review 349

B. The Federal Common Law of Nuisance and the Restatement's Definition of Public Nuisance 350

C. Have the States Stated a Claim under the Federal Common Law of Nuisance? 352

1. Applying the Public Nuisance Definition to the States 352

2. Defendants' Arguments 353

a. Constitutional Necessity 353

b. The Character of the Alleged Nuisance 355

D. May Non-State Parties Sue under the Federal Common Law of Nuisance? Analysis of Federal Common Law of Nuisance Case Law 358

1. Federal Common Law of Nuisance Case Law Concerning Non-State Parties 359

a The Federal Government and Municipalities as Plaintiffs 359

b. Private Plaintiffs 361

c. Whether Municipalities and Private Parties Can State a Claim under the Federal Common Law of Nuisance—An Examination of Milwaukee I's Footnote 6 364

2. The Restatement (Second) of Torts's Requirements for Maintaining an Action for Public Nuisance under § 821C 366

a. Can New York City Maintain a Public Nuisance Suit under § 821C? 366

b. Can the Trusts Maintain a Public Nuisance Suit under § 821C? 367

3. Have New York City and the Trusts Stated a Claim for Public Nuisance under § 821B? 369

V. Displacement of Plaintiffs' Federal Common Law Claim 371

A. The Displacement Standard 371

B. Analysis 375

1. The Clean Air Act 375

a. Overview: the Clean Air Act 375

b. Analysis: Whether the Clean Air Act Displaces Federal Common Law in the Area of Greenhouse Gas Emissions from Stationary Sources 378

2. All Legislation "on the Subject" of Greenhouse Gases 381

a. Overview: the Legislative Landscape 381

b. Analysis: All Statutes "Touching" on Greenhouse Gases 385

C. Displacement on Foreign Policy Grounds 388

VI. Defendant Tennessee Valley Authority's Separate Arguments 388

A. Background 388

B. Political Question Arguments 389

C. The Discretionary Function Exception 390

VII. State Law Claims 392

Conclusion 392

BACKGROUND

I. The States' Complaint

In July 2004, eight States—California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin—and the City of New York (generally, hereinafter, "the States") filed a complaint against Defendants American Electric Power Company, Inc., American Electric Power Service Corporation,[1] Southern Company, TVA, Xcel Energy, and Cinergy Corporation. The complaint sought "abatement of defendants' ongoing contributions to a public nuisance" under federal common law, or in the alternative, under state law. Specifically, the States assert that Defendants are "substantial contributors to elevated levels of carbon dioxide and global warming," as their annual emissions comprise "approximately one quarter of the U.S. electric power sector's carbon dioxide emissions and approximately ten percent of all carbon dioxide emissions from human activities in the United States." Moreover, the rate of increase of emissions from the U.S. electric power sector is expected to rise "significantly faster than the projected growth rate of emissions from the economy as a whole" from now until the year 2025. At the same time, the States contend that Defendants have "practical, feasible and economically viable options for reducing emissions without significantly increasing the cost of electricity for their customers."

The complaint cites reports from the Intergovernmental Panel on Climate Change and the U.S. Na-

---

[1] Although there are six named Defendants in the caption, American Electric Power Service Corporation provides management and professional services on behalf of American Electric Power Company, Inc., and does not generate carbon dioxide emissions.

tional Academy of Sciences to support the States' claims of a causal link between heightened greenhouse gas concentrations and global warming, explaining that carbon dioxide emissions have persisted in the atmosphere for "several centuries and thus have a lasting effect on climate." The States posit a proportional relationship between carbon dioxide emissions and injury: "The greater the emissions, the greater and faster the temperature change will be, with greater resulting injuries. The lower the level of emissions, the smaller and slower the total temperature change will be, with lesser injuries." The States caution that the earth's climate "can undergo an abrupt and dramatic change when a 'radiative forcing agent' causes the Earth's climate to reach a tipping point." Carbon dioxide emissions constitute such a radiative forcing agent due to its heat-trapping effects, and therefore, as stated by the National Academy of Sciences,

> the unrestrained and ever-increasing emissions of greenhouse gases from fossil fuel combustion increases the risk of an abrupt and catastrophic change in the Earth's climate when a certain, unknown, tipping point of radiative forcing is reached. An abrupt change in the Earth's climate can transpire in a period as short as ten years. Defendants' emission of millions of tons of carbon dioxide each year contribute to this risk of an abrupt change in climate due to global warming.

As a result, the States predict that these changes will have substantial adverse impacts on their environments, residents, and property, and that it will cost billions of dollars to respond to these problems.

The complaint details the harms that will befall the States, plaintiff by plaintiff. Not only does the

complaint spell out expected future injuries resulting from the increased carbon dioxide emissions and concomitant global warming, but it also highlights current injuries suffered by the States. As an example of global warming having already begun to alter a State's climate, the complaint refers to the reduction of California's mountain snowpack, "the single largest freshwater source, critical to sustaining water to the State's 34 million residents during the half of each year when there is minimal precipitation." The complaint goes on to explain that

> [d]iminished summer runoff from mountain snow will cause water shortages and disruptions to the interrelated water systems and hydroelectric plants on which the State's residents rely. Flooding will increase in California as a result of the earlier melting. This process of reduced mountain snowpack, earlier melting and associated flooding, and reduced summer streamflows already has begun.

Other current injuries resulting from climate changes that the States allege they have already begun to experience include warmer average temperatures, later fall freezes and earlier spring thaws, and the decrease in average snowfall and duration of snow cover on the ground in New England and California. While the complaint does not articulate the impact of these changes on the States currently, it does discuss the effect of these changes in the context of future injuries.

With regard to future injuries, the complaint categorizes in detail a range of injuries the States expect will befall them within a span of 10 to 100 years if global warming is not abated. Among the injuries they predict are: increased illnesses and deaths

caused by intensified and prolonged heat waves; increased smog, with a concomitant increase in residents' respiratory problems; significant beach erosion; accelerated sea level rise and the subsequent inundation of coastal land and damage to coastal infrastructure; salinization of marshes and water supplies; lowered Great Lakes water levels, and impaired shipping, recreational use, and hydropower generation; more droughts and floods, resulting in property damage; increased wildfires, particularly in California; and the widespread disruption of ecosystems, which would seriously harm hardwood forests and reduce biodiversity. The States claim that the impact on property, ecology, and public health from these injuries will cause extensive economic harm.

Seeking equitable relief, the States seek to hold Defendants jointly and severally liable for creating, contributing to, or maintaining a public nuisance. They also seek permanently to enjoin each Defendant to abate that nuisance first by capping carbon dioxide emissions and then by reducing emissions by a specified percentage each year for at least ten years.

II. The Land Trusts' Complaint

Also in July 2004, three land trusts ("the Trusts")—the Open Space Institute ("OSI"), the Open Space Conservancy ("OSC"), and the Audubon Society of New Hampshire ("Audubon")—filed a complaint against the same six Defendants named in the States' complaint. The Trusts are "nonprofit land trusts that acquire and maintain ecologically significant and sensitive properties for scientific and educational purposes, and for human use and enjoyment. They own nature sanctuaries, outdoor research laboratories, wildlife preserves, recreation areas, and open space." OSI "was formed to help protect the natural

environment by, among other means, preserving open space and open land for recreation, conservation, and resource and wildlife protection. OSI holds and manages interests in real property in order to preserve and enhance those properties' natural and ecological values." OSC, organized and operated to carry out the purposes of OSI, "holds and manages lands, and conservation easements on lands, in order to preserve and enhance those lands' natural and ecological values." It has an inventory of land and conservation easements "with a book value of approximately $56 million." Audubon "owns and preserves more than 6,000 acres of sensitive land" throughout New Hampshire as nature sanctuaries. "Tens of thousands of people" visit the OSC/OSI properties annually, and all of Audubon's properties are open to the public. Their complaint asserts that "[w]hile the global warming to which Defendants contribute injures the public at large, Plaintiffs suffer special injuries, different in degree and kind from injuries to the general public." They then enumerate how the ecological value of specific properties in which they have an interest will be diminished or destroyed by global warming. For example, the Trusts claim that the accelerated sea level rise and coastal storm surges caused by global warming would permanently inundate some of their property, salinizing marshes and destroying wildlife habitat. Increased smog attributed to global warming would "diminish or destroy the health of the forests that are central ecological features of [their] properties" and cause the loss or decline of other species inhabiting those properties.

The Trusts also base their claims on the federal common law of nuisance or, in the alternative, "the statutory and/or common law of private and public

nuisance of each of the states where [Defendants] own, manage, direct, and/or operate fossil fuel-fired electric generating facilities." They assert that reductions in Defendants' "massive carbon dioxide emissions will reduce all injuries and risks of injuries to the public, and all special injuries to Plaintiffs, from global warming." Accordingly, the Trusts seek to abate Defendants' "ongoing contributions to global warming."

In many ways, the Trusts' complaint mirrors that of the States. It explains the heat-trapping effects of carbon dioxide, identifies the significant emissions by Defendants, outlines the current and projected impact of global warming, and posits that a reduction of emissions would prevent, diminish, or delay the harmful effects of global warming. The principal difference between the complaints lies in the nature of the injury alleged, as the Trusts' complaint details the special injuries to their property interests that would occur as a result of global warming. The Trusts predict that global warming would "diminish or destroy the particular ecological and aesthetic values that caused [them] to acquire, and cause them to maintain, the properties they hold in trust" and would "interfer[e] with their efforts to preserve ecologically significant and sensitive land for scientific and educational purposes, and for human use and enjoyment."

III. The District Court's Amended Opinion and Order

In district court, Defendants moved to dismiss both complaints on several grounds. They asserted that Plaintiffs failed to state a claim because: "(1) there is no recognized federal common law cause of action to abate greenhouse gas emissions that allegedly contribute to global warming; (2) separation of powers

principles preclude this Court from adjudicating these actions; and (3) Congress had displaced any federal common law cause of action to address the issue of global warming." *Am. Elec. Power Co.*, 406 F.Supp.2d at 270. They also contended that the court lacked jurisdiction over Plaintiffs' claims because: "(1) Plaintiffs do not have standing to sue on account of global warming and (2) Plaintiffs' failure to state a claim under federal law divests the court of § 1331 jurisdiction." *Id.* In addition, four of the defendants moved to dismiss for lack of personal jurisdiction and TVA moved to dismiss on the ground of the discretionary function exception. *Id.*

In an Amended Opinion and Order, the district court dismissed the complaints, interpreting Defendants' argument that "separation-of-powers principles foreclosed recognition of the unprecedented 'nuisance' action plaintiffs assert" as an argument that the case raised a non-justiciable political question. *Id.* at 271. Drawing on *Baker v. Carr*, 369 U.S. 186, 198, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), in which the Supreme Court enumerated six factors that may indicate the existence of a non-justiciable political question, the district court stated that "[a]lthough several of these [*Baker v. Carr*] indicia have formed the basis for finding that Plaintiffs raise a non-justiciable political question, the third indicator is particularly pertinent to this case." *Am. Elec. Power Co.*, 406 F.Supp.2d at 271-72. The court based its conclusion that the case was non-justiciable solely on that third Baker factor, finding that Plaintiffs' causes of action were "'impossib[le] [to] decid[e] without an initial policy determination of a kind clearly for nonjudicial discretion.'" *Id.* (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 278, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004)). In the court's view, this factor counseled in favor of dismissal

because it would not be able to balance those "interests seeking strict schemes to reduce pollution rapidly to eliminate its social costs" against "interests advancing the economic concern that strict schemes [will] retard industrial development with attendant social costs." *Id.* (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 847, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) (internal quotation marks omitted)). The district court concluded that balancing those interests required an "'initial policy determination' first having been made by the elected branches to which our system commits such policy decisions, viz., Congress and the President." *Id.*

In addition, the district court rejected Plaintiffs' arguments that they were presenting "simple nuisance claim[s] of the kind courts have adjudicated in the past," observing that none of the other public nuisance cases involving pollution "touched on so many areas of national and international policy." *Id.* According to the district court, the broad reach of the issues presented revealed the "transcendently legislative nature of this litigation." *Id.* If it were to grant the relief sought by Plaintiffs—capping carbon dioxide emissions—the court believed that it would be required, at a minimum, to: determine the appropriate level at which to cap the emissions and the appropriate percentage reduction; create a schedule to implement the reductions; balance the implications of such relief with the United States' ongoing climate change negotiations with other nations; and assess and measure available alternative energy resources, "all without an 'initial policy determination' having been made by the elected branches." *Id.* at 272-73. The district court pointed to the "deliberate inactions of Congress and the Executive," both in the domestic

and international arena "in response to the issue of climate change," and remonstrated Plaintiffs for seeking to impose by "judicial fiat" the kind of relief that Congress and the Executive had specifically refused to impose. *Id.* at 213-14. That fact underscored for the court that the "initial policy determination addressing global climate change" was an undertaking for the political branches, which were charged with the "identification and balancing of economic, environmental, foreign policy, and national security interests." *Id.* at 274.

Judgment entered on September 19, 2005, and both groups of Plaintiffs timely appealed. Amici have submitted briefs as well, but most of them are untimely and we will therefore not consider them.[2]

DISCUSSION

I. Standard of Review

"We review *de novo* a district court's grant of a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted." *Flores v. S. Peru Copper Corp.*, 414

---

[2] The Alliance of Automobile Manufacturers, et al. ("the Alliance"), Unions for Jobs and the Environment, Sen. James M Inhofe, et. al , and Law Professors filed amicus briefs in support of Defendants' arguments in the States' case, and the Alaska Inter-Tribal Council and Akiak Native Community filed an amicus brief in support of Plaintiffs' arguments The same groups filed as amici in the Trusts' case (Sen. Inhofe did not file a separate brief, he stated that the arguments contained in the brief filed in the States' case applied equally to the Trusts' case). Only the Alliance and Law Professors' briefs complied with Fed. R.App. P. 29(c), requiring amici to file their briefs "no later than seven days after the principal brief of the party being supported is filed." We thus disregard the untimely briefs and consider only the arguments in these two timely briefs.

F.3d 233, 241 (2d Cir.2003). "For the purpose of such review, this Court must accept as true all allegations in the complaint and draw all reasonable inferences in favor of the non-moving party." *Gorman v. Consol. Edison Corp.*, 488 F.3d 586, 591-92 (2d Cir.2007) (citing *Taylor v. Vt. Dep't of Educ.*, 313 F.3d 768, 776 (2d Cir.2002)).

If a complaint presents a non-justiciable political question, the proper course is for us to affirm dismissal. *See 767 Third Ave. Assocs. v. Consulate Gen. of Socialist Fed. Republic of Yugoslavia*, 218 F.3d 152, 164 (2d Cir.2000) ("[W]here adjudication would force the court to resolve 'political questions,' the proper course for the courts is to dismiss.").

II. The Political Question Doctrine

A. Overview of the Political Question Doctrine

The political question doctrine is "primarily a function of the separation of powers," *Baker v. Carr*, 369 U.S. 186, 210, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), "designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government," *United States v. Munoz-Flores*, 495 U.S. 385, 394, 110 S.Ct. 1964, 109 L.Ed.2d 384 (1990), where that other branch is better suited to resolve an issue. This limitation on the federal courts was recognized in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803), in which Chief Justice Marshall wrote, "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." *Id.* at 170. Consequently, "[o]ut of due respect for our coordinate branches and recognizing that a court is incompetent to make final resolution of certain matters, these political questions are deemed 'nonjusticiable.'" *Lane*

ex rel. Lane v. Halliburton, 529 F.3d 548, 557 (5th Cir.2008). *See generally Schneider v. Kissinger*, 412 F.3d 190, 194-96 (D.C.Cir.2005) (describing Constitution's textual allocation of authority among three branches of government).

In an effort to "expose the attributes of the [political question] doctrine—attributes which, in various settings, diverge, combine, appear, and disappear in seeming disorderliness," *Baker*, 369 U.S. at 210, 82 S.Ct. 691, the Court set out six "formulations" which "may describe a political question":

> Prominent on the surface of any case held to involve a political question is found [(1)] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [(2)] a lack of judicially discoverable and manageable standards for resolving it; or [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [(4)] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [(5)] an unusual need for unquestioning adherence to a political decision already made; or [(6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217, 82 S.Ct. 691. *Baker* set a high bar for nonjusticiability: "Unless one of these formulations is *inextricable* from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence." *Id.* (emphasis added). In a recent pronouncement on the political question doctrine, the Supreme Court noted that the *Baker* factors "are probably listed in descending order of

both importance and certainty." *Vieth v. Jubelirer*, 541 U.S. 267, 278, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004). Notwithstanding ample litigation, the Supreme Court has only rarely found that a political question bars its adjudication of an issue. *See* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine & the Rise of Judicial Supremacy*, 102 Colum. L.Rev. 237, 267-68 (2002) ("In fact, in the almost forty years since *Baker v. Carr* was decided, a majority of the Court has found only two issues to present political questions, and both involved strong textual anchors for finding that the constitutional decision rested with the political branches.").

Defendants' arguments touch upon the two most highly litigated areas of the political question doctrine: domestic controversies implicating constitutional issues and the conduct of foreign policy. In the first area, courts generally analyze the language of the Constitution to determine whether adjudication of a dispute is "textually committed" to the Executive or Legislative branches. *See, e.g., Nixon v. United States*, 506 U.S. 224, 228, 238, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993) (finding political question in case where federal judge alleged that the Senate's impeachment procedures violated the Constitution's Impeachment Clause and the Senate, not the Court, had sole discretion to choose impeachment procedures); *Gilligan v. Morgan*, 413 U.S. 1, 7, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973) (finding political question based on Article I, Section 8, Clause 16 of the U.S. Constitution in case where the relief sought by former Kent State University students over the training, weaponry, and orders of the Ohio National Guard "embrace[d] critical areas of responsibility vested by the Constitution in the Legislative and Executive branches of the Government");

United States v. Sitka, 845 F.2d 43, 46 (2d Cir.1988) (basing its ruling on the holding in *Coleman v. Miller*, 307 U.S. 433, 450-56, 59 S.Ct. 972, 83 L.Ed. 1385 (1939), that "procedures employed in the ratification of constitutional amendments" presented non-justiciable political questions, and affirming dismissal of taxpayer's challenge to allegedly improper ratification of Sixteenth Amendment).

However, not all cases touching upon constitutional issues that may also raise "an issue of great importance to the political branches" and have "motivated partisan and sectional debate," present non-justiciable political questions. *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 458, 112 S.Ct. 1415, 118 L.Ed.2d 87 (1992). In *Montana*, the Supreme Court wrote that, in invoking the political question doctrine,

> a court acknowledges the possibility that a constitutional provision may not be judicially enforceable. Such a decision is of course very different from determining that specific congressional action does not violate the Constitution. That determination is a decision on the merits that reflects the *exercise* of judicial review, rather than the *abstention* from judicial review that would be appropriate in a case of a true political question.

Id.; *see also, e.g., Wesberry v. Sanders*, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964) (ruling that challenge to state districting decisions relating to the election of Members of Congress was justiciable).

The second—and more frequently litigated—area where cases "might pose special questions concerning the judiciary's proper role [is] when adjudication might have implications in the conduct of this nation's foreign relations." *Kadic v. Karadzic*, 70 F.3d

232, 248 (2d Cir.1995). The Supreme Court has explained that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the executive and legislative—'the political'—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302, 38 S.Ct. 309, 62 L.Ed. 726 (1918). *Baker* summarized the areas where federal courts have found non-justiciable political questions in foreign relations matters, such as "recognition of foreign governments," "which nation has sovereignty over disputed territory," "recognition of belligerency abroad," determination of "a person's status as representative of a foreign government," and "[d]ates of duration of hostilities." *Baker*, 369 U.S. at 212, 213, 82 S.Ct. 691; *see, e.g., Johnson v. Eisentrager*, 339 U.S. 763, 789, 70 S.Ct. 936, 94 L.Ed. 1255 (1950) (challenging the President's decision to deploy troops in a foreign land); *Jones v. United States*, 137 U.S. 202, 212, 11 S.Ct. 80, 34 L.Ed. 691 (1890) ("Who is the sovereign, *de jure* or *de facto*, of a territory, is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government."); *Whiteman v. Dorotheum GmbH & Co., KG*, 431 F.3d 57, 59-60 (2d Cir.2005) (holding that deference to U.S. statement of foreign policy interests urging dismissal of claims against foreign sovereign was appropriate where Executive branch and U.S. Government had entered agreements and therefore resolution of issue in alternate international forum would be superior to federal court litigation of issue); *In re Austrian & German Holocaust Litig.*, 250 F.3d 156, 164 (2d Cir. 2001)

(holding that a district court order that "seemingly requires the German legislature to make a finding of legal peace and to do so before its summer recess" improperly intruded into the Executive's realm); *767 Third Ave. Assocs.*, 218 F.3d at 159-60 (determining whether successor States succeeded to liabilities of dissolved former State); *Can v. United States*, 14 F.3d 160, 162-63 (2d Cir.1994) (holding that a determination of title to blocked South Vietnamese assets would require resolution of issues of state succession and the President's power to recognize foreign governments, which were constitutionally committed to the Executive branch).

In sum,

> [t]he political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly ill suited to make such decisions, as 'courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature.'

Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986) (quoting *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1379 (D.C.Cir.1981) (footnote omitted)). Nevertheless, "[t]he political question doctrine must be cautiously invoked," *Can*, 14 F.3d at 163, and simply because an issue may have political implications does not make it non-justiciable, *see Baker*, 369 U.S. at 211, 217, 82 S.Ct. 691 (cautioning that the doctrine "is one of 'political questions,' not one of 'political cases'" and that, in the foreign relations sphere, "it is error to suppose that every case or controversy which

touches foreign relations lies beyond judicial cognizance"). As the Fifth Circuit recently wrote, "[t]he *Baker* analysis is not satisfied by 'semantic cataloguing' of a particular matter as one implicating 'foreign policy' or 'national security.' Instead, *Baker* demands a 'discriminating inquiry into the precise facts and posture of the particular case' before a court may withhold its own constitutional power to resolve cases and controversies." *Lane*, 529 F.3d at 558 (quoting *Baker*, 369 U.S. at 216, 82 S.Ct. 691). This Court has held that the "preferable approach is to weigh carefully the relevant considerations on a case-by-case basis." *Kadic*, 70 F.3d at 249.

B. Application of the Baker Factors

As noted above, the district court found the third *Baker* factor "particularly pertinent" to its "finding that Plaintiffs raise a non-justiciable political question." *Connecticut v. Am. Elec. Power Co.*, 406 F.Supp.2d 265, 272 (S.D.N.Y.2005). The court explained that an "initial policy determination" by the elected branches was required before it could adjudicate a global warming nuisance claim. *Id.* (internal quotation marks omitted). In buttressing its determination, the district court characterized Plaintiffs' arguments as "touch[ing] on so many areas of national and international policy," where the "scope and magnitude of the relief" sought "reveal[ ] the transcendently legislative nature of this litigation." *Id.* On appeal, Plaintiffs contend that none of the *Baker* factors apply, while Defendants assert that each *Baker* factor applies.

1. *The First Baker Factor: Is There a Textually Demonstrable Constitutional Commitment of the Issue to a Coordinate Political Department?*

This Court has described the first *Baker* factor as the "dominant consideration in any political question

inquiry." *Lamont v. Woods*, 948 F.2d 825, 831 (2d Cir.1991). The first factor "recognizes that, under the separation of powers, certain decisions have been exclusively committed to the legislative and executive branches of the federal government, and are therefore not subject to judicial review." *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1358-59 (11th Cir.2007).

Defendants define the issue in these two cases as "whether carbon dioxide emissions . . . should be subject to mandatory limits and/or reductions" and argue that resolution of that issue is "textually committed to Congress by the Commerce Clause" as a matter of "high policy." Beyond this cursory reference to "high policy," Defendants fail to explain how the emissions issue is textually committed to the Commerce Clause. We find this position insufficiently argued and therefore consider it waived. *See Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir.1998) ("Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal").

Next, Defendants argue that "permitting these and other plaintiffs to use an asserted federal common law nuisance cause of action to reduce domestic carbon dioxide emissions will impermissibly interfere with the President's authority to manage foreign relations"; that "unilateral reductions of U.S. carbon dioxide emissions would interfere with the President's efforts to induce other nations to reduce their emissions"; and the court's interjection in this arena would usurp the President's authority to "resolve fundamental policy questions" that he is seeking to solve through diplomatic means.

Again, Defendants make conclusory statements but provide no support for their argument in this section of their brief. They do, however, shed some light on these arguments in other parts of their brief. In their Statement of the Case, they note that the Senate urged President Clinton "not to sign any agreement that would result in serious harm to the economy or that did not include provisions limiting emissions by developing nations." In their discussion of displacement, they cite H.R.Rep. No. 102-474, pt. 1, at 152 (1992), U.S.Code Cong. & Admin.News 1992, pp. 1954, 1975, which provides that mandatory emissions measures should be undertaken "only in the context of concerted international action," and state that three Presidents have worked "within the United Nations framework and elsewhere to develop . . . an effective and science-based response to the issue of global warming." Defendants conclude that "unilateral, mandatory emissions reductions . . . will undermine the nation's multilateral strategy" and "reduce[ ] the bargaining leverage the President needs to implement a multilateral strategy by giving him less to offer in exchange for reductions by other nations."

It cannot be gainsaid that global warming poses serious economic and ecological problems that have an impact on both domestic politics and international relations. Nevertheless, Defendants' characterization of this lawsuit as implicating "complex, inter-related and far-reaching policy questions about the causes of global climate change and the most appropriate response to it" magnifies to the outer limits the discrete domestic nuisance issues actually presented. A result of this magnification is to misstate the issues Plaintiffs seek to litigate. Nowhere in their complaints do Plaintiffs ask the court to fashion a comprehensive and far-reaching solution to global cli-

mate change, a task that arguably falls within the purview of the political branches.[3] Instead, they seek to limit emissions from six domestic coal-fired electricity plants on the ground that such emissions constitute a public nuisance that they allege has caused, is causing, and will continue to cause them injury. A decision by a single federal court concerning a common law of nuisance cause of action, brought by domestic plaintiffs against domestic companies for domestic conduct, does not establish a *national* or *international* emissions policy (assuming that emissions caps are even put into place). Nor could a court set across-the-board domestic emissions standards or require any unilateral, mandatory emissions reductions over entities not party to the suit.[4] In contrast to cases such as *Whiteman v. Dorotheum GmbH & Co.* and *In re Austrian & German Holocaust Litigation*, where courts have found political questions barring adjudication, invocation of the political question doctrine here is unwarranted because the relief for which Plaintiffs pray applies in only the most tangen-

---

[3] In many of the cases where courts have found nonjusticiable political questions, plaintiffs sued the United States, United States officials, or foreign government officials, thereby directly challenging the foreign policy determinations at issue. *See, e.g., Schneider*, 412 F.3d 190, *Can*, 14 F.3d 160 This case presents at best an indirect challenge. *See Lane*, 529 F.3d at 560 (opining that the first *Baker* factor "is primarily concerned with *direct* challenges to actions taken by a coordinate branch of the federal government") (emphasis added).

[4] The possibility that mandatory emissions reductions may be imposed upon these defendants is quite different from "mandatory emissions reduction requirements on American industry" that the Professors' amicus brief views as a consequence of adjudication.

tial and attenuated way to the expansive domestic and foreign policy issues raised by Defendants.[5]

In this common law nuisance case, "[t]he department to whom this issue has been 'constitutionally committed' is none other than our own—the Judiciary." *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir.1991); *see also Me. People's Alliance & Natural Res. Def. Council v. Mallinckrodt, Inc.*, 471 F.3d 277, 286 (1st Cir.2006) ("[N]uisance principles contribute heavily to the doctrinal template that underbraces [environmental] statutes . . . and the tasks involved in adjudicating environmental cases are well within the federal courts' accustomed domain.") (internal citation omitted).

We find no textual commitment in the Constitution that grants the Executive or Legislative branches responsibility to resolve issues concerning carbon dioxide emissions or other forms of alleged nuisance. Accordingly, we hold that the first *Baker* factor does not apply.

2. *The Second Baker Factor: Is There a Lack of Judicially-Discoverable and Manageable Standards for Resolving This Case?*

"One of the most obvious limitations imposed by [Article III, Section 1 of the Constitution] is that judicial action must be governed by *standard*, by *rule*" *Vieth v. Jubelirer*, 541 U.S. 267, 278, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (plurality opinion). Defendants point to the complexities involved in pollution control cases and assert that such intricacies "pale in com-

---

[5] We could envision a political question arising if, for example, Plaintiffs sued the President directly, in an effort to force him to sign international global warming treaties.

parison to those presented here," given the uncertainties surrounding the precise effect of greenhouse gas emissions on climate. Those uncertainties, Defendants argue, are "mere preludes to the unmanageable policy questions a court would then have to confront" in adjudicating Plaintiffs' claim, including: How fast should emissions be reduced?; Should power plants or automobiles be required to reduce emissions?; Who should bear the cost of reduction?; and How are the impacts on jobs, the economy, and the nation's security to be balanced against the risks of future harms? Quoting *City of Milwaukee v. Illinois*, 451 U.S. 304, 317, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981) ("*Milwaukee II*"), Defendants assert that the "vague and indeterminate nuisance concepts and maxims of equity" gleaned from public nuisance cases or the Restatement (Second) of Torts § 821B (1979)[6] provide no guidance for resolving these unmanageable issues.

Defendants' argument is undermined by the fact that federal courts have successfully adjudicated complex common law public nuisance cases for over a century. The first cases involved States bringing claims against other States, or against private parties in other States, in the Supreme Court under its original jurisdiction. For example, in 1901, the Supreme Court decided *Missouri v. Illinois*, 180 U.S. 208, 21 S.Ct. 331, 45 L.Ed. 497 (1901) ("*Missouri I*"), a public nuisance case in which Missouri sued to prevent Illinois from discharging sewage into a channel that emptied into the Mississippi River forty-three miles above St. Louis, which Missouri feared would make the water unfit for human, agricultural,

---

[6] The Restatement (Second) of Torts § 821B(1) (1979) defines a public nuisance as "an unreasonable interference with a right common to the general public." *See* Section IV(B), *infra*.

or manufacturing purposes. The Court held that Missouri could maintain a lawsuit for equitable relief even before it actually sustained injury.[7] Illinois later began discharging sewage into the river. In *Missouri v. Illinois*, 200 U.S. 496, 26 S.Ct. 268, 50 L.Ed. 572 (1906) ("*Missouri II*"), Missouri brought a second suit before the Court, seeking to enjoin the discharge on the ground that it constituted a public nuisance. The Court carefully appraised the sophisticated scientific and expert evidence offered (such as whether the typhoid bacillus could survive the waterborne journey), weighed the equities, and concluded that Missouri had not made its case, particularly with respect to establishing injury and causation. *Id.* at 522-26, 26 S.Ct. 268.

Another example of the federal courts' masterful handling of complex public nuisance issues concerned an air pollution controversy. Between 1907 and 1916, the State of Georgia appeared before the Supreme Court on four different occasions in its suit against Tennessee Copper Company and another copper foundry, alleging that noxious emissions from the

---

[7] The Court articulated a standard for granting an injunction in a common law nuisance case:

> We fully agree with the contention of defendants' counsel that it is settled that an injunction to restrain a nuisance will issue only in cases where the fact of nuisance is made out upon determinate and satisfactory evidence; that if the evidence be conflicting and the injury be doubtful, that conflict and doubt will be a ground for withholding an injunction; and that, where interposition by injunction is sought, to restrain that which it is apprehended will create a nuisance of which its complainant may complain the proofs must show such a state of facts as will manifest the danger to be real and immediate.

Missouri, 180 U S. at 248, 21 S.Ct. 331.

plants were destroying forests, orchards, and crops in Georgia. In the first action, the Court characterized Georgia's injuries as "analogous to torts" and adjudicated the merits. *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237-39, 27 S.Ct. 618, 51 L.Ed. 1038 (1907). Next, the Court assessed the adequacy of steps taken by the defendants to abate the fumes and ordered injunctive relief including a reduction of sulfur dioxide emissions and total emissions to not more than 20 tons per day from April to October of each year and to not more than 40 tons per day during the rest of the year. *Georgia v. Tenn. Copper Co.*, 237 U.S. 474, 474-78, 35 S.Ct. 631, 59 L.Ed. 1054 (1915). The Court then discussed facts relevant to appropriate emissions limitations. *Georgia v. Tenn. Copper Co.*, 237 U.S. 678, 678-80, 35 S.Ct. 752, 59 L.Ed. 1173 (1915). In its final decree, the Court set definitive emissions limits, imposed monitoring requirements, and apportioned costs between the defendants. *Georgia v. Tenn. Copper Co.*, 240 U.S. 650, 650-51, 36 S.Ct. 465, 60 L.Ed. 846 (1916). In adjudicating this dispute, the Court evaluated the evidence, considered the magnitude of the injury, causation, and equitable factors, and granted injunctive relief to Georgia, "satisfied, by a preponderance of evidence, that the sulphurous fumes cause and threaten damage on so considerable a scale to the forests and vegetable life, if not to health, within the plaintiff state, as to make out a case within the requirements of [*Missouri II*]." *Tenn. Copper*, 206 U.S. at 238-39, 27 S.Ct. 618.

These cases were among the first in a long line of federal common law of nuisance cases where federal courts employed familiar public nuisance precepts, grappled with complex scientific evidence, and resolved the issues presented, based on a fully developed record. *See, e.g., New Jersey v. City of New York*, 283

U.S. 473, 51 S.Ct. 519, 75 L.Ed. 1176 (1931) (seeking to enjoin New York from dumping garbage into the ocean and polluting New Jersey beaches and water); *North Dakota v. Minnesota*, 263 U.S. 365, 44 S.Ct. 138, 68 L.Ed. 342 (1923) (seeking to enjoin, as public nuisance, a Minnesota irrigation project that contributed to flooding of North Dakota farmland); *New York v. New Jersey*, 256 U.S. 296, 41 S.Ct. 492, 65 L.Ed. 937 (1921) (seeking to enjoin sewage discharge into boundary waters and causing pollution); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 14 L.Ed. 249 (1851) (alleging interference with navigation on Ohio River by low bridge as constituting public nuisance). *See also Illinois v. City of Milwaukee*, 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972) ("*Milwaukee I*") (agreeing that sewage discharge constituted public nuisance and that case could still be adjudicated by federal courts under federal common law because amendments to Clean Water Act did not provide remedy).

Moreover, as a general matter, the Supreme Court and this Court have often turned to the Restatement (Second) of Torts for assistance in developing standards in a variety of tort cases.[8] *See, e.g.*, *United States v. Atl. Research Corp.*, 551 U.S. 128, 141, 127 S.Ct. 2331, 168 L.Ed.2d 28 (2007) (invoking Restatement (Second) of Torts § 886A(2) in applying traditional

---

[8] In *Field v Mans*, 516 U.S. 59, 70, 116 S Ct. 437, 133 L Ed.2d 351 (1995), the Supreme Court characterized the Restatement (Second) of Torts as "the most widely accepted distillation of the common law of torts." A torts compendium has described the first and second Restatement of Torts as being "frequently followed and applied by the courts. Each of these editions has had a profound influence and serious impact on American tort law." 1 Stuart M. Speiser, Charles F. Krause & Alfred W. Gans, The American Law of Torts 64 (Thomson West 2003).

rules of equity when assessing liability in CERCLA case); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 466-67, 126 S.Ct. 1991, 164 L.Ed.2d 720 (2006) (citing Restatement for proximate cause and certainty of damages); *Higazy v. Templeton*, 505 F.3d 161, 175 (2d Cir.2007) (applying Restatement's proximate cause/superseding cause analysis in *Bivens* action); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 287-88 (2d Cir.2007) (per curiam) (Hall, J., concurring) (adopting Restatement's definition of aiding and abetting in Alien Tort Claims Act case); *Project Hope v. M/V IBN SINA*, 250 F.3d 67, 76 (2d Cir.2001) (quoting Restatement (Second) of Torts § 879 for proposition that "federal common law permits imposition of joint and several liability"); *see also Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1353 (Fed.Cir.2001) (looking to Restatement for contours and scope of common law nuisance). It is true that the Restatement's definition of public nuisance—"an unreasonable interference with a right common to the general public"—is broad. Restatement (Second) of Torts § 821B. But Judge James Oakes, sitting on the district court by designation, successfully applied the Restatement's standard in a common law nuisance action brought by the United States to reduce pollution of Lake Champlain by vessels that transported oil, ordering a detailed remedial plan. *See United States v. Bushey & Sons*, 363 F.Supp. 110, 120-21 (D.Vt.1973), *aff'd without opinion*, 487 F.2d 1393 (2d Cir.1973); *see also Cox v. City of Dallas*, 256 F.3d 281, 291 (5th Cir.2001) (describing remedies available in nuisance actions by citing Restatement (Second) of Torts §§ 821B and 821C, and explaining that nuisance actions were "the common law backbone of modern environmental law" (citation omitted)); *Nat'l Sea Clammers Ass'n v. City*

of New York, 616 F.2d 1222, 1234 (3d Cir.1980), *vacated on other grounds*, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981) (adopting Restatement definition of public nuisance and observing that the Restatement formulation "encompasses the injury alleged in this case"). In Section IV(B), *infra*, we apply the Restatement definition of public nuisance to the federal common law of nuisance and demonstrate that it provides a workable standard.

Following the Restatement and common law tort principles is consistent with the exigencies of common law decision-making, which

> proceeds through the incremental, analogical application of broadly-stated principles, and . . . is therefore not amenable to the formulation of finely detailed rules in the manner of a regulatory code. . . . [T]he contextual nature and factual sensitivity of common law judicial rulemaking takes account of the "practical problems" that can result from ill-designed legal rules, and the flexibility of the common law process allows those problems to be addressed and avoided as they arise.

Khulumani, 504 F.3d at 290 (Hall, J., concurring).

Federal courts have applied well-settled tort rules to a variety of new and complex problems. For example, in *Klinghoffer*, a wrongful death case where an American passenger on an ocean liner was killed by Palestinian Liberation Organization ("PLO") operatives, this Court rejected the PLO's argument that the claim presented a non-justiciable political question because it raised "foreign policy questions and political questions in a volatile context [, *i.e.*, international terrorism,] lacking satisfactory criteria for judicial

determination." *Klinghoffer*, 937 F.2d at 49. This Court looked beyond "[t]he fact that the issues before us arise in a politically charged context," discerned that the actual cause of action was "an ordinary tort suit, alleging that the defendants breached a duty of care owed to the plaintiffs or their decedents," and concluded that the political implications of the suit did not "convert what is essentially an ordinary tort suit into a non-justiciable political question." *Id.* With regard to the standards employed to assess the claims, this Court stated that "because the common law of tort provides clear and well-settled rules on which the district court can easily rely, this case does not require the court to render a decision in the absence of judicially discoverable and manageable standards." *Id.* (internal quotation marks omitted).

Accordingly, we do not agree that there are no judicially discoverable and manageable standards for resolving this case. Well-settled principles of tort and public nuisance law provide appropriate guidance to the district court in assessing Plaintiffs' claims and the federal courts are competent to deal with these issues. Defendants' arguments to the contrary are overstated. As noted above, Plaintiffs' complaints do not ask the district court to decide overarching policy questions such as whether other industries or emission sources not before the court must also reduce emissions or determine how across-the-board emissions reductions would affect the economy and national security. In adjudicating the federal common law of nuisance claim pleaded here, the district court will be called upon to address and resolve the particular nuisance issue before it, which does not involve assessing and balancing the kind of broad interests that a legislature or a President might consider in formulating a national emissions policy. The question presented

here is discrete, focusing on Defendants' alleged public nuisance and Plaintiffs' alleged injuries. As the States eloquently put it, "[t]hat Plaintiffs' injuries are part of a worldwide problem does not mean Defendants' contribution to that problem cannot be addressed through principled adjudication."

That the district court may be called upon to decide causation issues and apply a remedy does not remove the case from the ambit of nuisance actions. Federal courts have long been up to the task of assessing complex scientific evidence in cases where the cause of action was based either upon the federal common law or upon a statute. They are adept in balancing the equities and in rendering judgment. *See, e.g., Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment."). The fact that a case may present complex issues is not a reason for federal courts to shy away from adjudication; when a court is possessed of jurisdiction, it generally must exercise it. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404, 5 L.Ed. 257 (1821). Additionally, the fact that this case is governed by recognized judicial standards under the federal common law of nuisance "obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion" and "further undermines the claim that such suits relate to matters that are constitutionally committed to another branch." *Kadic*, 70 F.3d at 249. Defendants are not entitled to dismissal based on the second *Baker* factor.

3. *The Third Baker Factor: Is It Impossible to Decide this Case Without an Initial Policy Determination of a Kind Clearly for Nonjudicial Discretion?*

The district court relied upon the third *Baker* factor in dismissing Plaintiffs' complaints. It concluded that a solution to the problems created by carbon dioxide emissions must be global in nature and based on domestic policy considerations—such as the need to balance relevant environmental and economic interests and the possible impact on national security—and held that only the political branches are empowered to act in such a context. *Am. Elec. Power Co.*, 406 F.Supp.2d at 272-73. On appeal, Defendants contend that the relevant policy decision is not, as Plaintiffs argue, abatement of a nuisance. Instead, "[t]he missing policy decision is whether to impose mandatory greenhouse gas emissions limits and, if so, on whom, in what manner and at what cost. No such . . . decision can be found in statutes in which Congress has called for additional study but *declined* to impose such limits." Defendants argue that the "very nature of this phenomenon requires a comprehensive response."

The district court found it significant that the political branches had failed to supply an initial policy decision because they had refused to regulate carbon dioxide emissions. The court viewed the possibility of any regulation coming out of the courts as countering the political branches' refusal to act. *Am. Elec. Power Co.*, 406 F.Supp.2d at 273-74. The district court's reliance on a *refusal* to legislate results in a decision resting on particularly unstable ground. The Supreme Court has stated, in the context of displacement of federal common law, that "Congress's mere refusal to legislate . . . falls far short of an expression of

legislative intent to supplant the existing common law in that area." *United States v. Texas*, 507 U.S. 529, 535, 113 S.Ct. 1631, 123 L.Ed.2d 245 (1993). The district court's reasoning in this regard is inapposite in a case making a federal common law of nuisance claim where, if regulatory gaps exist, common law fills those interstices. *See generally Khulumani*, 504 F.3d at 287 (citing *U.S. v. Kimbell Foods*, 440 U.S. 715, 727, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979)).

The holding in *Milwaukee I* accentuates that point. In *Milwaukee I*, the federal government had "enacted numerous laws touching interstate waters," including the Federal Water Pollution Control Act and statutes researching the aquatic environment. *Milwaukee I*, 406 U.S. at 101-02, 92 S.Ct. 1385. Because the pollution abatement remedy sought by Illinois was not "within the precise scope of remedies prescribed by Congress," the Court looked to federal common law to abate the nuisance, and to supply an appropriate remedy. *Id.* at 103-04, 92 S.Ct. 1385. The Court wrote:

> It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution.

Id. at 107, 92 S.Ct. 1385. *Milwaukee I* stands for the proposition that if the extant statutes governing water pollution do not cover a plaintiff's claims and provide a remedy, a plaintiff is free to bring its claim under the federal common law of nuisance; a plaintiff is not obliged to await the fashioning of a comprehensive approach to domestic water pollution before it can bring an action to invoke the remedy it seeks. *See*

id. at 101-02, 92 S.Ct. 1385. Similarly, the fact that the Clean Air Act ("CAA") or other air pollution statutes, as they now exist, do not provide Plaintiffs with the remedy they seek does not mean that Plaintiffs cannot bring an action and must wait for the political branches to craft a "comprehensive" global solution to global warming. Rather, Plaintiffs here may seek their remedies under the federal common law. They need not await an "initial policy determination" in order to proceed on this federal common law of nuisance claim, as such claims have been adjudicated in federal courts for over a century.

It is also fair to say that the Executive branch and Congress have not indicated they favor *increasing* greenhouse gases. On the contrary, the political branches are at the very least concerned about global warming, and Congress has passed laws that call for study of climate change and research into technologies that will reduce emissions. *See, e.g.*, Global Climate Protection Act of 1987, Pub.L. No. 100-204, Title XI, §§ 1103, 101 Stat. 1407, *as amended by* Pub.L. No. 103-199, 107 Stat. 2327, *reprinted as note to* 15 U.S.C. § 2901 (stating that United States policy should seek to "(a) increase worldwide understanding of the greenhouse effect and its environmental and health consequences; . . . [and] (3) identify technologies and activities to limit mankind's adverse effect on the global climate by—(A) slowing the rate of increase of concentrations of greenhouse gases in the near term. . . .")

As other courts have found, where a case "appears to be an ordinary tort suit, there is no 'impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion.'" *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1365

(11th Cir.2007) (quoting *Baker*, 369 U.S. at 217, 82 S.Ct. 691). Such is the case here. Accordingly, the third *Baker* factor does not apply.

4. *The Fourth, Fifth, and Sixth Baker Factors: Will Adjudication of This Case Demonstrate "Lack of Respect" for the Political Branches, Contravene "An Unusual Need for Unquestioning Adherence to a Political Decision Already Made," or "Embarrass" the Nation as a Result of "Multifarious Pronouncements by Various Departments"?*

"The fourth through sixth *Baker* factors appear to be relevant only if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests." *Kadic*, 70 F.3d at 249. Defendants lump these final *Baker* factors together, arguing only that because "U.S. policy is manifestly not to engage in unilateral reductions of domestic emissions," where Congress opted only to study the issue, a judicially imposed resolution enjoining domestic emissions through federal common law would demonstrate a "lack of respect" for the political branches, contravene a "political decision already made," and create the potential for "embarrassment from multifarious pronouncements by various departments on one question."

Lurking behind Defendants' arguments is this salient question: What exactly *is* U.S. "policy" on greenhouse gas emissions? At one point in their briefs, Defendants acknowledge that this country's official policy and Congress's strategy is to reduce the generation of greenhouse gases. Elsewhere, they point to a policy of research as a prelude to formulating a

coordinated, national policy. They also assert that U.S. policy is "*not* to engage in unilateral reduction of domestic emissions" (relating, in particular, to the international arena). These variegated pronouncements underscore the point that there really is no unified policy on greenhouse gas emissions.[9] Allowing this litigation where there is a lack of a unified policy does not demonstrate any lack of respect for the political branches, contravene a relevant political decision already made, or result in multifarious pronouncements that would embarrass the nation. *See Alperin v. Vatican Bank*, 410 F.3d 532, 558 (9th Cir.2005) ("Because of a lack of a policy decision on point, we do not reach the question posed by the fifth *Baker* test whether there is an 'unusual need for unquestioning adherence' thereto." (quoting *Baker*, 369 U.S. at 217, 82 S.Ct. 691)); *Klinghoffer*, 937 F.2d at 50 ("[N]o prior political decisions are questioned—or even implicated—by the matter before us.").

At the same time, to the extent that Defendants claim U.S. emissions policy does not aim to reduce emissions, their argument is undermined by the legislation they cite in their brief, which supports a conclusion that U.S. emissions policy seeks to eventually achieve the "stabilization and eventual reduction in the generation of greenhouse gases," Energy Policy Act of 1992, 42 U.S.C. § 13382(a)(2), (g), and to "limit mankind's adverse effect on the global climate . . . ," Global Climate Protection Act of 1987, § 1103(a)(3). In this respect, adjudication would certainly not contravene any political decision already made.

---

[9] When Defendants briefed this argument, they were focusing on the greenhouse gas emissions policy of the former administration. Now that a new administration is in office, the emissions policy is changing. *See* Section v. on Displacement, *infra*.

Certainly, the political implications of any decision involving possible limits on carbon emissions are important in the context of global warming, but not every case with political overtones is non-justiciable. It is error to equate a political question with a political case. *See Baker*, 369 U.S. at 217, 82 S.Ct. 691 ("The doctrine . . . is one of 'political questions,' not one of 'political cases.'"). Given the checks and balances among the three branches of our government, the judiciary can no more usurp executive and legislative prerogatives than it can decline to decide matters within its jurisdiction simply because such matters may have political ramifications.

Furthermore, given the nature of federal common law, where Congress may, by legislation, displace common law standards by its own statutory or regulatory standards and require courts to follow those standards, there is no need for the protections of the political question doctrine. The legislative branch is free to amend the Clean Air Act to regulate carbon dioxide emissions, and the executive branch, by way of the EPA, is free to regulate emissions, assuming its reasoning is not "divorced from the statutory text." *Massachusetts v. EPA*, 549 U.S. 497, 532, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007). Either of these actions would override any decision made by the district court under the federal common law.

In sum, we hold that the district court erred when it dismissed the complaints on the ground that they presented non-justiciable political questions.

III. Standing

The district court explicitly declined to address Defendants' standing arguments, reasoning in a footnote that "because the issue of Plaintiffs' standing is

so intertwined with the merits and because the federal courts lack jurisdiction over this patently political question, I do not address the question of Plaintiffs' standing." *Connecticut v. Am. Elec. Power Co.*, 406 F.Supp.2d 265, 271 n. 6 (S.D.N.Y.2005). In *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000), the Supreme Court held that when a lower court dismisses a case without deciding whether standing exists and the basis for the dismissal was found to be error, the Court has an obligation *sua sponte* to assure itself that the plaintiffs have Article III standing before delving into the merits. *See id.* at 180, 120 S.Ct. 693; *see also Ross ex rel. Dunham v. Lantz*, 408 F.3d 121 (2d Cir.2005) (standing must be established to invoke jurisdiction before a federal court can consider the merits of a case). Because we hold that the complaints should not have been dismissed on the ground that they presented non-justiciable political questions, we must explore whether Plaintiffs have standing. The parties in this appeal have fully briefed the issue of standing.

The procedural posture of a case is important when assessing standing. The standard against which a court measures allegations of standing on the pleadings is well known:

> [W]e presume the general factual allegations embrace those facts necessary to support the claim, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), and are constrained not only to accept the truth of the plaintiffs' jurisdictional allegations, but also to construe all reasonable inferences to be drawn from those allegations in plaintiffs' favor. *See Warth [v. Seldin]*, 422 U.S. [490,] 501-

> 02, 95 S.Ct. 2197, 45 L.Ed.2d 343 [(1975)]; *Robinson v. Gov't of Malaysia*, 269 F.3d 133, 140 (2d Cir.2001).

Brooklyn Legal Servs. Corp. v. Legal Servs. Corp., 462 F.3d 219, 226 (2d Cir.2006). The Supreme Court has commented on the lowered bar for standing at the pleading stage, stating that "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990)). This Court echoed that point in *Baur v. Veneman*, 352 F.3d 625, 631 (2d Cir.2003), stating that "at the pleading stage, standing allegations need not be crafted with precise detail, nor must the plaintiff prove his allegations of injury." *See also Bldg. & Constr. Trades Council of Buffalo v. Downtown Dev., Inc.*, 448 F.3d 138, 145 (2d Cir.2006) (holding that federal pleading rules do not require heightened pleading standards to allege standing).

At this point in the litigation, Plaintiffs need not present scientific evidence to prove that they face future injury or increased risk of injury, that Defendants' emissions cause their injuries, or that the remedy they seek will redress those injuries. As the *Baur* Court wrote:

> [T]o the degree that defendants challenge the factual underpinnings of [plaintiffs'] standing the argument is premature. Defendants may certainly test [plaintiffs'] standing as the litigation progresses by requesting an evidentiary hearing or by challenging [plaintiffs'] standing on summary

> judgment or even at trial. However, allegation of a credible risk may be sufficient at the pleading stage without further factual confirmation or quantification of the precise risk at issue. Adopting a more stringent view of the injury-in-fact requirement in environmental cases . . . would essentially collapse the standing inquiry into the merits.

Baur, 352 F.3d at 642 (alteration, internal quotation marks, and citations omitted). Although we are not reviewing the district court's ruling on a motion to dismiss for lack of standing, as the district court did not address that issue, we nevertheless are assessing two cases at the pleading stage and thus the *Lujan-Baur* reasoning applies.

In *Connecticut v. Cahill*, 217 F.3d 93 (2d Cir.2000), this Court enumerated three capacities in which States may bring suit in federal court: "(1) proprietary suits in which the State sues much like a private party suffering a direct, tangible injury; (2) sovereignty suits requesting adjudication of boundary disputes or water rights; or (3) *parens patriae* suits in which States litigate to protect 'quasi-sovereign' interests." *Id.* at 97 (citations omitted). Here, the States are suing in both their proprietary and *parens patriae* capacities, and New York City and the Trusts are suing in their proprietary capacities. We analyze the States' *parens patriae* standing first, followed by an analysis of New York City's, the States', and the Trusts' proprietary standing.

A. The States' Parens Patriae Standing

1. *Background*

Parens patriae is an ancient common law prerogative which "is inherent in the supreme power of every

state . . . [and is] often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves." *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 57, 10 S.Ct. 792, 34 L.Ed. 478 (1890). The Supreme Court, in *Missouri I*, articulated the rationale behind parens patriae standing in common law nuisance cases when it allowed Missouri to sue Illinois to enjoin it from dumping sewage that poisoned Missouri's water supply. The Court stated that:

> [A]n adequate remedy can only be found in this court at the suit of the state of Missouri. It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant state. But it must surely be conceded that, if the health and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them. If Missouri were an independent and sovereign State all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy, and that remedy, we think, is found in the constitutional provisions we are considering.

Missouri I, 180 U.S. at 241, 21 S.Ct. 331. A few years later, the Court drew upon *Missouri I*'s principles and extended this approach to a state's suit against a private party—once again in a common law nuisance suit. In *Georgia v. Tennessee Copper* Co., 206 U.S. 230, 27 S.Ct. 618, 51 L.Ed. 1038 (1907), the Supreme Court's first major air pollution case, Georgia sought

to enjoin Tennessee Copper from discharging noxious gases that, it claimed, injured its citizens and its land. Although the Court referred to Georgia's proprietary claims as a "makeweight," it allowed the state to sue "for an injury to it in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether . . . its inhabitants shall breathe pure air." *Id.* at 237, 27 S.Ct. 618. The *Tennessee Copper* Court, citing *Missouri II*, explained that when the states joined the union, "they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court." *Id.* These cases demonstrate that a state's interests in protecting both its natural resources and the health of its citizens have been recognized as legitimate quasi-sovereign interests since the turn of the last century. *See id.; Snapp v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 603, 102 S.Ct. 3260, 73 L.Ed.2d 995 (1982) (noting "a line of cases . . . in which States successfully sought to represent the interests of their citizens in enjoining public nuisance");[10] *Pennsylvania ex rel. Shapp v. Kleppe*, 533 F.2d 668, 673-74 (D.C.Cir.1976) ("The earliest cases allowing a state to sue as representa-

---

[10] The cases mentioned by Snapp included: *North Dakota v. Minnesota*, 263 U.S. 365, 44 S.Ct 138, 68 L.Ed. 342 (1923), *Wyoming v. Colorado*, 259 U.S. 419, 42 S.Ct. 552, 66 L.Ed. 999 (1922); *New York v. New Jersey*, 256 U S. 296, 41 S.Ct. 492, 65 L.Ed. 937 (1921); *Kansas v Colorado*, 206 U.S. 46, 27 S.Ct. 655, 51 L Ed. 956 (1907); *Tenn. Copper Co.*, 206 U.S at 230, 27 S.Ct. 618, *Kansas v Colorado*, 185 U.S. 125, 22 S.Ct. 552, 46 L.Ed. 838 (1902); and *Missouri I*, 180 U.S. at 208, 21 S.Ct. 331.

tive of its citizenry involved the protection or preservation of land or other natural resources. . . . While the state thus lacked standing to sue in its own right, it was found to be a proper party to bring suit because of its residual interest independent of and behind the titles of its citizens, in all the earth and air within its domain." (citation and internal quotation marks omitted)).

2. Parens Patriae *as a Species of Article III Standing*

State standing is not monolithic and depends on the role a state takes when it litigates in a particular case. *See Cahill*, 217 F.3d at 97. In *Snapp*, the seminal modern-day *parens patriae* standing case, the Supreme Court explained how the capacity in which a state sues has an impact on the standing analysis. After discussing a state's sovereign interests, the Court drew a distinction between a state's proprietary and quasi-sovereign interests:

> Not all that a State does, however, is based on its sovereign character. Two kinds of nonsovereign interests are to be distinguished. First, *like other associations and private parties*, a State is bound to have a variety of proprietary interests. A State may, for example, *own land* or participate in a business venture. As a proprietor, it is likely to have the same interests as other similarly situated proprietors. And like other such proprietors it may at times need to pursue those interests in court. Second, a State may, for a variety of reasons, attempt to pursue the interests of a private party, and pursue those interests only for the sake of the real party in interest. . . .

> Quasi-sovereign interests stand apart from . . . the above: They are not sovereign interests, proprietary interests, or private interests pursued by the State as a nominal party. They consist of a set of interests that the State has in the well-being of its populace. Formulated so broadly, the concept risks being too vague to survive the standing requirements of Art. III: A quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant. The vagueness of this concept can only be filled in by turning to individual cases.

Snapp, 458 U.S. at 601-02, 102 S.Ct. 3260 (emphases added).

In order to ensure that a state suing on behalf of its injured citizens properly asserts a case or controversy sufficient for Article III standing purposes, *Snapp* formulated a test for *parens patriae* standing. A state: (1) "must articulate an interest apart from the interests of particular private parties, *i.e.*, the State must be more than a nominal party"; (2) "must express a quasi-sovereign interest"[11]; and (3) must have "alleged injury to a sufficiently substantial segment of its population."[12] *Id.* at 607, 102 S.Ct. 3260; *see also*

---

[11] The Court identified two types of quasi-sovereign interests: (1) protecting "the health and well-being . . . of its residents," and (2) "securing observance of the terms under which [the state] participates in the federal system." *Snapp*, 458 U.S. at 607-08, 102 S.Ct 3260. Only the "health and well-being" quasi-sovereign interest is at issue here, and our analysis is thus limited to this interest

[12] Justice Brennan, in a four-Justice concurrence in *Snapp*, suggested that the state, as "no ordinary litigant," was "entitled to assess its needs, and decide which concerns of its citizens warrant its protection and intervention." *Snapp*, 458 U.S at 612, 102 S.Ct. 3260 (Brennan, J., concurring).

People of N.Y. by Abrams v. Seneci, 817 F.2d 1015, 1017 (2d Cir.1987) (analyzing state *parens patriae* standing according to *Snapp* criteria). This Court, in *People of New York by Abrams v. 11 Cornwell Co.*, 695 F.2d 34 (2d Cir.1982), *vacated in part on other grounds*, 718 F.2d 22 (2d Cir.1983) (en banc), added another requirement for states to sue as *parens patriae*: the Court must also make "a finding that individuals [upon whose behalf the state is suing] could not obtain complete relief through a private suit." *Id.* at 40; *see also, e.g., Connecticut v. Physicians Health Servs. of Conn., Inc.*, 287 F.3d 110, 119-20 (2d Cir. 2002) (reviewing factors that the Supreme Court, Second Circuit, and other courts have viewed as prerequisites for *parens patriae* standing, including whether there were "'adequate alternative means of civil enforcement by which individual plaintiffs may obtain complete relief" (quoting *Connecticut v. Physicians Health Servs. of Conn., Inc.*, 103 F.Supp. 2d 495, 509 (D.Conn.2000))).

The *Snapp* Court applied its test, post-hoc, to the public nuisance cases of *Missouri* and *Tennessee Copper*, finding that "the injury to the public health and comfort was graphic and direct," thereby giving an after-the-fact imprimatur to *parens patriae* standing in those public nuisance cases that satisfied Article III's "Case" or "Controversy" requirement. 458 U.S. at 604, 102 S.Ct. 3260.

In the decades following *Snapp*, federal courts have applied its test to determine whether a state had standing as *parens patriae*. For the most part, in our increasingly statutory and regulatory system, courts have explored whether states have *parens patriae* standing under a statute, *see, e.g., Seneci*, 817 F.2d at 1017 (standing under RICO), rather than under

federal common law.[13] The view that states' *parens patriae* standing sufficed for Article III standing was not called into question until the recent Supreme Court opinion in *Massachusetts v. EPA*, 549 U.S. 497, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007).

3. *Effect of Massachusetts v. EPA*

In April 2007, the Supreme Court decided *Massachusetts*, ruling that the plaintiffs (ten states and six trade associations) could challenge: (1) a decision by the Environmental Protection Agency ("EPA") not to regulate greenhouse gas emissions from new motor vehicles under the CAA; and (2) EPA's stated reasons for refusing to regulate those emissions. *See id.* Prior to its merits assessment, the Supreme Court focused on the contentious issue of standing, given that each member of the D.C. Circuit panel had written a separate opinion and had come to a different conclusion about whether the States had standing to bring the action. The Court summarized the circuit court opinions as follows: "Judge Randolph avoided a definitive ruling as to petitioners' standing, reasoning that it was permissible to proceed to the merits because the standing and the merits inquiries overlapped"; "Judge Sentelle wrote separately because he believed petitioners failed to demonstrate the elements of injury necessary to establish standing under Article III"; and Judge Tatel dissented, concluding "that at least Massachusetts had satisfied each element of Article III standing—injury, causation, and redressa-

---

[13] In *Texas v. American Tobacco Co.*, 14 F.Supp.2d 956, 962 (E.D.Tex.1997), the district court held that Texas had *parens patriae* standing to bring its claim under common law.

bility." *Id.* at 514-16, 127 S.Ct. 1438 (internal quotation marks and citations omitted).[14]

The Supreme Court ruled that Massachusetts had Article III standing. The Court introduced the standing section by citing the three-part *Lujan* test, focusing in its initial analysis on the States' proprietary interests as property owners. This approach is consistent with *Snapp's* distinction between a state suing as *parens patriae* and a state suing in a capacity similar to that of an individual landowner. The Court observed that Congress had explicitly authorized a procedural right to challenge EPA actions under the CAA, *see* 42 U.S.C. § 7607(b)(1) (pertaining to judicial review), reaffirming Congress's power to "'define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.'" *Id.* at 516, 127 S.Ct. 1438 (quoting *Lujan*, 504 U.S. at 580, 112 S.Ct. 2130). This procedural right was "of critical importance to the standing inquiry" and permitted the States a short cut in the *Lujan* standing analysis, as they were not obliged to "'meet[ ] all the normal standards for redressability

---

[14] Judges Randolph and Sentelle did not focus on the State's quasi-sovereign role when analyzing standing. In fact, Judge Sentelle introduced his injury analysis with a quote from *Ex Parte Levitt*, 302 U.S. 633, 58 S.Ct. 1, 82 L.Ed. 493 (1937), which discussed injury in the context of a private individual. *Massachusetts v. EPA*, 415 F.3d 50, 59 (D.C.Cir.2005). Judge Tatel made only a glancing reference to Massachusetts' claim of injury, which seemed to refer to the State's proprietary interests as landowner. He cited Massachusetts' "loss of land within its sovereign boundaries—that 'affects [it] in a personal and individual way.'" *Id.* at 65 (quoting *Lujan*, 504 U.S. at 560 n. 1, 112 S.Ct. 2130).

and immediacy.'" *Id.* at 516-17, 127 S.Ct. 1438 (quoting *Lujan*, 504 U.S. at 572 n. 7, 112 S.Ct. 2130).[15]

But the *Massachusetts* Court then added another layer to its analysis—one which arguably muddled state proprietary and *parens patriae* standing. The majority noted that it was "of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual." *Id.* at 518, 127 S.Ct. 1438. The majority also quoted language from *Tennessee Copper*, 206 U.S. at 237, 27 S.Ct. 618, which defined injury to a state "in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens. . . ." *Massachusetts*, 549 U.S. at 518-19, 127 S.Ct. 1438. The *Massachusetts* Court likened Massachusetts' injury to Georgia's injury in *Tennessee Copper*. "Just as Georgia's 'independent interest . . . in all the earth and air within its domain' supported federal jurisdiction a century ago, so too does Massachusetts' well-founded desire to preserve its sovereign territory today." *Id.* at 519, 127 S.Ct. 1438.[16]

---

[15] *See* Bradford Mank, *Should States Have Greater Standing Rights Than Ordinary Citizens?: Massachusetts v. EPA's New Standing Test for States*, 49 Wm. & Mary L.Rev. 1701 (2008) (proposing that courts relax the immediacy and redressability prongs of the standing test when states bring *parens patriae* suits to protect their quasi-sovereign interests in the health, welfare, and natural resources of their citizens).

[16] In parrying the Chief Justice's dissenting argument that the majority was devising a new doctrine of state standing, the Court emphasized that no less an authority than Hart & Wechsler viewed *Tennessee Copper* as a standing decision, and that Hart & Wechsler had chronicled "the long development of cases permitting States to litigate as *parens patriae* to protect quasi-sovereign interests." *Massachusetts*, 549 U.S. at 520 n. 17,

In the midst of invoking language that hearkened to a state's quasi-sovereign interests, the *Massachusetts* Court mentioned proprietary injury to the State as a landowner, commenting: "That Massachusetts does in fact *own a great deal of the territory* alleged to be affected only reinforces the conclusion that its stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power." *Id.* (emphasis added) (internal quotation marks omitted). This sentence appears to conflate, to an extent, state *parens patriae* standing and proprietary standing. The Court seemed to find that injury to a state as a quasi-sovereign is a sufficiently concrete injury to be cognizable under Article III, and its finding of such injury is reinforced by the fact that the State is also a landowner and suffers injury to its land. The Court concluded this section of its standing analysis by opining: "Given that procedural right and Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis." *Id.* at 520, 127 S.Ct. 1438. The Court then briefly analyzed state standing under the *Lujan* injury, causation, and redressability tests—in Massachusetts' capacity as a property owner, not as a quasi-sovereign—and found that Massachusetts had satisfied those requirements. *Id.* at 521-25, 127 S.Ct. 1438.

The question is whether *Massachusetts'* discussion of state standing has an impact on the analysis of *parens patriae* standing, *supra*. That is, what is the role of Article III *parens patriae* standing in relation to the test set out in *Lujan*? Must a state asserting

---

127 S.Ct. 1438 (quoting R. Fallon, D. Meltzer, & D. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 290 (5th ed 2003)).

parens patriae standing satisfy both the *Snapp* and *Lujan* tests? However, we need not answer these questions because as discussed in Part III.B, *infra*, all of the plaintiffs have met the *Lujan* test for standing. Thus, even assuming that a state asserting *parens patriae* standing must meet the *Lujan* requirements, here, those requirements have been met.

4. *States' Allegations Satisfy the Snapp Test*

The States have adequately alleged the requirements for *parens patriae* standing pursuant to the *Snapp-11 Cornwell Co.* standards. They are more than "nominal parties." Their interest in safeguarding the public health and their resources is an interest apart from any interest held by individual private entities. Their quasi-sovereign interests involving their concern for the "health and well-being—both physical and economic—of [their] residents in general," *Snapp*, 458 U.S. at 607, 102 S.Ct. 3260, are classic examples of a state's quasi-sovereign interest. The States have alleged that the injuries resulting from carbon dioxide emissions will affect virtually their entire populations. Moreover, it is doubtful that individual plaintiffs filing a private suit could achieve complete relief. *See Puerto Rico ex rel. Quiros v. Bramkamp*, 654 F.2d 212, 217 (2d Cir.1981) (noting that vindication of Puerto Rico's rights should not be dependent upon possible relief obtained by individuals, even if they could marshal the resources to institute and prosecute a class action).

Defendants argue that in order for states to sue in their *parens patriae* capacity, the citizens that the states seek to protect must themselves satisfy Article III's core requirements. In so arguing, Defendants attempt to import into *parens patriae* standing the Article III requirements for organizational standing

set out in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). In *Hunt*, the Supreme Court stated:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Id. at 343, 97 S.Ct. 2434. *Snapp* did not require states suing as *parens patriae* to meet the test for organizational standing. In fact, it required the opposite, *i.e.*, that the individuals with adversely affected interests could not obtain relief via a private suit; that the interest asserted by the state must be *apart from* the interests of the individual citizens on behalf of whom it was suing; and that the injury must affect a substantial segment of the population, not one individual. *Snapp*, 458 U.S. at 607, 102 S.Ct. 3260.

Standing is "gauged by the specific *common-law*, statutory or constitutional claims that a party presents." *Int'l Primate Prot. League v. Admins. of Tulane Educ. Fund*, 500 U.S. 72, 77, 111 S.Ct. 1700, 114 L.Ed.2d 134 (1991) (emphasis added). For over a century, states have been accorded standing in common law nuisance causes of action when suing as *parens patriae*. In this case, the States have satisfied the *Snapp-11 Cornwell Co.* test.[17]

---

[17] New York City may not assert *parens patriae* standing. *See Cmty Commc'ns Co. v. City of Boulder*, 455 U.S. 40, 53-54, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982) Given that the States have

B. The States' and the Trusts' Article III Proprietary Standing

In *Lujan*, the Supreme Court explained that standing "is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130. The plaintiff environmental organizations in *Lujan* sued the U.S. Secretary of the Interior. They sought a declaratory judgment that a newly-promulgated regulation, which offered less protection for endangered species, was in error as to the scope of the statute. They also sought to restore the interpretation embodied in the initial regulation. In holding that the plaintiff organizations lacked standing, the Court set out the well-known three-part test:

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

---

successfully alleged standing in their *parens patriae* capacity, however, New York City's standing is assured because, as a party to the States' lawsuit, "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n. 2, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) ("*FAIR*").

Id. at 560-61, 112 S.Ct. 2130 (internal quotation marks and citations omitted). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

The States and New York City have sued in their proprietary capacity as property owners. The Trusts' complaint does not state whether the Open Space Institute ("OSI"), the Open Space Conservancy ("OSC"), and the Audubon Society of New Hampshire ("Audubon") are membership organizations; rather, it describes the Trusts as not-for-profit corporations. The allegations in the complaint indicate that each organization is suing on its own behalf, in its proprietary capacity as an owner of particular pieces of property dedicated to conservation uses.[18] *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 n. 19, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982) ("[O]rganizations are entitled to sue on their own behalf for injuries they have sustained."); *Warth*, 422 U.S. at 511, 95 S.Ct. 2197 ("There is no question that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy."). The Trusts must "meet[ ] the same standing test that applies to individuals [and] must show actual or threatened injury in fact that is fairly traceable . . . and likely to be redressed by a favorable court decision." *Spann v. Colonial Vill., Inc.*, 899 F.2d 24,

---

[18] Even if OSI is not a property owner asserting injury to its proprietary interests, as long as either OSC or Audubon has standing, that will suffice to provide standing to OSI. *See FAIR*, 547 U.S. at 52 n. 2, 126 S Ct. 1297.

27 (D.C.Cir.1990); *see also Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 649 (2d Cir.1998).

1. *Have Plaintiffs Sufficiently Alleged Injury-in-Fact?*

The D.C. Circuit, in *Public Citizen, Inc. v. National Highway Traffic Safety Administration*, 489 F.3d 1279 (D.C.Cir.2007), adroitly distilled the definitions for the terms used in *Lujan*'s injury-in-fact requirement:

> 1. The Supreme Court has stated that the asserted injury must be concrete—which the Court has also described as direct, real, and palpable—not abstract. *See, e.g., Lujan*, 504 U.S. at 560, 112 S.Ct. 2130 ("concrete"); *Whitmore*, 495 U.S. at 155, 110 S.Ct. 1717 ("palpable, as opposed to merely abstract"); *Allen*, 468 U.S. at 751, 104 S.Ct. 3315 ("palpable"); *City of Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) ("real"); *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) ("palpable"); *United States v. Richardson*, 418 U.S. 166, 180, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974) ("a direct injury");. . . .
>
> 2. The Supreme Court also has stated that the asserted injury must be particularized—which the Court has also described as personal, individual, distinct, and differentiated—not generalized or undifferentiated. *See, e.g., Lujan*, 504 U.S. at 560 n. 1, 112 S.Ct. 2130 ("By particularized, we mean that the injury must affect the plaintiff in a personal and individual way."); *DaimlerChrysler Corp. v. Cuno*, [547] U.S. [332, 342, 126 S.Ct. 1854, 164 L.Ed.2d 589] (2006) ("personal"); *Whitmore*, 495 U.S. at 155, 110 S.Ct. 1717 ("distinct"); Allen, 468 U.S. at 751, 104 S.Ct. 3315 ("personal");

> *Valley Forge*, 454 U.S. at 472, 102 S.Ct. 752 (litigant must show "he personally has suffered some actual or threatened injury"); *Richardson*, 418 U.S. at 177, 94 S.Ct. 2940 (not "undifferentiated");. . . .
>
> 3. The Supreme Court has further stated that the asserted injury must be actual or imminent—which the Court has also described as certainly impending and immediate—not remote, speculative, conjectural, or hypothetical. *See Lujan*, 504 U.S. at 560, 112 S.Ct. 2130 ("actual or imminent"); *DaimlerChrysler*, [547 U.S.] at [345, 126 S.Ct. 1854] ("certainly impending"); *Whitmore*, 495 U.S. at 155, 110 S.Ct. 1717 ("not conjectural or hypothetical"); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989) (opinion of Kennedy, J., joined by Rehnquist, C.J., and Stevens and Scalia, JJ.) (not "remote or speculative"); *Lyons*, 461 U.S. at 102, 103 S.Ct. 1660 ("immediate"). . . .

Public Citizen, Inc., 489 F.3d at 1292-93 (internal citations modified). "The injury-in-fact necessary for standing 'need not be large, an identifiable trifle will suffice.'" *LaFleur v. Whitman*, 300 F.3d 256, 270 (2d Cir.2002) (quoting *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 557 (5th Cir.1996)); *see also Summers v. Earth Island Inst.*, —U.S.—, 129 S.Ct. 1142, 1149, 173 L.Ed.2d 1 (2009) ("While generalized harm to the forest or the environment will not alone support standing, if that harm in fact affects the recreational or even the mere esthetic interests of the plaintiff, that will suffice.").

The States claim current injury as a result of the increase in carbon dioxide levels that has already caused the temperature to rise and change their

climates; devastating future injury to their property from the continuing, incremental increases in temperature projected over the next 10 to 100 years; and increased risk of harm from global warming, including an abrupt and catastrophic change in climate when a "tipping point of radiative forcing is reached." The Trusts do not allege any current injury. But like the States, they allege a multitude of future injuries and an increased risk of harm resulting from global warming, and assert that these future injuries constitute "special injuries" to their property interests—injuries different in kind and degree from the injuries suffered by the general public.

Defendants challenge the proprietary standing of the States and the Trusts on the same grounds. They contend that no Plaintiff has alleged a current injury, that the future harms alleged in the complaints are not "imminent" enough to satisfy Article III injury-in-fact, and that the increased risks of harm cited by Plaintiffs are not cognizable because they rely on *Baur v. Veneman*, 352 F.3d 625 (2d Cir.2003), which "identified enhanced risk as an injury only when Congress had enacted statutes to prevent the very increased risk the plaintiffs alleged."

a. Current Injury

One current harm that the States mention is the reduced size of the California snowpack. "This process of reduced mountain snowpack, earlier melting and associated flooding, and reduced summer streamflows already has begun." The current declining water supplies and the flooding occurring as a result of the snowpack's earlier melting obviously injure property owned by the State of California. In *Massachusetts*, the State alleged that coastal erosion caused by global warming constituted a current

injury to its property. The Court held that this erosion sufficed as an allegation of "particularized injury in [Massachusetts'] capacity as a landowner," and served as a harbinger of injuries to come: "The severity of that injury will only increase over the course of the next century." 549 U.S. at 522, 127 S.Ct. 1438. Similarly, the destruction of California property wrought by the flooding associated with the earlier-melting snowpack qualifies as a current injury-in-fact for Article III purposes. Such an injury is "concrete," as property damage is "plainly [a] concrete harm[ ] under Supreme Court precedents," *Public Citizen*, 489 F.3d at 1292, "particularized," as California is harmed in a distinct way, and "actual or imminent," "not 'conjectural' or 'hypothetical,'" as the injury is occurring now and is not speculative. *See, e.g., Massachusetts*, 549 U.S. at 521, 127 S.Ct. 1438 (characterizing reduction in snow-cover extent and earlier melting of rivers and lakes as "significant harms"). Moreover, the injuries to California far exceed the "identifiable trifle" required by Article III. *LaFleur*, 300 F.3d at 270 (citation and internal quotation marks omitted). We thus reject Defendants' argument that the Plaintiff States do not allege any current injury.

b. Future Injury

The bulk of the States' allegations concern future injury. For example, those Plaintiff States with ocean coastlines, including New York City, charge that a rise in sea level induced by global warming will cause more frequent and severe flooding, harm coastal infrastructure including airports, subway stations, tunnels, tunnel vent shafts, storm sewers, wastewater treatment plants, and bridges, and cause hundreds of billions of dollars of damage. In addition, they assert

that some low-lying public property would be permanently inundated unless protective structures are built, with the cost falling heavily on those coastal Plaintiffs. Further, a rise in sea level would salinize marshes and tidelands, destroy habitat for commercial and game species, migratory birds, and other wildlife; accelerate beach erosion; and cause saltwater intrusion into groundwater aquifers. Global warming threatens Plaintiff States bordering the Great Lakes with substantial injury by lowering the water levels of the Great Lakes, which would disrupt hydropower production. Warmer temperatures would threaten agriculture in Iowa and Wisconsin and increase the frequency and duration of summer heat waves with concomitant crop risk. Global warming will also disrupt ecosystems by negatively affecting State-owned hardwood forests and fish habitats, and substantially increase the damage in California due to wildfires. Plaintiff States predict these injuries will come to pass in the next 10 to 100 years.

The Trusts' complaint also focuses on future injury. For instance, the Trusts claim that the ecological value of their properties will be diminished or destroyed by the global warming to which Defendants' emissions contribute. They contend that sea level rise caused by global warming will "permanently inundate some low-lying property along coasts and tidal rivers, including property that Plaintiffs own or on which they hold conservation easements" and will salinize marshes on their properties, destroying fish and migratory bird habitats. They assert that global warming "will diminish or destroy the particular ecological and aesthetic values that caused [them] to acquire, and cause them to maintain, the properties they hold in trust," and will undermine their objectives by "interfering with their efforts to preserve

ecologically significant and sensitive land for scientific and educational purposes, and for human use and enjoyment." They posit that reducing carbon dioxide emissions will reduce those injuries. Like the claims asserted by the States and New York City, the Trusts' allegations of injury are not stated in terms of possibilities or contingencies, but certainties. While the Trusts do not provide a time frame for the injuries they expect to sustain from global warming, they assert that those injuries are "imminent."

Defendants challenge Plaintiffs' contentions of future injury by arguing that injuries occurring at "some unspecified future date" are not the kind of "imminent" injury referred to in *Lujan* and therefore neither the States nor the Trusts have properly alleged injury-in-fact. They claim that "[t]here must be a close temporal proximity between the complained-of conduct and the alleged harm," citing *McConnell v. FEC*, 540 U.S. 93, 226, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003), for its observation that Senator McConnell's alleged injury in that case was "too remote temporally to satisfy Article III standing." Defendants' analysis misses the mark.

In *Lujan*, the Court elaborated upon what it meant by "imminent" in the context of the standing inquiry. The Court wrote:

> Although "imminence" is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is "*certainly* impending," [*Whitmore v. Arkansas*, 495 U.S.] at 155 [110 S.Ct. 1717] (emphasis added). It has been stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some

> indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control. In such circumstances we have insisted that the injury proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all. *See, e.g., id.*, at 156-160 [110 S.Ct. 1717]; *Los Angeles v. Lyons*, 461 U.S. 95, 102-106, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983).

Lujan, 504 U.S. at 564 n. 2, 112 S.Ct. 2130. In describing imminence, the Court was not imposing a strict temporal requirement that a future injury occur within a particular time period following the filing of the complaint. Instead, the Court focused on the *certainty* of that injury occurring in the future, seeking to ensure that the injury was not speculative. *See 520 South Michigan Ave. Assocs. Ltd. v. Devine*, 433 F.3d 961, 962 (7th Cir.2006) (discussing imminence and stating "[s]tanding depends on the probability of harm, not its temporal proximity"). The Court also expressed wariness that if the future injury was contingent, at least to some extent, on a plaintiff acting in a particular way in the future, that plaintiff would have within its control whether the future injury would actually occur at all. If the plaintiff did not act in such a way as to incur the injury, a court would be left with a hypothetical injury—an insufficient basis upon which to confer standing.[19] *See*

---

[19] This was the problem in *McConnell*, in which the Court held that Senator McConnell lacked standing where: (a) he brought suit in 2002 to challenge a campaign finance provision that could not apply to him until 2008 at the earliest, (b) he would not stand for re-election until 2009, and (c) it was not certain that he would even be running again Because the reasoning behind the imminence requirement is "to ensure that the

Clinton v. City of New York, 524 U.S. 417, 459, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998) ("[H]ypothetical injuries do not suffice for Article III standing.").

This Court's discussion of future injury in *Baur*, 352 F.3d at 625, is instructive. Baur was held to have standing to sue the Secretary of Agriculture to challenge regulations that permitted downed cattle to be used for human consumption. He alleged that the regulations, implementation of which in effect exposed him to downed cattle, posed a significant health risk—contracting variant Creutzfeld-Jacob disease. *Id.* at 628-29. In analyzing Baur's standing, this Court clarified that "the relevant 'injury' for standing purposes may be *exposure* to a sufficiently serious risk of medical harm—not the anticipated medical harm itself—thus only the *exposure must be imminent*, not the actual onset of disease." *Id.* at 641 (emphasis added). By comparison with *Baur*, what makes Plaintiffs' future injury claims more compelling here is that Defendants are *currently* emitting large amounts of carbon dioxide and will continue to do so in the future. Due to Plaintiffs' exposure to the emissions, the future injuries complained of are "certainly impending" and are more concrete than those in *Baur* because the processes producing them have already begun.[20] As a result, according to Plaintiffs, the future

---

court avoids deciding a purely hypothetical case in which the projected harm may ultimately fail to occur," *Baur*, 352 F.3d at 632, if Sen. McConnell ultimately decided not to run, there would have been no "Case or Controversy," and the Court would have issued an advisory opinion. *See Whitmore*, 495 U.S. at 158, 110 S.Ct. 1717 (cataloguing cases where contingent behavior had defeated standing).

[20] Whether such injuries are properly viewed as current injuries or future injuries may be a distinction without a difference in the standing analysis. The actual onset of property destruc-

injuries they predict are anything but speculation and conjecture: "Rather, they are certain to occur because of the consequences, based on the laws of physics and chemistry, of the documented increased carbon dioxide in the atmosphere." There is no probability involved. *See United Transp. Union v. ICC*, 891 F.2d 908, 912, n. 7 (D.C.Cir.1989) (contrasting a plaintiff's speculative allegation of future injury with decidedly unspeculative "application of basic economic logic" and noting that "[a]llegations founded on economic principles . . . , while perhaps not as reliable as allegations based on the laws of physics, are at least more akin to demonstrable facts than are predictions based only on speculation"). These emissions, which allegedly contribute to global warming, will continue to exacerbate the injuries Plaintiffs are currently experiencing. Moreover, the future injuries that Plaintiffs allege are not in any way contingent on Plaintiffs' actions or inactions.

The *Massachusetts* majority alluded to the fact that incremental injury suffices for injury-in-fact. It rejected the dissent's view that Massachusetts' injury was "conjectural" because the land loss that the State expected could not be quantified, stating:

> Yet the likelihood that Massachusetts' coastline will recede has nothing to do with whether petitioners have determined the precise metes and bounds of their soon-to-be-flooded land. Petitioners maintain that the seas are rising and will

---

tion is alleged to have already begun, although the full deleterious effects have not fully materialized because the effect of carbon dioxide emissions is cumulative. The future injuries complained of are "certainly impending," given that they are *already in process* as a result of the ongoing emissions by Defendants that contribute to increasing temperatures.

> continue to rise, and have alleged that such a rise will lead to the loss of Massachusetts' sovereign territory. No one, save perhaps the dissenters, disputes those allegations. Our cases require nothing more.

549 U.S. at 523 n. 21, 127 S.Ct. 1438. The *Massachusetts* Court concluded its standing discussion by stating that "[t]he risk of catastrophic harm, though remote, is nevertheless real." *Id.* at 526, 127 S.Ct. 1438. That statement applies to these cases as well.

We find that Plaintiffs have sufficiently alleged future injury. Given the current injury alleged by the States, and the future injuries alleged by all Plaintiffs, we hold that Plaintiffs have alleged injury-in-fact.[21]

2. *Causation*

To satisfy the causation requirement, the alleged injury must be "fairly traceable to the actions of the defendant." *Bennett v. Spear*, 520 U.S. 154, 162, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (citation and internal quotation marks omitted). This requirement "ensures that there is a genuine nexus between a plaintiff's injury and a defendant's alleged . . . conduct," *Friends of the Earth, Inc. v. Gaston Copper Recycling*

---

[21] Plaintiffs have also alleged that Defendants' continued emissions will increase their risk of future injury because "unrestrained and ever-increasing emissions of greenhouse gases from fossil fuel combustion increases the risk of an abrupt and catastrophic change in the Earth's climate when a certain, unknown, tipping point of radiative forcing is reached." In *Baur*, 352 F.3d at 633, this Court held that an increased risk of future harm constituted injury-in-fact. Because we find that all Plaintiffs have alleged future injury sufficient to constitute Article III injury-in-fact, we do not reach the question of whether Plaintiffs' allegations of increased risk of harm also suffices for Article III injury-in-fact

Corp., 204 F.3d 149, 161 (4th Cir.2000), and "is in large part designed to ensure that the injury complained of is 'not the result of the independent action of some third party not before the court,'" *id.* at 162 (quoting *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130).

Plaintiffs allege that Defendants are the "five largest emitters of carbon dioxide in the United States," *Am. Elec. Power Co.*, 406 F.Supp.2d at 268, and that Defendants' emissions directly and proximately contribute to their injuries and threatened injuries. Defendants respond that Plaintiffs can neither isolate which alleged harms will be caused by Defendants' emissions, nor can Plaintiffs allege that such emissions would alone cause any future harms. In particular, Defendants claim that Plaintiffs' use of the words "contribute to" is not sufficient to allege causation, that the multiple polluter cases relied upon by Plaintiffs are inapposite because causation was presumed by contributions of a harmful pollutant in amounts that exceeded federally prescribed limits, and that, in any event, carbon dioxide is not inherently harmful[22] but mixes with worldwide emissions that collectively contribute to global warming.[23]

---

[22] After the briefs had been submitted in this case, the Supreme Court decided *Massachusetts v. EPA* wherein the majority ruled that carbon dioxide was in fact a "pollutant" within the meaning of the Clean Air Act. 549 U.S. at 532-33, 127 S.Ct. 1438. The CAA provides that EPA, by regulation, shall prescribe standards applicable to emissions from new motor vehicles which "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." *Id.* at 528, 127 S.Ct. 1438 (quoting 42 U.S.C. § 7521(a)(1)). However, as of the date of this opinion, EPA has not regulated such emissions.

[23] Defendants contend that where "numerous entities contribute to an alleged harm, plaintiffs bear a *special burden* of

Defendants' arguments are unavailing and we find that Plaintiffs have sufficiently alleged that their injuries are "fairly traceable" to the actions of Defendants. Plaintiffs assert that Defendants' continued emissions of carbon dioxide contribute to global warming, which harms them now and will harm them in the future in specific ways. *See Nader v. Democratic Nat'l Comm.*, 555 F.Supp.2d 137, 150 (D.D.C.2008) (opining that injury was "sufficient to establish Article III standing because it traces an injury to the defendant's conduct"); *Northwest Envtl. Def. Ctr. v. Owens Corning Corp.*, 434 F.Supp.2d 957, 967 (D.Or.2006) ("It is sufficient for Plaintiffs to assert that emissions from Defendant's facility will contribute to the pollution that threatens Plaintiffs' interests."). Defendants' attempts to argue the insufficiency of Plaintiffs' allegations of traceability must be evaluated in accordance with the standard by which a common law public nuisance action imposes liability on contributors to an indivisible harm. *See, e.g., Cox v. City of Dallas*, 256 F.3d 281, 292 n. 19 (5th Cir.2001) (declaring that "nuisance liability at common law has been based on actions which 'contribute' to the creation of a nuisance"); Restatement (Second) of Torts § 840E ("[T]he fact that other persons contribute to a nuisance is not a bar to the defendant's liability for his own contribution."); *id.*

---

linking their injury to defendants' particular emissions," citing *Texas Independent Producers & Royalty Owners Ass'n v. EPA*, 410 F.3d 964, 974 (7th Cir.2005) (emphasis added). This assertion mischaracterizes the court's ruling in *Texas Independent Producers* The court held that the plaintiffs lacked standing because they did not link the pollution to the defendants' discharges and had not claimed actual injury. *Id.* at 974-75. The case established no "special" traceability burden for plaintiffs where multiple polluters contribute to pollution.

§ 875 ("Each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm."). Moreover, the cases are clear that, particularly at the pleading stage, the "fairly traceable" standard is not equivalent to a requirement of tort causation. *Natural Res. Def. Council, Inc. v. Watkins*, 954 F.2d 974, 980 n. 7 (4th Cir.1992); *see also Barbour v. Haley*, 471 F.3d 1222, 1226 (11th Cir.2006) (explaining that "for purposes of satisfying Article III's causation requirement, we are concerned with something less than the concept of proximate cause" (citation and internal quotation marks omitted)). The cases relied upon by both Plaintiffs and Defendants to buttress their respective positions on traceability—*Gaston Copper*, 204 F.3d 149; *Cedar Point Oil Co.*, 73 F.3d 546; *Watkins*, 954 F.2d 974; and *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64 (3d Cir.1990)—were decided either on summary judgment or after a bench trial, where the plaintiffs' standing allegations were put to the proof based on the facts elicited. Even in that context, however, courts have pointed out that "tort-like causation is not required by Article III," *Powell Duffryn*, 913 F.2d at 73 n. 10, and "[t]he requirement that plaintiff's injuries be 'fairly traceable' to the defendant's conduct does not mean that plaintiffs must show to a scientific certainty that defendant's effluent, and defendant's effluent alone, caused the precise harm suffered by the plaintiffs." *Id.* at 72 (footnote omitted).

Gaston Copper, *Cedar Point*, and *Watkins* all relied upon *Powell Duffryn*'s three-part test to determine whether an injury was fairly traceable under the CWA to a defendant's discharge. After discussing the causation requirement that plaintiffs "need only show

that there is a substantial likelihood that defendant's conduct caused plaintiff's harm," the *Powell Duffryn* Court wrote:

> [T]his likelihood may be established by showing that a defendant has (1) discharged some pollutant in concentrations greater than allowed by its permit (2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that (3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.

913 F.2d at 72. Defendants focus exclusively on the first prong of the test. The first prong is inapplicable here, however, because there is no statute governing carbon dioxide emissions. Nor in a case based on common law nuisance, such as this one, would there necessarily be a regulatory reference against which to measure the offending conduct. Defendants' effort to impose that part of the test as the determinative measure of causation is neither legally nor factually meaningful. The third element of the test, however—whether the "pollutant causes or contributes to the kind of injuries alleged by the plaintiffs"—is relevant to our analysis. *Id.*

The *Powell Duffryn* Court observed that "[i]n order to obtain standing, plaintiffs need not sue every discharger in one action, since the pollution of any one may be shown to cause some part of the injury suffered. The size of injury is not germane to standing analysis." *Id.* at 72 n. 8 (citing *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n. 14, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973)). The Fourth Circuit in *Gaston Copper* and *Watkins* echoed *Powell Duffryn*: "Rather than pinpointing the origins of particular molecules, a plaintiff

'must merely show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged'. . . . In this way a plaintiff demonstrates that a particular defendant's discharge has affected or has the potential to affect his interests." *Gaston Copper*, 204 F.3d at 161 (quoting *Watkins*, 954 F.2d at 980). The same result obtained in *Cedar Point*, 73 F.3d at 558 (finding that the polluted water "contributes to the types of injuries" alleged by a plaintiff, and stating that the Constitution does not require an affiant who claims that defendant's discharge "*in particular* injured him in some way" given the number of entities discharging pollutants into Galveston Bay).

In view of this widely accepted case law, and the procedural posture of the case, Defendants' argument that many others contribute to global warming in a variety of ways, and that therefore Plaintiffs cannot allege traceability, does not defeat the causation requirement.

Defendants also claim that their emissions, which "allegedly account for 2.5% of man-made carbon dioxide emissions" are, in essence, too insignificant to cause future injuries, particularly since only the collective effect of worldwide emissions allegedly causes injury. They conclude that the States cannot allege that their emissions would alone cause *any* future harms. This is simply a variation on their argument that a polluter who "contributes to" pollution does not allege causation, an argument we have addressed *supra*. Additionally, this is an issue best left to the rigors of evidentiary proof at a future stage of the proceedings, rather than dispensed with as a threshold question of constitutional standing. Tellingly, in *Massachusetts'* discussion of causation, the Court rejected EPA's

argument that "its decision not to regulate greenhouse gas emissions from new motor vehicles contributes so insignificantly to petitioners' injuries that the agency cannot be haled into federal court to answer for them." *Massachusetts*, 549 U.S. at 523, 127 S.Ct. 1438.

Plaintiffs have sufficiently alleged that their current and future injuries are "fairly traceable" to Defendants' conduct. For purposes of Article III standing they are not required to pinpoint which specific harms of the many injuries they assert are caused by particular Defendants, nor are they required to show that Defendants' emissions alone cause their injuries. It is sufficient that they allege that Defendants' emissions contribute to their injuries.

3. *Redressability*

Finally, a complaint must sufficiently allege "a substantial likelihood that the requested relief will remedy the alleged injury in fact." *Jana-Rock Const., Inc. v. N.Y. State Dep't of Econ. Dev.*, 438 F.3d 195, 204 (2d Cir.2006). Put another way, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130 (quotations and citation omitted). A party need only demonstrate that it would receive "at least some" relief to establish redressability. *Tozzi v. U.S. Dep't of Health & Human Servs.*, 271 F.3d 301, 310 (D.C.Cir.2001).

Plaintiffs assert that, because Defendants are major emitters of carbon dioxide, capping Defendants' emissions and reducing them by a specified percentage each year for at least a decade "is necessary to avert or reduce the risk of the injuries described above." Defendants insist that Plaintiffs' injuries are not redressable because Plaintiffs do not and cannot

allege that capping and reducing emissions by an unidentified percentage "would or could remediate the alleged future harms they seek to forestall." Defendants maintain that the emissions reductions are "merely a part of the overall reductions 'necessary' to slow global warming." In addition, Defendants contend that the harms of global warming can only be redressed by reaching the actions of third party emitters, and cite Supreme Court decisions such as *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976), in support of the proposition that federal courts cannot redress injury "that results from the independent action of some third party not before the court."

Addressing Defendants' last argument first, the holding in *Simon* is inapposite. In that case, the plaintiffs—indigent citizens and organizations composed of indigent members—sued the Secretary of the Treasury and the Commissioner of the IRS in response to a ruling that allowed hospitals favorable tax treatment if they offered indigents emergency room services, but did not require the hospitals to provide indigents with other necessary services. The plaintiffs claimed that adoption of the ruling "encouraged" hospitals to deny them services. *Id.* at 42, 96 S.Ct. 1917. The Court observed that some individual plaintiffs who complained of being denied hospital services had not sued the hospitals that actually caused them injury by not treating them. The Court then rejected as too speculative the "implicit corollary" of plaintiffs' theory—*i.e.*, that an IRS requirement that all hospitals serve indigents as a condition of favorable tax treatment would discourage hospitals from denying services to them. *Id.* at 42-43, 96 S.Ct. 1917. By suing the wrong entities, the *Simon* plaintiffs

could not establish injury, nor could the lawsuit redress the actual injuries they allegedly suffered. *Simon* does not apply here, as Plaintiffs have sued Defendants who, they allege, are directly causing them injury.

Defendants' assertions echo their arguments for nonjusticiability under the political question doctrine: because global warming is a world-wide problem, federal courts are not the proper venue for this action, nor could the courts redress the injuries about which Plaintiffs complain because global warming will continue despite any reduction in Defendants' emissions. *Massachusetts* disposed of this argument. The Court recognized that regulation of motor vehicle emissions would not "by itself *reverse* global warming," but that it was sufficient for the redressability inquiry to show that the requested remedy would "*slow or reduce* it." *Massachusetts*, 549 U.S. at 525, 127 S.Ct. 1438 (citing *Larson v. Valente*, 456 U.S. 228, 244, n. 15, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982) ("[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury.")). In other words, that courts could provide some measure of relief would suffice to show redressability, and the proposed remedy need not address or prevent all harm from a variety of other sources. Moreover, the Court observed that although EPA regulation of greenhouse gas emissions might not reverse global warming, in light of the fact that China and India were "poised to increase greenhouse gas emissions substantially over the next century," the remedy sought—reduction of domestic emissions—"would slow the pace of global emissions increases, no matter what happens elsewhere." *Massachusetts*, 549 U.S. at 525-26, 127 S.Ct. 1438. This rationale undercuts

Defendants' position that a reduction in their emissions will not have an impact on Plaintiffs' injuries because global warming will continue due to emissions by other parties.[24] As the States rightly assert: "Even if emissions increase elsewhere, the magnitude of Plaintiffs' injuries will be less if Defendants' emissions are reduced than they would be without a remedy." This perspective has particular resonance in a federal common law of nuisance case involving air pollution, where the ambient air contains pollution from multiple sources and where liability is joint and several. Plaintiffs have adequately alleged redressability.

In conclusion, we hold that all Plaintiffs have standing to maintain their actions.

---

[24] In *Northwest Environmental Defense Center v. Owens Corning Corp.*, 434 F.Supp.2d 957 (D.Or.2006), the plaintiffs alleged that a manufacturer was building a plant without first receiving permits required under the CAA, and that the emissions that would be generated constituted greenhouse gases. The court observed:

> Plaintiffs need not show that the entire problem (for instance, global warming) will be cured if the Plaintiffs prevail in this action, or that the challenged action is the exclusive source of that harm. Particularly in environmental and land use cases, the challenged harm often results from the cumulative effects of many separate actions that, taken together, threaten the plaintiff's interests. The relief sought in the Complaint need not promise to solve the entire problem, any more than a legislative body is forbidden to enact a law addressing a discrete part of a problem rather than the entire problem. *Cf. Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110, 69 S.Ct. 463, 93 L.Ed. 533 (1949) ("It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.").

Id. at 968 (internal citation modified).

V. Stating a Claim under the Federal Common Law of Nuisance

A. Standard of Review

Defendants have also argued—here and before the district court—that Plaintiffs have failed to state a claim under the federal common law of nuisance. *Connecticut v. Am. Elec. Power Co.*, 406 F.Supp.2d 265, 267 (S.D.N.Y.2005). The district court did not reach this issue, dismissing the cases on the ground that they presented political questions. In the interest of judicial economy, we exercise our discretion to address the question now, which has been fully briefed to this Court. *See Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) ("The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases.").

In reviewing the complaints to determine whether Plaintiffs have stated a claim, we will "construe[] the complaint[s] liberally, accepting all factual allegations in the complaint[s] as true, and drawing all reasonable inferences in the plaintiff[s'] favor." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir.2002). A complaint may be dismissed for failure to state a claim only if the plaintiff fails to provide factual allegations sufficient "'to raise a right to relief above the speculative level.'" *Goldstein v. Pataki*, 516 F.3d 50, 56 (2d Cir.2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). That said, Plaintiffs' pleading obligation still "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955.

B. The Federal Common Law of Nuisance and the Restatement's Definition of Public Nuisance

The American colonies imported public nuisance law from England. One of the earliest definitions of public nuisance (then known as "common nuisance") included any "act not warranted by law, or omission to discharge a legal duty, which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects." Restatement (Second) of Torts § 821B cmt. a (1977) (quoting J. Stephen, A General View of the Criminal Law of England 105 (1890)). Originally, public nuisance was a crime, and

> it was used against those who interfered with a public right of way, or ran 'noisome trades,' but its flexibility became apparent in the varied activities prosecuted under its name over the years: digging up a wall of a church, helping a 'homicidal maniac' to escape, being a common scold, keeping a tiger in a pen next to a highway. . . .

Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years after Boomer*, 54 Alb. L.Rev. 359, 362 (1990). In *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887), Justice Harlan took the opportunity to wax eloquent on nuisance law and its equitable roots:

> The ground of this jurisdiction, in cases of purpresture, as well as of public nuisances, is the ability of courts of equity to give a more speedy, effectual, and permanent remedy than can be had at law. They cannot only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in

> progress, and, by perpetual injunction, protect the public against them in the future . . . . This is a salutary jurisdiction, especially where a nuisance affects the health, morals, or safety of the community. Though not frequently exercised, the power undoubtedly exists in courts of equity thus to protect the public against injury.

Id. at 673, 8 S.Ct. 273. Public nuisance eventually became a source of common law civil liability.

The earliest Supreme Court public nuisance cases, brought by States pursuant to the Court's original jurisdiction, did not define what constituted a "public nuisance," as the damage or threatened damage caused by air or water pollution was readily apparent from the pleadings and testimony. For example, the noxious, "sulphurous acid gas" released from the Tennessee Copper Company foundry was alleged to cause "wholesale destruction of forests, orchards and crops." *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 236, 238, 27 S.Ct. 618, 51 L.Ed. 1038 (1907). Similarly, "large quantities of undefecated sewage" were seen as "poison[ing] the water supply of the inhabitants of Missouri and injuriously affect[ing] that portion of the bed or soil of the Mississippi river which lies within its territory." *Missouri v. Illinois* ("*Missouri I*"), 180 U.S.208, 243, 21 S.Ct. 331, 45 L.Ed. 497 (1901). In each instance, the effect of the nuisancewas widespread—injuring the public-at-large—and States as *parens patriae* acted to protect their citizens from the harms caused by the pollution.

United States v. Bushey & Sons, Inc., 363 F.Supp. 110 (D.Vt.1973), *aff'd* 487 F.2d 1393 (2d Cir.1973),

cert. denied, 417 U.S. 976, 94 S.Ct. 3182, 41 L.Ed.2d 1146 (1974), was one of the first cases to apply the standards of public nuisance, as defined in Restatement § 821B, to the federal common law of nuisance.[25] Judge Oakes, then a member of this Court sitting by designation in Vermont's district court, examined the federal common law of nuisance and recognized the reshaping of "the old law of public nuisance . . . to fit the 'realities of modern technology.'" *Id.* at 120. He updated federal nuisance law by adopting the Restatement (Second) of Torts's[26] definition of public nuisance: "an unreasonable interference with a right common to the general public." Judge Oakes opined that the oil spills at issue in the *Bushey* case[27] interfered "with the right of the public in the waters of Lake Champlain to have those waters preserved from oil-spill pollution." *Id.* at 116-17, 120. He determined that the defendants' interference with that public right was "unreasonable" because the oil-spill pollution was proscribed by both the Refuse Act, 33 U.S.C. § 407, and by the fact that it "has been of a recurring nature, although not continuous, producing long-lasting effects and substantial detriment upon the public right, with the actor—in this case, the

---

[25] In *Matter of Oswego Barge*, 664 F.2d 327, 333 n. 5 (2d Cir 1981), this Circuit also cited the Restatement definition of public nuisance used by Judge Oakes in *Bushey* when commenting on what a plaintiff would need to show to make a claim under the federal common law of nuisance.

[26] All references to the "Restatement" refer to the Restatement (Second) of Torts (1979).

[27] In *Bushey*, the federal government had sued the New York corporate owners of vessels that transported petroleum products across Lake Champlain. The vessels had been responsible for a number of oil spills affecting Vermont waters and the federal government sought injunctive relief. *Bushey*, 363 F.Supp. 110.

defendants—knowing or having reason to know of that effect." *Bushey*, 363 F.Supp. at 120-21 (applying Restatement §§ 821B(2)(b) and (c)). Judge Oakes's approach proved both practical and feasible in forging an equitable remedy, and was upheld on appeal. *Bushey*, 487 F.2d 1393.

Bushey's application of the Restatement's public nuisance standard was not unwarranted. Federal common law of nuisance cases had for decades referred to abating the "public nuisance" of various types of pollution and had applied precepts of public nuisance theory when adjudicating such cases. *See, e.g., Missouri I*, 180 U.S. at 244-46, 21 S.Ct. 331. It was not until *Milwaukee I*, however, that the Supreme Court explicitly examined "[t]he application of federal common law to abate a public nuisance in interstate or navigable waters. . . ." *Illinois v. Milwaukee* ("*Milwaukee I*"), 406 U.S. 91, 104, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972). The Restatement definition of public nuisance has since been used in other federal cases involving the federal common law of nuisance, *see, e.g., Nat'l Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222, 1234 (3d Cir.1980) (applying Restatement's definition of public nuisance in federal common law of nuisance litigation), *vacated on other grounds*, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981), and the Restatement principles have served as the backbone of state nuisance law.[28]

---

[28] A majority of states have adopted the Restatement's definition of public nuisance. *See* David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 Colum. J Envtl. L. 1, 53 (2003). While the public nuisance tort principles in the Restatement have been culled primarily from state court cases, the application of the principles of state common law to federal common law is well understood. *See*

In keeping with the precedents discussed above, we will apply the Restatement's principles of public nuisance as the framework within which to examine the federal common law of nuisance question presented by the instant cases. We believe the Restatement definition provides a workable standard for assessing whether the parties have stated a claim under the federal common law of nuisance.[29] *See, e.g., North Carolina v. Tenn. Valley Auth.*, 593 F.Supp.2d 812, 829-34 (W.D.N.C.2009) (in adjudicating state law public nuisance claim against TVA for environmental and health effects allegedly caused by coal-fired power plants, court issued findings of fact and conclusions of law using public nuisance law principles, cited the Restatement, and ordered specific pollution controls). The Restatement definition of public nuisance set out in § 821B(1) has two elements: an "unreasonable

---

Milwaukee I, 406 U.S. at 103 n. 5, 92 S Ct. 1385 ("'We conclude that the substantive law to apply in suits under [Labor Management Relations Act] § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws. . . . Federal interpretation of the federal law will govern, not state law. But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.'") (quoting *Textile Workers v. Lincoln Mills*, 353 U S. 448, 456-57, 77 S.Ct. 912, 1 L Ed.2d 972 (1957)); *id.* at 107, 92 S Ct. 1385 ("While federal law governs, consideration of state standards may be relevant."); *see also City of Evansville v Ky. Liquid Recycling, Inc.*, 604 F.2d 1008, 1021 n. 43 (7th Cir.1979) (in federal common law action for damages caused by discharge of contaminants into interstate waterway, court stated, "[a]lthough federal common law controls, federal statutes as well as state statutes and common law are nevertheless highly relevant").

[29] *See* Section II(B)(2), *supra*.

interference" and "a right common to the general public." Section 821B(2) further explains:

> Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
>
> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>
> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
>
> (c) whether the conduct is of a continuing nature or has produced a permanent and long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Restatement § 821B(2).

We examine separately the questions of whether the State Plaintiffs and the non-State Plaintiffs (New York City and the Trusts) have stated a claim under the federal common law of nuisance.

C. Have the States Stated a Claim under the Federal Common Law of Nuisance?

1. *Applying the Public Nuisance Definition to the States*

The States have sued in both their *parens patriae* and proprietary capacities. As quasi-sovereigns and as property owners, they allege that Defendants' emissions, by contributing to global warming,

> constitute a substantial and unreasonable interference with public rights in the plaintiffs' jurisdictions, including, *inter alia*, the right to public comfort and safety, the right to protection of vital natural resources and public property,

> and the right to use, enjoy, and preserve the aesthetic and ecological values of the natural world.

These grievances suffice to allege an "unreasonable interference" with "public rights" within the meaning of § 821B(2)(a). *See In re StarLink Corn Prods. Liab. Litig.*, 212 F.Supp.2d 828, 848 (N.D.Ill.2002) ("The Restatement sweeps broadly in defining a 'public right,' including 'the public health, the public safety, the public peace, the public comfort or the public convenience.'" (quoting Restatement § 821B(2)(a))). The States have additionally asserted that the emissions constitute continuing conduct that may produce a permanent or long lasting effect, and that Defendants know or have reason to know that their emissions have a significant effect upon a public right, satisfying § 821B(2)(c). We hold that the States, in their *parens patriae* and proprietary capacities, have properly alleged public nuisance under Restatement § 821B, and therefore have stated a claim under the federal common law of nuisance as it incorporates the Restatement's definition of public nuisance.

2. *Defendants' Arguments*

Defendants do not contest the principle that states, as parties, may state a valid claim for relief pursuant to the federal common law of public nuisance. Rather, Defendants argue that the arguments advanced by the States in this case are "wholly inapplicable" to the long-established line of federal common law of nuisance cases. Specifically, Defendants assert that: (1) principles of constitutional necessity limit the scope of the cause of action for transboundary nuisance disputes between states; and (2) the federal common law of nuisance is available only to abate nuisances of a "simple type" that are "so immediately

and severely harmful and so readily traced to an out-of-state source that they would have justified war at the time of the founding." We find these arguments unpersuasive.

a. Constitutional Necessity

We first address Defendants' argument that "constitutional necessity" limits the scope of the interstate nuisance cause of action. Defendants claim that the Supreme Court has not "creat[ed] a broad cause of action" and cite *Tennessee Copper* for the proposition that the Court has "examined demands for a judicial remedy for 'injuries analogous to torts' with great 'caution.'" Seizing on the principles the Supreme Court has applied to limit that Court's original jurisdiction over the actions of a state in nuisance disputes, Defendants engage in a misguided endeavor to impose those same strictures on the federal common law of nuisance cause of action more generally—and on the States' cause of action in particular.

First, the States do not seek to invoke the Supreme Court's original jurisdiction. Rather, they have brought their federal common law of nuisance claim to the federal courts under 28 U.S.C. § 1331. The cases on which Defendants rely, which discuss the limits of original jurisdiction, are inapposite.

Moreover, Defendants take the language quoted from *Tennessee Copper* out of context. In confronting "a suit by a state for an injury to it in its capacity of quasi-sovereign," the *Tennessee Copper* Court stated that "[t]he caution with which demands of this sort, on the part of a state, for relief from injuries analogous to torts, must be examined, is dwelt upon in [*Missouri II*]." *Tenn. Copper Co.*, 206 U.S. at 237, 27 S.Ct. 618. Analyzing *Missouri II*, we find the Court

engaged in a discussion of the purview of its original jurisdiction. *See Missouri II*, 200 U.S. at 519, 26 S.Ct. 268 ("The Constitution extends the judicial power of the United States to controversies between two or more states, and between a state and citizens of another state, and gives this court original jurisdiction in cases in which a state shall be a party."). The *Missouri II* Court recognized that its responsibility to adjudicate cases in which a state is a party means that "if one state raises a controversy with another, [the Supreme Court] must determine whether there is any principle of law, and, if any, what, on which the plaintiff can recover." *Id.*; *see also West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28, 71 S.Ct. 557, 95 L.Ed. 713 (1951) ("A State cannot be its own ultimate judge in a controversy with a sister State. To determine the nature and scope of obligations as between States, whether they arise through the legislative means of compact or the 'federal common law' governing interstate controversies, is the function and duty of the Supreme Court of the Nation." (citation omitted)).

At the same time, the Court acknowledged that it must make these declarations of law carefully because of the respect due to the state as a quasi-sovereign. *See Missouri II*, 200 U.S. at 521, 26 S.Ct. 268 ("But it does not follow that every matter which would warrant a resort to equity by one citizen against another in the same jurisdiction equally would warrant an interference by this court with the action of a state."). The Court cautioned that "the words of the Constitution [granting the Court original jurisdiction] would be a narrow ground upon which to construct and apply to the relations between states the same system of municipal law in all its details which would be applied between individuals."

Id. at 520, 26 S.Ct. 268. To put the matter another way, the Supreme Court limits its original jurisdiction over actions in which a state is a party so as not to infringe unduly on the state's sovereignty. *See id.* at 521, 26 S.Ct. 268 ("It hardly can be that we should be justified in declaring statutes ordaining such action void in every instance where the circuit court might intervene in a private suit, upon no other ground than analogy to some selected system of municipal law, and the fact that we have jurisdiction over controversies between states.").

The *Tennessee Copper* Court's passing reference to exercising "caution" did not, as Defendants claim, refer to whether states could bring nuisance suits for relief from injuries analogous to torts—that question was answered in the affirmative in Tennessee Copper, as well as in subsequent nuisance cases. *See Tenn. Copper Co.*, 206 U.S. at 237-39, 27 S.Ct. 618. Rather, the *Tennessee Copper* Court meant to acknowledge the "special solicitude," *Massachusetts v. EPA*, 549 U.S. 497, 520, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007), owed to states bringing suits in a quasi-sovereign capacity, *Tennessee Copper Co.*, 206 U.S. at 237, 27 S.Ct. 618. The Court explained that "[w]hen the states by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court." *Id.*

In fact, the precedents Defendants cite in making their "constitutional necessity" argument tend to cut against Defendants' position. In cases like *Missouri II*, where the opposing parties are each states, the

Supreme Court must tread especially carefully because states' quasi-sovereign rights are implicated either way it turns. *See Missouri II*, 200 U.S. at 521, 26 S.Ct. 268 ("Before this court ought to intervene, the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side."); *see also Sims*, 341 U.S. at 27, 71 S.Ct. 557 ("[T]he delicacy of interstate relationships and the inherent limitations upon this Court's ability to deal with multifarious local problems have naturally led to exacting standards of judicial intervention and have inhibited the formulation of a code for dealing with such controversies."). But in circumstances like those of the instant case, in which a state is involved as a party on only one side of a dispute, the Court has announced that a state raising a claim based on quasi-sovereign interests is "somewhat more certainly entitled to specific relief than a private party might be." *Tenn. Copper Co.*, 206 U.S. at 237, 27 S.Ct. 618; *see also Massachusetts*, 549 U.S. at 519-20, 127 S.Ct. 1438.

We reject Defendants' constitutional necessity argument.

b. The Character of the Alleged Nuisance

Defendants' next argument is based on a reference to *North Dakota v. Minnesota*, in which the Supreme Court wrote: "It is the creation of a public nuisance of simple type for which a State may properly ask an injunction." 263 U.S. 365, 374, 44 S.Ct. 138, 68 L.Ed. 342 (1923). North Dakota had sought to enjoin Minnesota's continued use of "cut-off ditches," which had the net effect of causing a river to overflow and harm valuable North Dakota farmland. In discussing

whether it had jurisdiction over the dispute, the Supreme Court reviewed the public nuisance cases it had previously decided and, in that context, referred to public nuisances "of simple type." Defendants seize upon the phrase and contend that *only* a public nuisance of a simple type may constitute a valid claim for public nuisance. They then create their own definition for the phrase in an attempt to show that the States have not stated a claim. According to Defendants, nuisances of a "simple type" involve "immediately noxious or harmful substances [that] cause severe localized harms that can be directly traced to an out-of-state source." They assert that carbon dioxide is not "poisonous or noxious" and does not "immediately harm anyone (as contagious and pathogenic bacteria do), or destroy forests, crops and farms (as sulphuric gases and floodwaters do)." Defendants also point out that their carbon dioxide emissions mix "with other greenhouse gases from innumerable sources across the planet." Because the States do not claim that any alleged future harm can be directly traced to their emissions, Defendants submit that the States have not alleged a "simple type" nuisance entitling them to relief.

The *North Dakota* Court did not otherwise explain or define the phrase "simple type."[30] *Id.* An earlier Supreme Court case, however, provides some clue as

---

[30] In *Milwaukee I*, the Supreme Court quoted the paragraph from *North Dakota* containing the sentence on which Defendants rely. *Milwaukee I*, 406 U.S at 106 n. 8, 92 S.Ct 1385. The quotation was presented to support the *Milwaukee I* Court's statement that "[w]hen it comes to water pollution this Court has spoken in terms of 'a public nuisance'" *Id.* at 106, 92 S.Ct 1385. The quotation should not be read to imply that the kinds of pollution addressed by the federal common law were limited to those of a "simple type."

to what the *North Dakota* Court meant. In *Missouri II*, 200 U.S. at 496, 26 S.Ct. 268, the Supreme Court analyzed whether the alleged nuisance—typhoid bacillus from Illinois's discharge of sewage into the Mississippi River—could survive the 357-mile journey to the St. Louis drinking water intake area. In assessing whether Missouri had proved a nuisance claim, the Court examined scientific data specifically directed to the issues, listened to dueling experts, and ultimately held that Missouri did not prove its case. *Id.* at 522-26, 26 S.Ct. 268. The Court wrote:

> [I]f this suit had been brought fifty years ago it almost necessarily would have failed. There is no pretense that there is a *nuisance of the simple kind* that was known to the older common law. There is nothing that can be *detected by the unassisted senses*—no visible increase of filth, no new smell. . . . The plaintiff's case depends upon *an inference of the unseen*.

Id. at 522, 26 S.Ct. 268 (emphases added).

The phrase "simple type" thus appears to describe a kind of rudimentary nuisance that could easily be detected by "the unassisted senses"—apparently the only kind of pollution-related nuisance claim that had been actionable in the mid-1850s—which a complaining State would have little difficulty in proving. But rather than limiting what nuisances were actionable, the Court in *Missouri II* was, in fact, asserting the opposite. The Court never held that the complexity of Missouri's claim precluded Illinois's legal responsibility or, conversely, that a nuisance of a "simple type" was a *sine qua non* for a nuisance claim. It was merely making the point that the law of public nuisance had already evolved from the era when only easily perceived nuisances had been actionable. The

Missouri II Court's use of the phrase did not operate to divide nuisances into those that were simple or complex so as to cull out the latter, nor did it otherwise imply that only the "simple" type of nuisances were actionable.

As a corollary to their "simple type" of nuisance argument, Defendants additionally contend that the challenged pollution must be directly traced to an out-of-state source in order to be actionable. Because Defendants' emissions "mix with other greenhouse gases from innumerable sources across the planet and contribute to a global process that will allegedly cause a variety of future harms" and pose "the same alleged threat to every sovereign," Defendants assert that Plaintiffs cannot properly complain of a "simple type" nuisance. Defendants contest the States' argument that "[n]atural resources injuries due to pollution—the 'paradigmatic' federal common law case—rarely occur because of just one polluter," and that many sources often contribute to the alleged harm. As an example, Defendants assert that the amount of ocean waste not attributable to defendant New York, in *New Jersey v. New York*, 283 U.S. 473, 481, 51 S.Ct. 519, 75 L.Ed. 1176 (1931), "was negligible." Similarly, they maintain that in *Tennessee Copper*, "the Court nowhere stated that any forest destruction was attributable to other pollution—as opposed, for example, to other activities such as logging."

Defendants have cited no case law that supports their reasoning. In *Tennessee Copper*, the issue of whether there were multiple causes of harm never arose. The *New Jersey* Court's reference to other pollution sources as "negligible," allowing the nuisance to be directly traced, pertains only to the facts presented in that particular case. The Court has not

imposed a requirement upon all federal common law of nuisance cases that the challenged pollution must be "directly traced" or that plaintiffs must sue all sources of the pollution complained of in order to state an actionable claim. On the contrary, "the fact that other persons contribute to a nuisance is not a bar to the defendant's liability for his own contribution." Restatement (Second) of Torts § 840E (note that Comment a. states that this provision applies to both public and private nuisance.); *see also*, *e.g.*, *Illinois ex. rel Scott v. Milwaukee*, No. 72 C 1253, 1973 U.S. Dist. LEXIS 15607, at *20-22 (N.D.Ill. Nov. 1, 1973) ("[I]t is sufficient for plaintiffs to show that defendants' nutrient discharges [leading to eutrophication of Lake Michigan] constitute a significant portion of the total nutrient input to the lake. The correct rule would seem to be that any discharger who contributes an aliquot of a total combined discharge which causes a nuisance may be enjoined from continuing his discharge. Either that is true or it is impossible to enjoin point dischargers."), *aff'd in relevant part and rev'd in part*, 599 F.2d 151 (7th Cir.1979), *vacated on other grounds*, *Milwaukee II*, 451 U.S. 304, 101 S.Ct. 1784, 68 L.Ed.2d 114; *cf. Student Pub. Interest Research Group of N.J., Inc. v. Tenneco Polymers, Inc.*, 602 F.Supp. 1394, 1397 (D.N.J.1985) (holding, in the context of finding causation for standing purposes, that pollution may derive from multiple sources and that it is not necessary to pinpoint which polluter caused a specific harm).

Yet another limitation that Defendants seek to impose on the federal common law of nuisance is that the nuisance must be "poisonous" or "noxious" in order to be actionable. They insist that because carbon dioxide is neither, Plaintiffs' claim must fail. But none of the federal common law of nuisance cases

impose this requirement. Defendants' position, moreover, runs counter to the holding in *North Dakota*, for example, where the Court held that a life-giving substance such as water could be a nuisance under certain circumstances, such as when it flooded farmland. 263 U.S. at 374, 44 S.Ct. 138.

Nor does public nuisance theory require that the harm caused must be immediate, as even threatened harm is actionable under the federal common law of nuisance.[31] *See Mugler v. Kansas*, 123 U.S. 623, 673, 8 S.Ct. 273, 31 L.Ed. 205 (1887) (observing that courts of equity, in adjudicating public nuisance cases, can both prevent threatened nuisances, "before irreparable mischief ensues," as well as abate those in progress). Judge Oakes, in *Bushey*, recognized this attribute of nuisance law, writing that "'[o]ne distinguishing feature of equitable relief is that it may be granted upon the threat of harm which has not yet occurred.'" *Bushey*, 346 F.Supp. at 150 (quoting W. Prosser, Handbook of the Law of Torts 624 (3d ed.1964)); *see also Texas v. Pankey*, 441 F.2d 236, 242 (10th Cir.1971) (reversing district court refusing to issue injunction against pesticide spraying that was both threatened at the time the suit was instituted and had since been done); 7 Stuart M. Speiser, Charles F. Krause & Alfred W. Gans, The American Law of Torts § 20.19 (Thomson West 2003) ("We deem it necessary to explain that a prospective nuisance is a fit candidate for injunctive relief. . . . One distinguishing feature of equitable relief is that it may be granted upon the threat of harm which has not yet occurred."); Andrew H. Sharp, Comment, *An*

---

[31] *See* Standing Section III(B)(1)(b) on future injury, discussing how threatened injury has been adequately pled to allow Article III standing.

Ounce of Prevention: Rehabilitating the Anticipatory Nuisance Doctrine, 15 B.C. Envtl. Aff. L.Rev. 627, 633-36 (1988).

Defendants' assertion that the federal common law of nuisance mandates that the harm be localized is similarly misplaced. The touchstone of a common law public nuisance action is that the harm is widespread, unreasonably interfering with a right common to the general public. *See Tenn. Copper Co.*, 206 U.S. at 238-39, 27 S.Ct. 618 ("[W]e are satisfied, by a preponderance of evidence, that the sulphurous fumes cause and threaten damage on so considerable a scale to the forests and vegetable life, if not health, with the plaintiff State as to make out a case. . . ."); *Missouri I*, 180 U.S. at 241, 21 S.Ct. 331 ("The health and comfort of the large communities inhabiting those parts of the state situated on the Mississippi river are not alone concerned, but contagious and typhoidal diseases introduced in the river communities may spread themselves throughout the territory of the state.").

The only qualification that the Supreme Court has placed upon a state bringing a nuisance action against another state was that "the case should be of serious magnitude, clearly and fully proved." *Missouri II*, 200 U.S. at 521, 26 S.Ct. 268. As discussed above, this statement was not intended to limit the scope of the nuisance cause of action, but to recognize the sensitivity with which the Court must undertake, pursuant to its original jurisdiction, adjudication of disputes involving a state's quasi-sovereign interests. But even assuming, *arguendo*, that the Court intended such a limitation to apply more broadly, the Court in *Missouri II* immediately went on to characterize as "a question of the first

magnitude whether the destiny of the great rivers is to be the sewers of the cities along their banks or to be protected against everything which threatens their purity." *Id.* In this case, the States have properly asserted *parens patriae* standing with respect to a public nuisance, and the "serious magnitude" of the nuisance caused by climate change, as it has been alleged, is apparent.

In sum, the States have stated a claim under the federal common law of nuisance.

D. May Non-State Parties Sue under the Federal Common Law of Nuisance? Analysis of Federal Common Law of Nuisance Case Law

Defendants' primary arguments that New York City and the Trusts have not asserted a claim under the federal common law of nuisance are, respectively, that "only states can bring a federal common law claim to abate nuisances of a simple type" and that "private plaintiffs cannot invoke any federal common law cause of action to abate interstate nuisances." Defendants note that cities and private parties "surrendered no sovereign rights in exchange for a remedy, and are not beneficiaries of the Article III jurisdictional grant under which the Court fashioned that remedy." Defendants conclude that the federal common law of nuisance cause of action is reserved only for states.

We believe the correct approach to answering the question of whether non-state parties may sue under the federal common law of nuisance is to examine first how the small number of federal nuisance cases have treated the issue and then to analyze the Restatement provision § 821C, which concerns whether

private parties may sue for public nuisance.[32] Both lines of analysis lead us to conclude that non-state entities may bring such claims.

---

[32] Casting the issue as one of failure to state a claim, Defendants have argued that only States may bring a federal common law of nuisance claim to abate public nuisances. It may be that Defendants have confused the requirements of standing—who may bring an action—with what is necessary to state a claim, a confusion that is understandable, given the interrelationship that sometimes occurs between the two legal doctrines. *See Raines v. Byrd*, 521 U.S 811, 818, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997) ("The standing inquiry focuses on whether the plaintiff is the proper party to bring this suit, although that inquiry 'often turns on the nature and source of the claim asserted.'") (quoting *Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) (other citations omitted)) We have already examined the standing of the non-State plaintiffs in great detail, and have determined that they have standing to proceed

The effort to identify whether the relevant question is one of standing or of stating a claim is not made easier by Restatement § 821C. Section 821C discusses *who* may recover for public nuisance, but appears to mix issues of who may state a claim in § 821C(1) with who may "maintain a proceeding" to enjoin a public nuisance in § 821C(2), potentially implicating standing concerns *See* § 821C cmt. j ("It has been the traditional rule that if a member of the public has not suffered damages different in kind and cannot maintain a tort action for damages, he also has no standing to maintain an action for an injunction ").

We have opted to treat the issue of whether non-State entities may maintain an action under the federal common law of nuisance as a question of whether they have stated a claim. The analysis for both New York City and the Trusts returns to § 821C(1), which concerns whether a party has stated a claim. *Cf. Davis v. Passman*, 442 U.S. 228, 239 n 18, 99 S.Ct. 2264, 60 L.Ed 2d 846 (1979) ("*[S]tanding* is a question of whether a plaintiff is sufficiently adversary to a defendant to create an Art III case or controversy . . .; *cause of action* is a question of

1. *Federal Common Law of Nuisance Case Law Concerning Non-State Parties*

The question of whether a non-state entity could plead a federal common law of nuisance claim did not arise until the Supreme Court ruled in *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 495, 91 S.Ct. 1005, 28 L.Ed.2d 256 (1971) and *Milwaukee I*, 406 U.S. at 108, 92 S.Ct. 1385, that states could bring nuisance claims in the district courts. In allowing such suits in the lower federal courts, the Court untethered the nuisance cause of action from the strictures of Supreme Court original jurisdiction that until then had been a component in all federal common law of nuisance cases. In determining whether non-state parties may bring a federal common law of nuisance claim, district courts have parsed the language of *Milwaukee I*, focusing particularly on footnote 6 of the Court's decision, which reads:

> Thus, it is *not only the character of the parties* that requires us to apply federal law. *See Tennessee Copper Co.*, 206 U.S. at 237, 27 S.Ct. 618; *cf. Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 289, 8 S.Ct. 1370, 32 L.Ed. 239 (1888); The Federalist No. 80 (A.Hamilton). As Mr. Justice Harlan indicated for the Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421-27, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964), where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law. . . .

---

whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court . . . ." (citation omitted)).

> Certainly these same demands for applying federal law are present in the pollution of a body of water such as Lake Michigan bounded, as it is, by four States.

Milwaukee I, 406 U.S. at 105 n. 6, 92 S.Ct. 1385 ("footnote 6") (emphasis added) (citations modified).

a. The Federal Government and Municipalities as Plaintiffs

Once nuisance suits were initiated in the district courts, the federal government began to bring cases. *See, e.g., United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 611 (3d Cir.1974) ("The United States can, of course, sue to abate a public nuisance under federal common law."). The expansion of the class of federal nuisance plaintiffs to encompass the federal government became so well-established that then-district court Judge Newman remarked that the federal common law of nuisance had been extended "beyond cases brought by states as plaintiffs to include cases brought by the United States." *Parsell v. Shell Oil Co.*, 421 F.Supp. 1275, 1281 (D.Conn.1976), *aff'd mem. sub nom. East End Yacht Club, Inc. v. Shell Oil Co.*, 573 F.2d 1289 (2d Cir.1977).

The only reference in this Circuit as to whether municipal and private plaintiffs could bring a federal common law of nuisance claim can be found in a footnote in *New England Legal Foundation v. Costle*, 475 F.Supp. 425, 441 n. 18 (D.Conn.1979). There, Second Circuit Judge Newman, sitting in the district court, wrote: "It may not be essential for the state to be a formal party to a federal common law nuisance action, however, where the interests of the state are sufficiently implicated in a dispute of clearly interstate nature." *Id.* (citing *Twp. of Long Beach v. City of*

New York, 445 F.Supp. 1203, 1213-14 (D.N.J.1978)). Because this Court has not yet addressed the issue, we look for additional guidance from outside our circuit.

In *City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008 (7th Cir.1979), the Seventh Circuit explicitly held that a municipality could assert a claim under the federal common law of nuisance. *Id.* at 1018-19. The defendant-polluters had argued that, under *Milwaukee I*, "only a state may file such an action," and that municipal plaintiffs did not represent the "'quasi-sovereign interest'" or "'ecological rights'" of the State of Indiana. *Id.* at 1017 (quoting *Tenn. Copper Co.*, 206 U.S. at 237, 27 S.Ct. 618; *Texas v. Pankey*, 441 F.2d 236, 240 (10th Cir.1971)). The *Evansville* Court looked to *Milwaukee I* to "determin[e] the content and scope" of the federal common law of nuisance, noting that the Supreme Court "did not address itself . . . to the question of whether parties other than states were protected by, or could invoke, that law." *Id.* Specifically, it found footnote 6 in *Milwaukee I*, 406 U.S. at 105 n. 6, 92 S.Ct. 1385, to be "particularly suggestive of the correct resolution of the issue." *Evansville*, 604 F.2d at 1017. The court concluded that "there can be little doubt that the reasons the Supreme Court found compelling for declaring a federal common law of interstate water pollution are applicable here" given that the plaintiff municipal corporations, subdivisions of the state, were required to "spend public funds because of pollution of an interstate waterway by acts done in another state. The interests of the state in this interstate pollution dispute are impli-

cated in the same way such interests were implicated in [*Milwaukee I*]." *Id.* at 1018.[33]

Defendants here assert that *Evansville* was "wrong." They argue that courts had not recognized a federal common law of nuisance cause of action because states were "required to spend public funds," but rather because they had surrendered their sovereign powers upon entering the union and had received a judicial remedy. Once again, Defendants confuse the underlying basis for the Supreme Court's original jurisdiction over actions involving a state as a party with what is necessary to state a federal nuisance claim. The *Evansville* court drew a parallel between the plaintiff municipalities' interests and those of the States in *Milwaukee I*, holding that the former were proper parties to assert a water pollution claim under the federal common law of nuisance and rejecting the defendants' narrow reading of footnote 6 to the effect that only a state could maintain a suit under the federal common law. The holding in *Evansville* rested on footnote 6's pronouncement of "an overriding federal interest in the need for a uniform rule of decision" in interstate pollution cases and its call for a uniform federal law governing the federal tort of polluting federal waters. *Id.* at 1017-18

---

[33] One additional district court has allowed municipal plaintiffs to bring a federal common law of nuisance action. In *Township of Long Beach v. City of New York*, 445 F.Supp 1203 (D N.J.1978), the court held that the township-plaintiff should be allowed to bring an action under the federal common law of nuisance because the extension of *Milwaukee I* "to include governmental units does not appear to be a drastic or an unwarranted application," but rather "appears to aid in the effectuation of the concerns which prompted the Court to take the action further implementing the evolution of the federal common law." *Id.* at 1214

(quoting *Milwaukee I*, 406 U.S. at 105 n. 6, 92 S.Ct. 1385).

Defendants also cite to original jurisdiction cases such as *New Jersey v. New York*, 345 U.S. 369, 73 S.Ct. 689, 97 L.Ed. 1081 (1953), for the propositions that the Supreme Court has refused to allow cities to intervene in a suit between states and that, in order to maintain a separate cause of action, a city should assert a separate and "compelling interest" different from that asserted by its state. In New Jersey, the Court refused to allow the City of Philadelphia to intervene in a suit between New Jersey and New York—where Pennsylvania had already been allowed to intervene as a party—because Philadelphia represented

> only a part of the citizens of Pennsylvania who reside in the watershed area of the Delaware River and its tributaries and depend upon those waters. If we undertook to evaluate all the separate interests within Pennsylvania, we could, in effect, be drawn into an intramural dispute over the distribution of water within the Commonwealth.

Id. at 373, 73 S.Ct. 689. Guarding against the expansion of its original jurisdiction, the Court commented that "[a]n intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *Id.*

Defendants in the instant case argue that because New York City does not show some "compelling interest in [its] own right," particularly where New

York State is suing in its *parens patriae* capacity on behalf of all of its citizens, New York City cannot state a claim under the federal common law of nuisance. The *Evansville* defendants raised this same argument, quoting the same passage from *New Jersey*, and the Seventh Circuit rejected it. The *Evansville* court observed that "[w]hat the [Supreme] Court said in addressing [the intervention] issue has no bearing on whether a party other than a state can maintain a federal common law nuisance action in a district court." *Evansville*, 604 F.2d at 1018. That conclusion is sound, and we hold that it applies to these cases as well.

b. Private Plaintiffs

As with cases involving municipal plaintiffs, cases addressing the issue of whether private parties may sue under the federal common law of nuisance have been sparse. Courts' interpretations of footnote 6 figure prominently in the analysis.

In *Committee for the Consideration of the Jones Falls Sewage System v. Train*, 375 F.Supp. 1148 (D.Md.1974), individuals and citizen associations sought to restrain EPA from granting permits for sewer hookups. Confronting a possible dismissal of their statutory causes of action, the plaintiffs asked the court whether they could amend their complaint to allege public nuisance under federal common law. The defendants countered that only governmental units could bring such claims. The district court agreed, pointing to the fact that only states had previously brought such actions. *Id.* at 1153-54. In a footnote, the court observed that the first sentence in *Milwaukee I*'s footnote 6 stating, "it is not only the character of the parties that requires us to apply

federal law," was ambiguous and could be read in at least two different ways:

> [I]t could mean a) that there were other considerations sufficient in themselves to require application of federal law, or b) that there were other federal interests which in addition to the character of the parties required the application of federal law although those other interests in themselves would not have been sufficient.

Id. at 1154 n. 12. The Jones Falls district court opted for the latter interpretation, and denied the plaintiffs' motion to amend. *Id.*

The Fourth Circuit affirmed, although it did not squarely hold that only states could assert a federal common law nuisance cause of action. It grounded its ruling on the alleged pollution's lack of interstate effect:

> Here, where the controversy is strictly local, where there is no claim of vindication of the rights of another state and where there is no allegation of any interstate effect, we conclude there is no body of federal common law to which the plaintiffs may resort in their effort to obtain judicial relief from discharges which the federal statute and the federal regulatory agency permit.

Comm. for the Consideration of the Jones Falls Sewage Sys. v. Train, 539 F.2d 1006, 1010 (4th Cir.1976) (en banc). The opinion sent somewhat mixed signals with regard to the issue of who could properly bring a claim. The Fourth Circuit viewed *Milwaukee I* as limiting the federal common law to "interstate controversies in which the *rights of a state* are sought to be vindicated," *id.* at 1010 (emphasis added), and observed in a footnote that "[i]t is not

essential that one or more states be formal parties if the interests of the state are sufficiently implicated," *id.* at 1009 n. 8. It is important to note that the Fourth Circuit never held that states were the only proper parties to a federal common law of nuisance cause of action. In fact, it signaled a willingness to consider whether non-state parties asserting the "rights of a state" could be proper plaintiffs in this kind of action. *See id.* at 1010.

The *Jones Falls* opinion sparked a strong dissent. In addition to criticizing other matters, the dissenting judge took issue with the majority's view that only a state's rights could be vindicated in a federal nuisance suit. He pointed out that while the *Milwaukee I* Court had held that a state was a proper party plaintiff, "its discussion concerning the nature of the federal common law applicable to navigable waters is not expressly limited to actions brought by states." *Id.* at 1013 (Butzner, J., dissenting). Rather, in the dissent's view, the federal common law of nuisance was "fashioned from the policies of national laws dealing with the country's natural resources," and its function was "to fill statutory interstices and to provide uniform rules regarding the waters of the United States." *Id.* The dissent regarded footnote 6 as a caution against "confusing parties with subject matter in determining whether to apply federal common law." *Id.* Returning to subject matter jurisdiction under 28 U.S.C. § 1331(a), conferred by the federal nature of the dispute, the dissent concluded that "[n]o authority justifies placing a gloss on this basic jurisdictional statute to limit its application to controversies involving a state," and that a private person could enjoin a public nuisance in the circumstances presented in that case. *Id.* at 1014.

In this Circuit, Judge Newman, in *Parsell v. Shell Oil Co.*, 421 F.Supp. 1275 (D.Conn.1976),[34] culled three important factors from *Milwaukee I* regarding what was required for federal question jurisdiction in public nuisance cases: 1) the plaintiff was a governmental entity; 2) the water pollution affected more than one state; and 3) the claim was for equitable relief. *Id.* at 1280. As to the first factor, Judge Newman acknowledged that the federal common law of nuisance had been extended to include cases brought by the United States, and cited the holding of the *Jones Falls* district court as refusing to extend that claim to private plaintiffs. *Id.* at 1281. Without deciding the question of who could bring such an action, Judge Newman held that, "at the very least this right of action should be limited to suits involving pollution with an impact on more than one

---

[34] There are few cases addressing the issue in this Circuit, and those that do provide little guidance. A few years after *Parsell*, in *New England Legal Foundation v. Costle*, 475 F.Supp. 425 (D.Conn.1979), *aff'd*, 666 F.2d 30 (2d Cir.1981), private plaintiffs sought to convince the court that they could maintain a federal common law nuisance action in an air pollution case. Judge Newman, then a Circuit Judge sitting by designation in the district court, held that the plaintiffs had failed to state a claim because EPA had granted a variance allowing the defendant electricity generating plant to burn oil containing specific sulfur components, and thus he would not devise an equitable remedy to proscribe conduct that EPA had specifically legitimated. *Id.*

In *Byram River v. Village of Port Chester*, 394 F.Supp. 618 (S.D.N.Y.1975), however, an individual and association brought suit to abate the depositing of inadequately treated sewage into a river. On a motion to dismiss, the court held, without analysis, that the plaintiffs "should be permitted to produce evidence to prove its [federal common law of nuisance] cause of action against the defendants." *Byram River*, 394 F.Supp. at 629.

state." *Id.* However, the court also noted that "there is some justification for limiting any right of action under [*Milwaukee I*] to private parties seeking injunctive relief rather than damages." *Id.* at 1282 (citing *Milwaukee I*, 406 U.S. at 107-08, 92 S.Ct. 1385).

The leading case holding that private parties may bring a federal common law of nuisance cause of action is *National Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222 (3d Cir.1980), *vacated on other grounds*, *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981). In that case, the Third Circuit declared that "the common law nuisance remedy recognized in [*Milwaukee I*] is available in suits by private parties." *Id.* at 1233. The court interpreted footnote 6 as calling for the application of a uniform federal standard when dealing with interstate pollution, because "[r]elegating these litigants to possibly conflicting New York and New Jersey nuisance standards would ignore the clear intent of the Supreme Court to federalize those standards and would undermine that federal uniformity." *Id.* at 1233-34. The court added that, in order to give full effect to the federal common law of nuisance, "private parties should be permitted, and indeed encouraged, to participate in the abatement of such nuisances. Courts have already extended the [*Milwaukee I*] remedy to the federal government and to municipalities, and one district court has applied it on behalf of private litigants." *Id.* at 1234 (citing *Byram River*, 394 F.Supp. at 622) (footnotes omitted). Relying on Restatement §§ 821B and C, which defines public nuisance and describes when a private party may recover for a public nuisance, the Third Circuit found that the plaintiffs had alleged that they

had suffered "sufficient individual harm to sue for damages arising from that public nuisance" and allowed their claims to go forward. *Id.* at 1234-35.[35]

Defendants here argue that the Supreme Court overruled the Third Circuit on this point in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981). In *Sea Clammers*, the Supreme Court held that the federal common law of nuisance had been fully displaced in the area of ocean pollution by the amended Federal Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act, and it thus vacated and remanded the

---

[35] Also in 1980, the Seventh Circuit weighed in on the import of footnote 6 in *Illinois v Outboard Marine Corp.*, 619 F.2d 623 (7th Cir.1980), *vacated by Milwaukee II*, 451 U.S. 304, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981), *aff'd in part, rev'd in part*, 680 F.2d 473 (7th Cir.1982) The subsequent vacatur, reversal, and remands focused on the question of whether the federal common law cause of action in water pollution cases had been displaced But one of the issues presented in the district court and before the Seventh Circuit was whether the federal common law of nuisance applied to intrastate as well as interstate pollution.

The initial Seventh Circuit decision interpreted footnote 6 to provide that the federal common law of nuisance applied when the dispute at issue was "a matter of federal concern. When it is, as in this case, federal courts should be accessible." *Outboard Marine*, 619 F.2d at 630 The court also noted that "[t]here is no language in the Supreme Court's [*Milwaukee I*] opinion to suggest that the predicate for the decision is one state's adversely affecting the environment or ecology of another." *Id.* at 627; *see also United States v Solvents Recovery Serv of New England*, 496 F.Supp 1127, 1135-36, 1141 (D Conn 1980) (Cabranes, J.) (adopting a similar, expansive approach to the language of footnote 6 and holding that the federal common law of nuisance governed under a particular provision of the Resource Conservation and Recovery Act, and that such body of law did not require allegation of interstate effect).

portion of the Third Circuit's opinion holding otherwise. The Court explicitly declined to address, however, the Third Circuit's holding that a cause of action could be brought under the federal common law of nuisance by a private plaintiff seeking damages. *Id.* at 11 n. 17, 101 S.Ct. 2615 ("We therefore need not discuss the question whether the federal common law of nuisance could ever be the basis of a suit for damages by a private party."). The Third Circuit's holding in that regard, therefore, remains undisturbed.

Finally, in the last of the long line of decisions in *Milwaukee I* and *II*, the Seventh Circuit in *Illinois v. Milwaukee*, 731 F.2d 403 (7th Cir.1984), discussed footnote 6 in terms consistent with the view that a party need not be a state to bring an action under the federal common law of nuisance. The court wrote: "*Milwaukee I*'s second reason for applying federal law was the character of the parties. It is clear, however, that the federal nature of the problem, and the basic interests of federalism do not depend on the case being a state versus state case." *Id.* at 407.

c. Whether Municipalities and Private Parties Can State a Claim Under the Federal Common Law of Nuisance—An Examination of *Milwaukee I*'s Footnote 6

By extrapolating from the fact that only states have been plaintiffs in Supreme Court nuisance cases, Defendants conclude that only states may state a claim under the federal common law of nuisance. In effect, as already noted, Defendants have conflated the rationale that limits the Supreme Court's original jurisdiction over nuisance conflicts in which a state is a party—a matter implicating *parens patriae* standing—with the elements required to

state a claim under the federal common law of nuisance.[36] The structure of footnote 6 in *Milwaukee I* and case law applying the principles of federal common law lead us to conclude that a plaintiff need not be a state in order to sue under the federal common law of nuisance.

Analysis of the sentence structure of footnote 6 supports our reading that it is not necessary for a complaining party to be a state in order to bring a federal common law of nuisance cause of action. *Milwaukee I*, 406 U.S. at 105 n. 6, 92 S.Ct. 1385. Justice Douglas, writing for the Court, discussed two factors that bear on whether a party may bring a federal common law nuisance cause of action. These factors are set out in separate sentences. The Court stated first, in its only reference to the nature of the parties before it: "Thus, it is not only the character of the parties that requires us to apply federal law." *Id.* It followed that sentence with citations to *Tennessee Copper*, a case in which the Court discussed nuisance suits by States in their quasi-sovereign capacities,

---

[36] In *Pennsylvania v New Jersey*, 426 U.S. 660, 96 S.Ct. 2333, 49 L.Ed 2d 124 (1976), the Supreme Court reviewed two grounds upon which a state could invoke that Court's original jurisdiction: the first was when a plaintiff state demonstrated "that the injury for which it seeks redress was directly caused by the actions of another [s]tate." *Id.* at 663, 96 S.Ct. 2333. A state also had such "standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens." *Id.* at 665, 96 S.Ct. 2333. As examples of the latter category, the Court cited numerous nuisance suits over the course of the last century. *See id., accord Oklahoma v. Cook*, 304 U.S. 387, 393, 58 S.Ct. 954, 82 L.Ed. 1416 (1938). *Snapp v. Puerto Rico*, 458 U.S. 592, 607, 102 S.Ct. 3260, 73 L.Ed.2d 995 (1982), essentially incorporated this test when setting out the elements for *parens patriae* standing

and to *Wisconsin v. Pelican Insurance Co.*, 127 U.S. 265, 8 S.Ct. 1370, 32 L.Ed. 239 (1888), a case in which the Court explained the rationale for the Supreme Court's original jurisdiction over suits involving states as parties. *Milwaukee I*, 406 U.S. at 105 n. 6, 92 S.Ct. 1385. The Court then began a new sentence focused on a distinct and equally valid ground for invoking federal common law: the overriding federal interest in the need for a uniform rule of decision or in a controversy that touches basic interests of federalism. In support of this latter ground the Court cited *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964), a case in which an instrumentality of the Cuban government had sued a commodities broker. *Milwaukee I*, 406 U.S. at 105 n. 6, 92 S.Ct. 1385. The Court observed in *Sabbatino* that the involvement of private parties did not affect the intrinsically federal nature of the interests at issue. *Sabbatino*, 376 U.S. at 426-27, 84 S.Ct. 923 ("The decision implies that no State can undermine the federal interest in equitably apportioned interstate waters even if it deals with private parties."). In the final sentence of footnote 6, the Court referred to both grounds—state actors and the overriding federal interest—as having been satisfied. The Court noted that "[c]ertainly these same demands for applying federal law are present in the pollution of a body of water such as Lake Michigan bounded, as it is, by four States." *Milwaukee I*, 406 U.S. at 105 n. 6, 92 S.Ct. 1385. The Court went on to apply the federal common law of nuisance to the interstate nuisance claim.

Tellingly the *Milwaukee I* Court did *not* write what it easily could have articulated, to wit: "it is not only the character of the parties that requires us to apply federal law, *but also* where there is an overriding

federal interest in the need for a uniform rule of decision . . . we have fashioned federal common law." Had the Court presented the proposition in that way, the footnote would leave little if any doubt that *both* the character of the party—as a state—*and* an overriding federal interest in a uniform rule of decision were needed in order to apply the federal common law of nuisance. But it did not do so, choosing instead to note that certain federal interests could serve as an alternate basis for applying federal common law. While the Court noted the character of the party as a factor bearing on its decision to apply the federal common law of nuisance, it was only one factor and not a *sine qua non* for its application. The Court set out no requirement that only states could bring claims under the federal common law of nuisance.

In addition to the structure of footnote 6, the Court's reference to *Sabbatino* provides additional guidance on whether non-states may pursue an action grounded in federal common law of nuisance. The Supreme Court, of course, has not explicitly addressed whether private parties may bring such a nuisance action. But in other areas of the federal common law—areas involving the same kind of overriding federal interest in the need for a uniform rule of decision or presenting a controversy that touches basic interests of federalism—the Court has focused on the claim, not on the *party presenting the claim*, and has held that private plaintiffs may bring actions and may seek remedies under federal common law. *See, e.g., Nat'l Audubon Soc'y v. Dep't of Water*, 869 F.2d 1196, 1211-12 (9th Cir.1988) (Reinhardt, J., dissenting) (citing Supreme Court cases in which federal common law claims by private parties were allowed to proceed); *cf. Sabbatino*, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) (permit-

ting an action brought by an instrumentality of the Cuban government); *Nat'l Sea Clammers*, 616 F.2d at 1234-35. It would make no sense to carve out the federal common law of nuisance from other areas of the federal common law as the one area that permits states, and only states, to bring actions. Private parties and governmental entities that are not states may well have an equally strong claim to relief in a circumstance invoking an overriding federal interest or where the controversy touches issues of federalism.

For the foregoing reasons, we hold that New York City and the Trusts are not precluded from bringing claims sounding in the federal common law of nuisance.

2. *The Restatement (Second) of Torts's Requirements for Maintaining an Action for Public Nuisance under § 821C*

Because we apply the Restatement's definition of public nuisance in federal common law of nuisance suits, we will also look to the Restatement for guidance on whether non-state entities may bring claims for public nuisance. The question of whether such entities may maintain a public nuisance suit under § 821C is a threshold issue that must be addressed before the Court can examine whether the parties have stated a claim for public nuisance under § 821B.

Section 821C, entitled "Who can recover for public nuisance," provides:

> (1) In order to recover damages in an individual action for public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the

right common to the general public that was the subject of the interference.

(2) In order to maintain a proceeding to enjoin to abate a public nuisance, one must

(a) have the right to recover damages, as indicated in Subsection (1), or

(b) have the authority as a public official or public agency to represent the state or a political subdivision in the matter, or

(c) have standing to sue as a representative of the general public, as a citizen in a citizen's action or as a member of a class in a class action.

Restatement (Second) of Torts § 821B; *see also, e.g.*, *In re Exxon Valdez*, 104 F.3d 1196, 1197 (9th Cir.1997) (applying § 821C to whether individuals could assert a public nuisance claim under Alaska law); *Nat'l Sea Clammers*, 616 F.2d at 1234 (applying § 821C to the question of whether a private party may recover damages for public nuisance).

a. Can New York City Maintain a Public Nuisance Suit under § 821C?

New York City has alleged that it is "responsible for protecting the health and well-being of its citizens and residents and protecting the natural resources of the City." It maintains that unrestrained emissions of greenhouse gases will increase the temperature in the City, which will in turn increase heat-related deaths, damage the coastal infrastructure, and wreak havoc in residents' daily lives. Under these circumstances, the City has sufficiently alleged interference with rights common to the general public. In addition, cities are political subdivisions of states.

Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 609 n. 10, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001). New York City appears as a party plaintiff in its own name. *See e.g.*, *N.Y. State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1362 (2d Cir.1989) (stating that New York City was a "proper party to bring an action to restrain a public nuisance that allegedly may be injurious to the health and safety of its citizens" under New York State public nuisance law). Accordingly, pursuant to Restatement § 821C(2)(b), New York City may maintain an action for public nuisance.

b. Can the Trusts Maintain a Public Nuisance Suit under § 821C?

We must conduct a more extensive analysis to determine if the Trusts, as private entities, may maintain an action for public nuisance. The relevant subsection of § 821C(2) asks whether the Trusts would "have the right to recover damages." Restatement § 821C(2)(a); *see also* Restatement § 821C(1). In order to maintain a public nuisance action, the Trusts must allege that they have suffered a harm different from that suffered by other members of the public, and that they suffered that harm when exercising a public right with which Defendants interfered.

The Trusts assert that the public rights at issue in this case are "the rights to use, enjoy, and preserve the aesthetic and ecological values of the natural world." Their complaint provides specific examples of how the ecological value of the properties they own will be diminished or destroyed by global warming, and alleges that they suffer "special injuries, different in degree and kind from injuries to the general public." Restatement § 821B "sweeps broadly in de-

fining a 'public right,' including 'the public health, the public safety, the public peace, the public comfort, or the public convenience.'" *In re StarLink Corn Prods. Liab. Litig.*, 212 F.Supp.2d 828, 848 (N.D.Ill.2002) (quoting Restatement § 821B(2)(a)). As did the States and New York City, the Trusts assert that the deleterious effects of global warming interfere with public rights. Specifically, the Trusts assert a public right to a climate that will not drastically change as a result of greenhouse gas 'pollution,' thereby devastating the ecology and the human population. Public nuisance cases have traditionally defined public rights broadly. We find that the Trusts have asserted an interference with a public right in protecting natural resources. *See, e.g., Nat'l Adver. Co. v. City of Denver*, 912 F.2d 405, 409 (10th Cir.1990) (noting that there is a governmental, *i.e.*, public, interest in preserving aesthetic values); *Phila. Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 316 (3d Cir.1985) (holding that right to pure water is a public right); *Celanese Corp. v. Coastal Water Auth.*, 475 F.Supp.2d 623, 639 (S.D.Tex.2007) (observing that public rights include enjoyment of clean air or water); *Graham Oil Co. v. BP Oil Co.*, 885 F.Supp. 716, 723 (W.D.Pa.1994) (finding that the public right interfered with the right to soil and water free of contamination).

The next question is whether the Trusts may maintain an action for public nuisance because they have suffered harm to that right of a kind different from that suffered by the general public. Section 821C, cmt. b, provides some insight into what constitutes harm different in kind and degree:

> The private individual can recover in tort for a public nuisance only if he has suffered harm of a

> different kind from that suffered by other persons exercising the same public right. It is not enough that he has suffered the same kind of harm or interference but to a greater extent or degree. . . . The explanation of the refusal of the courts to take into account these differences in extent undoubtedly lies in the difficulty or impossibility of drawing any satisfactory line for each public nuisance at some point in the varying gradations of degree, together with the belief that to avoid multiplicity of actions invasions of rights common to all of the public should be left to be remedied by action by public officials.

Restatement § 821C, cmt. b. Difference in degree, however, as a measure of a different kind of harm, is not entirely out of the picture. Comment c provides:

> Difference in degree of interference cannot, however, be entirely disregarded in determining whether there has been difference in kind. Normally there may be no difference in the kind of interference with one who travels a road once a week and one who travels it every day. But if the plaintiff traverses the road a dozen times a day he nearly always has some special reason to do so, and that reason will almost invariably be based upon some special interest of his own, not common to the community. Significant interference with that interest may be particular damage, sufficient to support the action in tort. . . . Thus in determining whether there is a difference in the kind of harm, the degree of interference may be a factor of importance that must be considered.

Id. § 821C, cmt. c.

Numerous commentators have discussed the problems associated with determining whether a private entity may maintain an action for public nuisance. Despite the still-evolving nature of public nuisance, especially when plaintiffs are seeking equitable remedies, the experts agree that a line must be drawn between the many who suffer from a public nuisance and those who may properly bring an action. That line is especially important in this case, where the harms allegedly inflicted by global warming have an impact on millions of people to greater or lesser degrees. Prosser states that "Defendants are not to be harassed, and the time of the courts taken up, with complaints about public matters from a multitude who claim to have suffered. . . . This insistence upon the rejection of the trivial has been especially marked in the decisions. . . ." William L. Prosser, *Private Action for Public Nuisance*, 52 Va. L.Rev. 997, 1007 (1966). Twenty-five years later, commentators observed,

> [A] court confronted with a private plaintiff would likely require a stronger showing that the plaintiff indeed represented the larger public interest before a *public* nuisance was found. Logically, a private citizen whose interest in the litigation arises solely from having incurred special—and private—damages should not be regarded as equivalent to the public official who brings an action in public nuisance.

Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After Boomer*, 54 Alb. L.Rev. 359, 389 (1990). These views underscore the importance of setting forth how the difference in "kind" must be assessed when private entities seek to

maintain an action for public nuisance, particularly when the nuisance concerns carbon dioxide and other greenhouse gas emissions that lead to global warming.

Fortunately, in the case before us, we need not demarcate the outer limits of § 821C(1)'s requirement that the harms be different in kind (sometimes called "special injury"), because the harms asserted by the Trusts qualify. The Trusts are nonprofit land trusts with legally recognized missions to preserve ecologically sensitive land areas, and they own land threatened with significant harm (as a result of global warming). The Trusts have opened that land for public use—an invitation the public has accepted in significant numbers. Put another way, although the Trusts are private entities, they share similar features with public entities due to the fact that their lands are open to the public and they are private property owners "whose charter, purpose and mission is to preserve land for public use, enjoyment, and benefit." These factors lead us to conclude that the Trusts will suffer harms different in kind from the harms suffered by other members of the public, including individual landholders. The magnitude of the Trusts' land ownership also constitutes such a difference in degree as to become a difference in kind, the sort of difference explicated in § 821C, cmt. c. Because the Trusts have satisfied the requirements of § 821C(1), they may maintain an action for public nuisance.

We hold that New York City and the Trusts may properly maintain actions under the federal common law of nuisance. We now turn to the question of whether the Trusts and New York City have stated a claim.

3. *Have New York City and the Trusts Stated a Claim for Public Nuisance under § 821B?*

We have determined that the City and private entities are not barred by their status from bringing a public nuisance cause of action. We now return to the ultimate question: have the non-State Plaintiffs alleged a public nuisance, *i.e.*, an "unreasonable interference with a right common to the general public," pursuant to the definition found in Restatement § 821B(1)? Section 821B(1) refers us to three circumstances listed in § 821B(2), any of which may sustain a holding that an interference with a public right is unreasonable: (1) whether the "conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience," Restatement § 821B(2)(a); (2) "whether the conduct is proscribed by a statute," *id.* § 821B(2)(b); or (3) "whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right," *id.* § 821B(2)(c). The Restatement comments that these three circumstances for determining unreasonable interference

> are not conclusive tests controlling the determination of whether an interference with a public right is unreasonable. They are listed in the disjunctive; any one may warrant a holding of unreasonableness. They also do not purport to be exclusive. Some courts have shown a tendency, for example, to treat significant interferences with recognized aesthetic values or established principles of conservation of natural resources as amounting to a public nuisance. The

> language of Subsection (2) is not intended to set restrictions against developments of this nature.

Id. § 821B, cmt. e. The Restatement goes on to explain how conduct interferes with a public right so as to be cognizable as a public nuisance:

> Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right. A public right is one common to all members of the general public. It is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured. . . .
>
> It is not, however, necessary that the entire community be affected by a public nuisance, so long as the nuisance will interfere with those who come in contact with it in the exercise of a public right or it otherwise affects the interests of the community at large. . . . The spread of smoke, dust or fumes over a considerable area filled with private residences may interfere also with the use of the public streets or affect the health of so many persons as to involve the interests of the public at large.

Id. § 821B, cmt. g. Courts apply a "permissive" standard in assessing public nuisance pleadings. *See, e.g., In re StarLink Corn Prods. Liab. Litig.*, 212 F.Supp.2d at 848.

We have found that New York City and the Trusts have alleged interference with rights common to the general public. Their pleadings must also satisfy § 821B(2)'s requirement that the interference be unreasonable. Subsections 821B(2)(a) ("whether the

conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort, or the public convenience") and 821B(2)(c) ("whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right") apply here.

New York City, as a public entity, has pleaded an unreasonable interference with public rights. It has alleged significant interference: with public health (where heat-related deaths could double and increased smog will increase residents' respiratory illnesses); with public safety (where increased flooding in its coastal areas will damage to city-owned property, creating hazardous conditions); and with public comfort and convenience (by flooding of airports, subway stations, tunnels, storm sewers and wastewater treatment plants). These allegations constitute significant interference, satisfying § 821B(2)(a). The City has also claimed that the conduct is of a continuing nature, pointing out that Defendants' plants have been in continuous operation and have emitted large amounts of carbon dioxide from the combustion of fossil fuels for decades, and that "Defendants know or should know that their emissions of carbon dioxide contribute to global warming and to the resulting injuries and threatened injuries to the plaintiffs, their citizens and residents, and the environment." New York City has thus pleaded a claim that satisfies the requirements of Restatement § 821B(2)(c) and the federal common law of nuisance.

Similarly, the Trusts have pleaded an unreasonable interference with public rights. The Trusts have asserted that Defendants' carbon dioxide emissions,

"by contributing to global warming, constitute a substantial and unreasonable interference with public rights including, *inter alia*, the rights to use, enjoy, and preserve the aesthetic and ecological values of the natural world." This alleged significant interference with the public right to be free from widespread environmental harm caused by the effects of global warming satisfies § 821B(2)(a)'s requirement that Defendants' conduct significantly interferes with the public health, comfort, and convenience. The Trusts have also asserted that "Defendants know or should know that their emissions of carbon dioxide contribute to global warming, to the general public injuries such warming will cause, and to plaintiffs' special injuries," and that "Defendants and their predecessors in interest have emitted large amounts of carbon dioxide from the combustion of fossil fuels for at least many decades." These statements are sufficient to allege that Defendants' conduct was "of a continuing nature," as well as that it has already produced a "permanent or long-lasting effect," and that Defendants "know or have reason to know" that their conduct "has a significant effect on the public right." As such, the allegations establish a claim for public nuisance under § 821B(2)(c).

We note that Defendants have raised the same argument against New York City and the Trusts as that Defendants raised against the States—*i.e.*, that the common law of nuisance exists only for "simple type" nuisances involving substances that cause immediate, localized harms directly traceable to out-of-state sources, and that the nuisance asserted by New York City and the Trusts does not fit that definition. We have already examined those contentions and found them to be without merit. The same result obtains here.

In conclusion, we hold that New York City and the Trusts have stated a claim under the federal common law of nuisance.

V. Displacement of Plaintiffs' Federal Common Law Claim

Defendants allege that even if Plaintiffs can raise a federal common law nuisance claim, any such cause of action has been displaced[37] by federal legislation. A cause of action has been displaced when "federal statutory law governs a question previously the subject of federal common law." *Milwaukee II*, 451 U.S. at 316, 101 S.Ct. 1784.

A. The Displacement Standard

Because "federal common law is subject to the paramount authority of Congress," federal courts may resort to it only "in absence of an applicable Act of Congress." *Milwaukee II*, 451 U.S. at 313-14, 101 S.Ct. 1784 (alteration and internal quotation marks omitted). Federal common law is a "necessary

---

[37] As noted above, the concept of 'displacement' refers to a situation in which "federal statutory law governs a question previously the subject of federal common law." *Milwaukee II*, 451 U.S. 304, 316, 101 S Ct. 1784, 68 L.Ed.2d 114 (1981). The term 'pre-emption,' in contrast, generally addresses a circumstance in which a federal statute supersedes state law, but courts have also frequently used the word "pre-emption" when discussing whether a statute displaces federal common law *See, e.g., id.* at 317 n 9, 101 S.Ct. 1784; *Oneida Indian Nation of N.Y. v. County of Oneida*, 719 F.2d 525, 530 (2d Cir.1983), *aff'd in part and rev'd in part on other grounds*, 470 U.S. 226, 105 S.Ct. 1245, 84 L.Ed 2d 169 (1985). We further note that the "appropriate analysis" in determining whether displacement of the federal common law has occurred "is not the same as that employed in deciding if federal law pre-empts state law." *Milwaukee II*, 451 U.S. at 316, 101 S.Ct. 1784.

expedient" to which federal courts may turn when "compelled to consider federal questions which cannot be answered from federal statutes alone." *Id.* at 314, 101 S.Ct. 1784 (internal quotation marks omitted). But "when Congress addresses a question previously governed by a decision rested on federal common law the need for . . . lawmaking by federal courts disappears." *Id.* "[T]he question [of] whether a previously available federal common-law action has been displaced by federal statutory law involves an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common law." *Id.* at 315 n. 8, 101 S.Ct. 1784.

The state of Illinois's suit against the City of Milwaukee resulted in the leading Supreme Court cases addressing the circumstances under which courts may find Congress has displaced the federal common law.[38] In *Milwaukee I*, 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972), the Supreme Court determined that federal common law governed the water pollution dispute at issue in that case, notwithstanding that Congress had "enacted numerous laws touching interstate waters." *Id.* at 101, 92 S.Ct. 1385.

At the time of *Milwaukee I*, the Federal Water Pollution Control Act required EPA to "prepare or develop *comprehensive* programs for eliminating or reducing the pollution of interstate waters and tri-

---

[38] Illinois sued "four cities of Wisconsin, the Sewerage Commission of the City of Milwaukee, and the Metropolitan Sewerage Commission of the County of Milwaukee" seeking abatement of a public nuisance caused by the defendants' discharge of "raw or inadequately treated sewage and other waste materials" into Lake Michigan, "a body of interstate water." *Milwaukee I*, 406 U.S. at 93, 92 S.Ct. 1385.

butaries thereof and improving the sanitary condition of surface and underground waters." 33 U.S.C. § 1153 (1970) (emphasis added). The Court noted that the Rivers and Harbors Act of 1899, which "established some surveillance by the Army Corps of Engineers over industrial pollution, not including sewage," had been "reinforced and broadened by a complex of laws recently enacted." *Milwaukee I*, 406 U.S. at 101, 92 S.Ct. 1385. The Court described the legislative landscape existing at the time as follows:

> By the National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. § 4321 *et seq.*, Congress "authorizes and directs" . . . that "all agencies of the Federal Government shall . . . identify and develop methods and procedures . . . which will insure that presently unqualified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations."
>
> Congress has evinced increasing concern with the quality of the aquatic environment as it affects the conservation and safeguarding of fish and wildlife resources.
>
> Buttressed by these new and expanding policies, the Corps of Engineers has issued new Rules and Regulations governing permits for discharges or deposits into navigable waters.

Id. at 101-02, 92 S.Ct. 1385 (citations omitted and additional internal paragraph breaks inserted). Perhaps most importantly:

> The Federal Water Pollution Control Act, tightens control over discharges into navigable

> waters so as not to lower applicable water quality standards. . . .
>
> The Federal Water Pollution Control Act . . . makes clear that it is federal, not state, law that in the end controls the pollution of interstate or navigable waters. While the States are given time to establish water quality standards, if a State fails to do so the federal administrator promulgates one. Section 10(a) *makes pollution of interstate or navigable waters subject "to abatement"* when it "endangers the health or welfare of any persons." The abatement that is authorized follows a long-drawn out procedure unnecessary to relate here. It uses the conference procedure, hoping for amicable settlements. But if none is reached, the federal administrator may request the Attorney General to bring suit on behalf of the United States for abatement of the pollution.

Id. at 101-03, 92 S.Ct. 1385 (footnotes and citations omitted) (emphasis added); *see also* 33 U.S.C. § 1160(a) (1970).[39]

The Court determined that relief was available under the federal common law because "[t]he remedy sought by Illinois"—to abate the public nuisance of water pollution—was "not within the precise scope of

---

[39] The Court further noted that the "[t]he application of federal common law to abate a public nuisance in interstate or navigable waters is not inconsistent with the Water Pollution Control Act," because "Congress provided in § 10(b) of that Act that, save as a court may decree otherwise in an enforcement action, '(s)tate and interstate action to abate pollution of interstate or navigable waters shall be encouraged and shall not . . . be displaced by Federal enforcement action.'" *Milwaukee I*, 406 U.S. at 104, 92 S.Ct. 1385

remedies prescribed by Congress." *Id.* at 103, 92 S.Ct. 1385. The Court stated presciently, however, that "[i]t may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But *until that comes to pass*, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution." *Id.* at 107, 92 S.Ct. 1385 (emphasis added).

Following the decision in *Milwaukee I*, Congress passed the more comprehensive Federal Water Pollution Control Act Amendments of 1972 ("FWPCA" or "the Amendments"), just as the *Milwaukee I* Court had anticipated. *See* Pub.L. 92-500, 86 Stat. 816; *Milwaukee II*, 451 U.S. at 310-11, 101 S.Ct. 1784. The Supreme Court "granted certiorari to consider the effect of this legislation on the previously recognized cause of action."[40] *Milwaukee II*, 451 U.S. at 308-09, 101 S.Ct. 1784.

The *Milwaukee II* Court explained that Congress had enacted the amended FWPCA in recognition that "the Federal water pollution control program . . . has been inadequate in every vital aspect." *Id.* at 310, 101

---

[40] Because the Supreme Court in *Milwaukee I* declined to exercise original jurisdiction over the state of Illinois's complaint, *Milwaukee I*, 406 U.S. at 108, 92 S.Ct 1385, Illinois filed a complaint in the federal district court, which entered judgment in favor of Illinois, *see Milwaukee II*, 451 U.S at 310-12, 101 S.Ct. 1784, and the City of Milwaukee appealed. The Seventh Circuit affirmed in part and reversed in part, *Illinois v. City of Milwaukee*, 599 F.2d 151 (7th Cir.1979), ruling, *inter alia*, that the 1972 Amendments to the FWPCA had not pre-empted the federal common law of nuisance. *See Milwaukee II*, 451 U.S. at 312, 101 S.Ct. 1784. The Supreme Court granted certiorari to consider this issue in *Milwaukee II*, 451 U.S. at 307-08, 310 n. 4, 101 S Ct. 1784.

S.Ct. 1784 (citation and internal quotation marks omitted). The Court characterized the Amendments as "not merely another law 'touching interstate waters' of the sort surveyed in [*Milwaukee I*]." *Id.* at 317, 101 S.Ct. 1784. Rather, the new federal legislation had "occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency," in which "[e]*very* point source discharge is prohibited unless covered by a permit." *Id.* at 317-18, 101 S.Ct. 1784. Looking to the legislative history of the Amendments, the Court found that "Congress'[s] intent in enacting the Amendments was clearly to establish an all-encompassing program of water pollution regulation." *Id.* at 318, 101 S.Ct. 1784 ("The 'major purpose' of the Amendments was 'to establish a *comprehensive* long-range policy for the elimination of water pollution.'") (quoting S.Rep. No. 92-414, at 95 (1975), U.S.Code Cong. & Admin.News 1972, p. 3668 (emphasis added in *Milwaukee II*)). Accordingly, the Court stated, "[t]he establishment of such a self-consciously comprehensive program by Congress, which certainly did not exist when [*Milwaukee I*] was decided, strongly suggests that there is no room for courts to attempt to improve on that program with federal common law."[41] *Id.* at 319, 101 S.Ct. 1784.

Turning to the particular claims involved in the case, the *Milwaukee II* Court concluded that there was "no question that the problem of effluent limitations has been thoroughly addressed" by the FWPCA

---

[41] A Supreme Court case decided two months later, *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed 2d 435 (1981), explicitly held that the FWPCA displaced federal common law in the entire area of water pollution.

administrative regime, thereby precluding the federal courts from applying the federal common law to impose "more stringent limitations than those imposed under the regulatory regime." *Id.* at 320, 101 S.Ct. 1784. Illinois had complained that the defendants' sewage treatment plants and sewer systems were discharging inadequately treated sewage into Lake Michigan at discrete points. *See id.* at 308-09, 319-20, 101 S.Ct. 1784. The Court stated that the permitting system and specific effluent limitations established pursuant to the Act "addressed the problem" of harmful pollution stemming from point source discharges such that there was "no 'interstice' here to be filled by federal common law." *Id.* at 319-24, 101 S.Ct. 1784; *see also id.* at 310-11, 101 S.Ct. 1784 ("The Amendments established a new system of regulation under which it is illegal for anyone to discharge pollutants into the Nation's waters except pursuant to a permit."). Significantly, the "complaint . . . that the permits issued . . . under the Act do not control overflows or treated discharges in a sufficiently stringent manner" did "not suffice to create an 'interstice' to be filled by federal common law." *Id.* at 324 n. 18, 101 S.Ct. 1784. "The question is whether the field has been occupied, not whether it has been occupied in a particular manner." *Id.* at 324, 101 S.Ct. 1784.

This Court has noted that *Milwaukee II* articulated:

> [A] strict test for determining the preemptive effect of a federal statute. Instead of inquiring whether "Congress ha[s] affirmatively proscribed the use of federal common law," we are to conclude that federal common law has been preempted as to every question to which the legis-

> lative scheme "spoke directly," and every problem that Congress has "addressed."

Matter of Oswego Barge Corp., 664 F.2d 327, 335 (2d Cir.1981) (quoting *Milwaukee II*, 451 U.S. at 315, 101 S.Ct. 1784) (citations omitted). To put it another way, in determining whether a federal statute has displaced a federal common law cause of action, a court must consider

> whether the federal statute "[speaks] *directly* to [the] question" otherwise answered by federal common law. As we stated in *Milwaukee II*, federal common law is used as a "necessary expedient" when Congress has not "spoken to a *particular* issue."

County of Oneida v. Oneida Indian Nation of N.Y. State, 470 U.S. 226, 236-37, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985) (citations omitted). A statute need "not address every issue of [an area of law], . . . but when it does speak directly to a question, the courts are not free to 'supplement' Congress'[s] answer so thoroughly that the [statute] becomes meaningless." *Milwaukee II*, 451 U.S. at 315, 101 S.Ct. 1784 (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978)). The displacement question requires courts to distinguish between situations in which regulatory coverage leaves a "gap" which federal common law can appropriately fill, and situations in which the federal common law overlaps with an existing regulatory scheme but would supply a different approach than the one Congress has mandated. *See Milwaukee II*, 451 U.S. at 324 n. 18, 101 S.Ct. 1784.

In analyzing Defendants' contention that federal legislation has displaced Plaintiff's federal common

law nuisance claim, we are mindful that dueling presumptions apply. On the one hand, "separation of powers concerns create a presumption in favor of preemption of federal common law whenever it can be said that Congress has legislated on the subject." *Oswego Barge*, 664 F.2d at 335 (citation omitted). At the same time, "[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *United States v. Texas*, 507 U.S. 529, 534, 113 S.Ct. 1631, 123 L.Ed.2d 245 (1993) (internal quotation marks omitted). "[C]ourts may take it as a given that Congress has legislated with an expectation that the common law principle will apply except when a statutory purpose to the contrary is evident." *Id.* (internal quotation marks and alteration omitted).

B. Analysis

Defendants' primary argument is that the CAA is a "comprehensive legislative scheme," providing the backdrop against which Congress has "legislated repeatedly on the subjects of carbon dioxide emissions and global climate change." Defendants argue that the CAA and five other statutes—which primarily require scientific research, technology development, and reporting of emissions levels by electric utilities—sufficiently "address" global climate change and carbon dioxide emissions such that the federal common law of nuisance has been displaced because Congress has "legislated on the subject."

1. The Clean Air Act

a. Overview: the Clean Air Act

As this Court has previously stated, "[t]he Clean Air Act, created a complex and comprehensive leg-

islative scheme to protect and improve the nation's air quality."[42] *Weiler v. Chatham Forest Prod., Inc.*, 392 F.3d 532, 534 (2d Cir.2004) (citation omitted). Under the CAA, the EPA Administrator must specify the "criteria" for "air quality" by determining which "air pollutant[s] . . ., in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare [and] the presence of which in the ambient air results from numerous or diverse mobile or stationary sources."[43] 42 U.S.C. § 7408(a)(1)(A)-(B); *see also Natural Res. Def. Council, Inc. v. Train*, 545 F.2d 320, 328 (2d Cir.1976). For each of these so-called "criteria" air pollutants, the Administrator promulgates "national . . . ambient air quality standard[s]" ("NAAQS") to limit the amount of each pollutant in the ambient air, 42 U.S.C. § 7409(a), to levels

---

[42] We caution that our previous observation that the CAA is "comprehensive" was not made in a displacement context. *Weiler* addressed whether section 304(a)(3) of the Act, 42 U.S.C. § 7604(a)(3), allowed a private litigant to sue to challenge the determination of a state environmental agency with respect to whether the defendant could construct a factory without obtaining a particular kind of permit *Weiler*, 392 F.3d at 534-36; *cf Nat'l Audubon Soc'y v. Dep't of Water*, 869 F.2d 1196, 1213 n. 12 (9th Cir.1988) (Reinhardt, J., dissenting).

[43] The CAA defines "air pollutant" as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S.C. § 7602(g).

The Act also separately regulates "hazardous air pollutants," "which present, or may present": (1) "a threat of adverse human health effects" such as substances which are potentially "carcinogenic, mutagenic, teratogenic, neurotoxic, which cause reproductive dysfunction, or which are acutely or chronically toxic," or (2) "adverse environmental effects." 42 U.S.C. § 7412(b)(2).

"requisite to protect the public health . . . [and] the public welfare,"[44] *id.* § 7409(b)(1)-(2); *see also id.* § 7408(a)(2); *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001); *Weiler*, 392 F.3d at 534. EPA has interpreted "ambient air" to mean "that portion of the atmosphere, external to buildings, to which the general public has access." 40 C.F.R. § 50.1(e). Under the CAA, each State bears "the primary responsibility for assuring air quality" in accordance with these standards within its borders, and for developing a "State Implementation Plan" ("SIP") for how to do so, subject to EPA oversight. 42 U.S.C. §§ 7407, 7410.

Notably, the CAA distinguishes between stationary and mobile sources of air pollution.[45] *See, e.g. Weiler*, 392 F.3d at 534 ("'Broadly speaking, Title I of the statute regulates stationary sources of pollution and Title II regulates mobile sources, most importantly motor vehicles.'" (quoting *Sierra Club v. Larson*, 2 F.3d 462, 464 (1st Cir.1993))); Daniel A. Farber, et al., Cases and Materials on Environmental Law 533 (7th ed. 2006) ("The Act treats mobile sources

---

[44] The Act defines "welfare" as "includ[ing], but not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being." 42 U.S.C. § 7602(h).

[45] The CAA regulates mobile sources primarily by requiring standards for tailpipe emissions and by regulating fuel content. *See* 42 U.S.C. §§ 7521, 7545. While the states have significant latitude in setting stationary source emissions limits to meet the NAAQS, the Act reserves to the federal government exclusive authority to regulate motor vehicle emissions, although it permits the state of California to adopt its own standards. *See id.* § 7543.

differently than stationary sources."). The CAA defines the term "stationary source" as "generally any source of an air pollutant except those emissions resulting directly from an internal combustion engine for transportation purposes or from a nonroad engine or nonroad vehicle," 42 U.S.C. § 7602(z), or more specifically as "any building, structure, facility, or installation which emits or may emit any air pollutant," *id.* § 7411(a)(3). In the instant case, Plaintiffs complain of a nuisance resulting from greenhouse gas emissions from Defendants' power plants, so we must look specifically at the regulation of stationary sources.

Pursuant to the NAAQS, "'[w]hether new construction of polluting facilities is permitted in an area, and what kind of controls [on pollution] are required, depends on whether the area is below or above the standard for each pollutant.'" *Weiler*, 392 F.3d at 534 (quoting Sierra Club, 2 F.3d at 464). The emissions of criteria pollutants by stationary sources are largely regulated through the Title V permitting process. *See* 42 U.S.C. §§ 7661-7661f. A permit requires that a permit holder abide by emissions limits and imposes monitoring requirements. *See id.* §§ 7661a(a)-(b), 7661c. Title V permitting of stationary sources was added as part of the 1990 Amendments to the CAA and is administered by the states through their SIPs. *See id.* § 7661a(d), (i). "The state must calculate the emissions reductions necessary to achieve compliance with NAAQS and allocate the reductions among the sources of emissions. . . . [S]o long as the national standards are met, the state may use any mix of controls it wishes, no matter how lax or how strict." Farber, Environmental Law 563-64. In addition to the SIPs and Title V permitting process, the CAA authorizes EPA to establish technology-based stan-

dards for new stationary sources. *See* 42 U.S.C. § 7411.

At the present time, EPA has set NAAQS for only six criteria pollutants. Those pollutants are: sulfur dioxide, *see* 40 C.F.R. §§ 50.4, 50.5; particulate matter, *see* 40 C.F.R. §§ 50.6, 50.7, 50.13; carbon monoxide, *see* 40 C.F.R. § 50.8; ozone, *see* 40 C.F.R. §§ 50.9, 50.10, 50.15; nitrogen dioxide, *see* 40 C.F.R. § 50.11; and lead, *see* 40 C.F.R. §§ 50.12, 50.16. EPA does not currently regulate carbon dioxide under the CAA—at least not in the sense that EPA requires control of such emissions at this time.[46]

The Supreme Court recently held in *Massachusetts v. EPA*, 549 U.S. 497, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007), that "[b]ecause greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant' . . . EPA has the statutory authority to regulate the emission of [greenhouse] gases from new motor vehicles." *Id.* at 532, 127 S.Ct. 1438. The

---

[46] The Clean Air Act Amendments of 1990 provided that EPA "shall promulgate regulations" to "monitor" carbon dioxide emissions, Pub L. No 101-549, § 821(a), and EPA has done so, *see* 40 C.F.R. § 75. (Section 821 was not codified as part of the Act and appears as a note to 42 U.S.C. § 7651k.) A recent decision of the Environmental Appeals Board ("EAB") addressed whether this monitoring of carbon dioxide meant that the gas was "subject to regulation" for the purposes of the provision of the CAA requiring that the "best available control technology" ("BACT") be applied to emissions of any pollutant "subject to regulation" under the Act. *See* 42 U.S.C. § 7475(a)(4); *In re: Deseret Power Electric Cooperative (Bonanza)*, PSD Appeal No. 07-03, 14 E.A.D. —, 2008 WL 5572891 (EAB Nov. 13, 2008). The EAB found that the phrase "subject to regulation" was "not so clear and unequivocal" as to dictate whether EPA must impose a BACT limit for carbon dioxide, essentially leaving the matter to EPA's discretion. *See Deseret Power*, Slip Op. at 2.

Massachusetts Court rejected EPA's arguments and held that section 202(a)(1) of the CAA, 42 U.S.C. § 7521, authorized EPA "to regulate greenhouse gas emissions *from new motor vehicles* in the event that it forms a 'judgment' that such emissions contribute to climate change." *Id.* at 528, 127 S.Ct. 1438 (emphasis added). The Court was careful to state that it did not "reach the question whether . . . EPA *must* make an endangerment finding." *Id.* at 534, 127 S.Ct. 1438 (emphasis added). And only "[*i*]f EPA makes a finding of endangerment, [does] the Clean Air Act require[ ] the agency to regulate emissions of the deleterious pollutant from new motor vehicles." *Id.* at 533, 127 S.Ct. 1438 (emphasis added). Accordingly, while the Court viewed greenhouse gases as falling under the broad definition of "air pollutant" under the statute, *id.* at 528-29, 532, 127 S.Ct. 1438, its holding was narrow. Whether EPA would in fact regulate greenhouse gas emissions was to be decided by EPA upon remand.

In April 2009, EPA issued a Proposed Rule, in which it proposed to make a finding that "greenhouse gases in the atmosphere endanger the public health and welfare of current and future generations" due to the effects of climate change. Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed.Reg. 18886, 18886 (proposed Apr. 24, 2009). Specifically, the EPA Administrator proposed to find that:

- "atmospheric concentrations of greenhouse gases endanger public health and welfare within the meaning of Section 202(a) of the Clean Air Act";

- this occurs "specifically with respect to six greenhouse gases that together constitute the root of the climate change problem: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride";
- "the combined emissions of carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons from new motor vehicles and new motor vehicle engines are contributing to this mix of greenhouse gases in the atmosphere"; and
- as a result, "emissions of these substances from new motor vehicles and new motor vehicle engines are contributing to air pollution which is endangering public health and welfare under section 202(a) of the Clean Air Act."

Id. EPA also proposed to "define a single air pollutant that is the collective class of the six greenhouse gases." *Id.* at 18904. It views "this collective approach . . . [as] most consistent with the treatment of greenhouse gases by those studying climate change science and policy" where greenhouse gases are commonly evaluated on "a collective [carbon dioxide]-equivalent basis." *Id.*

b. Analysis: Whether the Clean Air Act Displaces Federal Common Law in the Area of Greenhouse Gas Emissions from Stationary Sources

Defendants suggest that the Clean Air Act, on its own, is a "comprehensive" scheme sufficient to displace federal common law in the area of global warming regulation. As an initial matter, we point

out that, in contrast to the "the area of water pollution," with respect to which the *Milwaukee II* and *Sea Clammers* cases held that the FWPCA "entirely" displaced the federal common law of nuisance, *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 21-22, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981), no Supreme Court case has held that the CAA has displaced federal common law in the area of air pollution.[47]

After *Massachusetts*, it is clear that EPA has statutory authority to regulate greenhouse gases as a "pollutant" under the Clean Air Act. *Massachusetts*, 549 U.S. at 532, 127 S.Ct. 1438. While the Massachusetts holding was made with explicit reference to emissions of greenhouse gases "from new motor vehicles," *id.* at 528-29, 533, we consider it reasonable to assume that the *Massachusetts* Court's finding that EPA has the statutory authority to deem greenhouse gases an "air pollutant" under the statute would apply to emissions of greenhouse gases from stationary sources as well. The *Massachusetts* Court primarily based its analysis on the Act's "capacious"

---

[47] Two district courts have held that the CAA preempts federal common law, but they addressed regulated, local air pollution, not interstate or unregulated pollution. *See Reeger v. Mill Serv., Inc.*, 593 F.Supp. 360, 363 (W.D.Pa.1984) (involving local emissions from a hazardous waste facility); *United States v. Kin-Buc, Inc.*, 532 F.Supp. 699 (D.N J.1982) (concerning local air pollution from a landfill). Based on statements made in Congress when the CAA was passed that termed the CAA "comprehensive," the *Kin-Buc* Court equated the CAA with the FWPCA—without further analyzing the two statutes—and held that the CAA preempted federal common law. As we discuss in this section, we respectfully disagree that the broad pronouncement in these two cases applies to our analysis of the law applicable to the emissions in this case.

definition of "air pollutant" found in the "General Provisions" of Title III:

> The Clean Air Act's sweeping definition of "air pollutant" includes "*any* air pollution agent or combination of such agents, including *any* physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air. . . ." § 7602(g) (emphasis added). On its face, the definition embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word "any." Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt "physical [and] chemical . . . substance[s] which [are] emitted into . . . the ambient air." The statute is unambiguous.

Id. at 528-29, 532, 127 S.Ct. 1438 (emphases in original) (footnotes omitted); *see also* 42 U.S.C. § 7602(g). The Court could hardly find otherwise because, as one commentator has noted, "CAA section 302(g) provides a definition of 'air pollutant' that is not only broad, it is absurdly broad. . . . The [portion] of the definition . . . establish[ing] what the term air pollutant 'includes[ ]' classifies nearly everything in the known universe that enters the air a CAA air pollutant." Christopher T. Giovinazzo, *Defending Overstatement: The Symbolic Clean Air Act and Carbon Dioxide*, 30 Harv. Envtl. L.Rev. 99, 151-52 (2006).

As the *Massachusetts* Court also made clear, however, the CAA requires regulation of greenhouse gas emissions from new motor vehicles *only if* EPA determines that the emissions of greenhouse gases from "new motor vehicles . . . cause, or contribute to, air pollution which may reasonably be anticipated

to endanger public health or welfare." 42 U.S.C. § 7521(a)(1); *Massachusetts*, 549 U.S. at 528-29, 533, 127 S.Ct. 1438; *see also Giovinazzo*, 30 Harv. Envtl. L.Rev. at 152 ("Since CAA regulation will only be triggered when a pollutant is shown to harm health or welfare, the absurd[ly broad] definition does not lead to absurd results."). To regulate emissions from stationary sources, like those at issue in the instant case, the CAA requires that EPA likewise find that emissions of greenhouse gases "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7408(a)(1)(A). But in the stationary source context, EPA must additionally find that "the presence of [greenhouse gases] in the ambient air results from numerous or diverse mobile or stationary sources." *Id.* § 7408(a)(1)(B).

At this time, EPA has not made any such findings. EPA has *proposed* to find that greenhouse gases endanger public health and welfare. Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed.Reg. at 18886. It has also *proposed* to find that emissions of such gases *from motor vehicles* contribute to an endangerment of public health and welfare. *Id.* As EPA notes succinctly on its website: "This proposed action, as well as any final action in the future, would not itself impose any requirements on industry or other entities." EPA, Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases under the Clean Air Act, http://www.epa.gov/climatechange/endangerment.html. A proposed finding has no effect in law that would affect any rights at issue here. After reviewing public comments EPA might legitimately determine—subject to the requirements of administrative law—

that its proposed finding is unwarranted or that regulation of greenhouse gases is otherwise inappropriate under the terms of the Act. We cannot say, therefore, that EPA's issuance of proposed findings suffices to regulate greenhouse gases in a way that "speaks directly" to Plaintiffs' problems and thereby displaces Plaintiffs' existing remedies under the federal common law. *See Milwaukee II*, 451 U.S. at 319-24, 101 S.Ct. 1784.

Furthermore, EPA's proposed 'cause and contribute' findings are made with reference to section 202(a) of the CAA, 42 U.S.C. § 7521(a), which requires EPA to set standards for emissions of "any air pollutant *from any class or classes of new motor vehicles or new motor vehicle engines*, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. Such standards shall be applicable to such vehicles and engines." *Id.* (emphases added). As EPA acknowledges on its website: "An endangerment finding under one provision of the Clean Air Act would not by itself automatically trigger regulation under the entire Act." EPA, Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases under the Clean Air Act, http://www.epa.gov/climatechange/endangerment.html. EPA has not even *proposed* to make any finding with respect to whether greenhouse gases are also an "air pollutant . . . the presence of which in the ambient air results from numerous or diverse mobile or stationary sources." *Id.* § 7408(a)(1)(B). Such a particularized finding would be required before EPA could regulate greenhouse gas emissions from stationary sources.

Additionally, at whatever point in the future EPA might make final and publish the necessary proposed

findings, EPA must still complete the remaining steps in the rulemaking process before it could actually regulate greenhouse gas emissions, including setting NAAQS and "delay[ing] any action 'to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance.'" *Massachusetts*, 549 U.S. at 531, 127 S.Ct. 1438 (quoting 42 U.S.C. § 7521(a)(2)). Until EPA completes the rulemaking process, we cannot speculate as to whether the hypothetical regulation of greenhouse gases under the Clean Air Act would in fact "speak[ ] directly" to the "particular issue" raised here by Plaintiffs, which is otherwise governed by federal common law. *County of Oneida*, 470 U.S. at 236-37, 105 S.Ct. 1245 (quoting *Milwaukee II*, 451 U.S. at 313-15, 101 S.Ct. 1784) (alterations omitted).

We also note that the regulatory scheme set up by the CAA bears more similarity to the Federal Water Pollution Control Act in place at the time of *Milwaukee I* than to the amended FWPCA addressed in *Milwaukee II*. When *Milwaukee I* was decided, the statute provided that pollution of interstate waters was "subject to abatement" when it "endanger[ed] the health or welfare of any persons." 33 U.S.C. § 1160(a) (1970). States were to adopt water quality criteria; if they did not, EPA was required to "promulgate such standards" itself. *Id.* § 1160(c)(2). Where pollution met the criteria for abatement, EPA would first convene parties to seek a voluntary resolution and, "[i]f the Administrator believes . . . effective progress toward abatement . . . is not being made and that the health or welfare of any persons is being endangered he shall recommend" remedial action to the appropriate State agency. *Id.* § 1160(e). If remedial action or "action which in the judgment of the Administrator is reasonably calculated to secure abatement"

had not been taken after six months, the Administrator "shall call a public hearing." *Id.* § 1160(f)(1). Finally, upon all other actions failing, EPA could request the Attorney General bring suit to secure abatement of interstate water pollution "which is endangering the health or welfare of persons." *Id.* § 1160(g)(1). Under the regime in place at the time of *Milwaukee I* the EPA could take action to abate water pollution that the Administrator found to "endanger[ ] . . . health or welfare," *id.*, just as under the CAA, EPA may seek to regulate air pollutants "which, in [the Administrator's] judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. §§ 7408(a)(1)(A), 7521(a)(1). The two statutes appear to afford the EPA Administrator a strikingly similar degree of discretion as to what and when to regulate.

In contrast, at the time of *Milwaukee II*, the amended FWPCA made it "illegal for anyone to discharge pollutants into the Nation's waters except pursuant to a permit" and EPA had "promulgated regulations establishing specific effluent limitations." *Milwaukee II*, 451 U.S. at 310-11, 101 S.Ct. 1784. As this Court has noted previously, the FWPCA "regulated *every* point source of water pollution," while under the CAA "the states and the EPA are not required to control effluents from every source, but only from those sources which are found by the states and the agency to threaten national ambient air quality standards."[48] *New England Legal Found. v.*

---

[48] In *New England Legal Foundation v. Costle*, 666 F.2d 30 (2d Cir.1981), this Court was presented with the question of whether the CAA "totally preempts federal common law nuisance actions based on the emission of chemical pollutants

Costle, 666 F.2d 30, 32 n. 2 (2d Cir.1981) (emphasis added); *cf. United States v. Tenn. Air Pollution Control Bd.*, 185 F.3d 529, 534 (6th Cir.1999) (noting "significant differences between the Clean Water Act and the Clean Air Act"). Additionally, the discharges at issue in the dispute between Illinois and Milwaukee were already subject to statutorily required permits and had been subject to statutory enforcement actions by the time of *Milwaukee II*. *See Milwaukee II*, 451 U.S. at 311, 101 S.Ct. 1784. With respect to the greenhouse gas emissions causing the alleged nuisance at issue in the instant cases, however, EPA has yet to make any determination that such emissions are subject to regulation under the Act, much less endeavor *actually* to regulate the emissions.

In sum, at least until EPA makes the requisite findings, for the purposes of our displacement analysis the CAA does not (1) regulate greenhouse gas emissions or (2) regulate such emissions from stationary sources. Accordingly, the problem of which Plaintiffs complain certainly has not "been thoroughly addressed" by the CAA. *Milwaukee II*, 451 U.S. at 320, 101 S.Ct. 1784. We express no opinion at this time as to whether the actual regulation of greenhouse gas emissions under the CAA by EPA, if and when such regulation should come to pass, would displace Plaintiffs' cause of action under the federal common law.

---

into the air," but affirmed on narrower grounds, never reaching that issue. *Id.* at 32 In a footnote, the *Costle* panel pointed out substantial differences between the FWPCA and the CAA "in areas which the majority of the Court in *City of Milwaukee* found were especially significant." *Id.* at 32 n. 2.

2. *All Legislation "on the Subject" of Greenhouse Gases*

a. Overview: the Legislative Landscape

Defendants further suggest that, against the "background" of the Clean Air Act, the various statutes Congress has enacted "touching" in some way on greenhouse gases or climate change are sufficient to displace Plaintiffs' federal common law of nuisance cause of action. The additional statutes to which Defendants refer require, *inter alia*, that the President establish a national climate program and make recommendations for responses to climate-induced problems; that research be undertaken; and that the Department of Energy assess policy mechanisms to reduce generation of greenhouse gases. Defendants argue that this conglomeration of statutes shows that Congress has "legislated on the subject" and that any federal common law cause of action has therefore been displaced.

Defendants refer to five statutes that they claim "address global climate change and carbon dioxide emissions." The earliest of these statutes, the National Climate Program Act of 1978, Pub.L. No. 95-367, 92 Stat. 601 (codified at 15 U.S.C. §§ 2901-2908), was enacted with the stated purpose of "establish[ing] a national climate program that will assist the Nation and the world to understand and respond to natural and man-induced climate processes and their implications." 15 U.S.C. § 2902; *see also* S.Rep. No. 95-740, at 1 (1978), U.S.Code Cong. & Admin.News 1978, pp. 1386, 1387 (Rep. of S. Comm. on Commerce, Sci., & Transp.) ("The purposes of the National Climate Act are to expand the nation's understanding of natural and man-induced climate processes, to relate knowledge of climate and its

implications and effects to human welfare and the environment, and to respond more effectively to climate-induced problems."). The law exclusively provides for research-related activities. The program's elements include:

> (1) *assessments of the effect* of climate on the natural environment, agricultural production, energy supply and demand, land and water resources, transportation, human health and national security. . . . Where appropriate such assessments may include *recommendations* for action;
>
> (2) basic and applied *research to improve the understanding* of climate processes, natural and man induced, and the social, economic, and political implications . . . ;
>
> (3) *methods for improving climate forecasts* . . . ;
>
> (4) global *data collection, and monitoring and analysis activities to provide* reliable, useful and readily available *information* on a continuing basis;
>
> (5) systems for the *management and active dissemination of* climatological *data, information and assessments* . . . ;
>
> (6) measures for increasing international cooperation in climate *research, monitoring, analysis and data dissemination*;
>
> (7) mechanisms for intergovernmental climate-related *studies* and services. . . . Such mechanisms may provide, among others, for the following State and regional services and functions: (A) *studies* relating to and *analyses* of climatic effects . . . ; (B) atmospheric *data collection and*

> *monitoring* . . . ; (C) *advice* to regional, State, and local government agencies regarding climate-related issues; (D) *information* to users within the State regarding climate and climatic effects; and (E) *information* to the Secretary regarding the needs of persons within the States for climate-related services, information, and data. . . . ;
>
> (8) experimental climate *forecast centers* . . . ; and
>
> (9) a preliminary 5-year *plan* [which] shall establish the goals and priorities for the Program. . . .

15 U.S.C. § 2904(d) (emphases added). The Senate Report recommending enactment of the bill stated that the program's objectives were: "(1) to *develop more reliable knowledge* about climate and to *improve the capability of forecast* . . . ; (2) to organize effectively the federal government's planning, management and budgeting *functions for climate research and advisory services*, and (3) *to use* existing and future climate *information to determine the effect* of climatic change." S.Rep. No. 95-740, at 2 (1978) U.S. Code Cong. & Admin.News 1978, at p. 1387 (emphases added). Nowhere does the law require any actions to limit greenhouse gas emissions that could even remotely "address" the problems of which Plaintiffs complain.

Defendants next cite the Global Climate Protection Act of 1987, Pub.L. No. 100-204, Title XI, §§ 1101-1106, 101 Stat. 1407, *as amended by* Pub.L. No. 103-199, 107 Stat. 2327, *reprinted as note to* 15 U.S.C. § 2901. This Act stated that:

> United States policy should *seek to*—

> (1) *increase* worldwide *understanding* of the greenhouse effect and its . . . consequences;
>
> (2) *foster cooperation* among nations *to develop* more extensive and coordinated scientific *research efforts* with respect to the greenhouse effect;
>
> (3) *identify* technologies and activities to limit mankind's adverse effect on the global climate . . . ; and
>
> (4) *work toward* multilateral agreements.

Id. § 1103(a) (emphases added). The Act additionally provided that the "President . . . shall be responsible for *developing and proposing* to Congress a coordinated national policy on global climate change" and that the "Secretary of State . . . shall be responsible to *coordinate* those aspects of United States policy requiring action through . . . diplomacy." *Id.* § 1103(b)-(c) (emphasis added). Although all of these requirements ostensibly serve as a "mandate for action on the global climate," *id.* § 1103, the Act consists almost entirely of mere platitudes. Beyond requiring that within two years the Secretary of State and EPA submit to Congress a report "analy[zing] . . . scientific understanding" and "assess[ing]" and "describ[ing]" U.S. "efforts" and "strategy" to further international cooperation in limiting global climate change, *id.* § 1104, the 1987 Act appears to require no action of any kind.

The Global Climate Change Act of 1990, Pub.L. No. 101-606, § 2, 104 Stat. 3096 (codified at 15 U.S.C. §§ 2921, 2931-2938), sought "to provide for *development and coordination of* a comprehensive and integrated United States *research program* which will *assist* the Nation and the world to *understand,*

assess, predict, and respond to human-induced and natural processes of global change." 15 U.S.C. § 2931(b) (emphases added). A Senate Committee Report describes the purpose of the bill as to "*provide the information* needed to achieve effective policies for addressing changes in the global climate and environment." S.Rep. No. 101-40, at 1 (1989), U.S.Code Cong. & Admin.News 1990, pp. 4394, 4395 (Rep. of S. Comm. on Commerce, Sci., & Transp.) (emphases added). The Act requires, in pertinent part:

- establishment of a Committee "for the purpose of increasing the overall effectiveness and productivity of Federal global change *research* efforts," 15 U.S.C. § 2932 (emphasis added);
- establishment of an "interagency United States Global Change *Research* Program to *improve understanding* of global change," *id.* § 2933 (emphases added);
- development of a National Global Change *Research Plan*, which shall "contain *recommendations for* national global change *research*," *id.* § 2934 (emphases added); and
- preparation of a "scientific *assessment*" that "*integrates, evaluates, and interprets* the *findings* of the Program . . . , *analyzes the effects* of global change . . . , and *analyzes* current *trends* in global change . . . and *projects* major *trends*," *id.* § 2936 (emphases added).

As with the statutes described above, this Act requires only research, which at best is a precursor to "speaking directly" to the problems created by cli-

mate change.[49] Significantly, however, the Act also provides that "[n]othing in this subchapter shall be construed, interpreted, or applied to preclude or delay the planning or implementation of any Federal action designed, in whole or in part, to address the threats of stratospheric ozone depletion or global climate change." *Id.* § 2938(c). This provision could be read as an acknowledgment by Congress that the legislation does little to avert the danger posed by climate change.

The Energy Policy Act of 1992, Pub.L. No. 102-486, § 2, 102 Stat. 2776 (codified at 42 U.S.C. §§ 13381-13388), provides in relevant part that:

- the Secretary of Energy shall *submit reports* to Congress that (1) "include [ ] an *assessment of* . . . the *feasibility and* . . . *implications* . . . of stabilizing [or reducing] the generation of greenhouse gases in the United States," 42 U.S.C. § 13381, and (2) "contain[ ] a comparative *assessment* of alternative policy mechanisms for reducing the generation of greenhouse gases," *id.* § 13384 (emphases added);

---

[49] Likewise, the International Cooperation in Global Change Research Act of 1990, Pub.L. No. 101-606, § 207, 104 Stat. 3096 (codified at 15 U.S.C §§ 2951-2953), provides in pertinent part only that the "President should direct the Secretary of State . . to *initiate discussions* with other nations leading toward international protocols and other agreements to *coordinate* global change *research* activities," 15 U.S.C § 2952(a) (emphases added), and "establish an Office of Global Change Research Information . . . to *disseminate* . . scientific *research information* . . which would be useful in preventing, mitigating, or adapting to the effects of global change," *id* § 2953 (emphases added).

- each "National Energy Policy Plan . . . shall include a least-cost energy *strategy*," which "shall be designed to achieve to the maximum extent practicable and at least-cost to the Nation," *inter alia*, "the stabilization and eventual reduction in the generation of greenhouse gases," *id.* § 13382 (emphasis added);
- the Secretary of Energy shall establish a Director of Climate Protection who will, *inter alia*, "*serve as the* Secretary's *representative for* interagency and multilateral policy *discussions* of global climate change . . . [and] *monitor* . . . domestic and international policies for their effects on the generation of greenhouse gases," *id.* § 13383 (emphases added);
- the Secretary of Energy shall "*develop . . . an inventory* of the national aggregate emissions of each greenhouse gas" for the years 1987-1990, though without "any new data collection authority," *id.* § 13385 (emphasis added);
- the Secretary of Energy shall "develop policies and programs *to encourage* the export and promotion of domestic energy resource technologies, including renewable energy, energy efficiency, and clean coal technologies," *id.* § 13386 (emphasis added); and
- the Secretary of the Treasury shall "establish a Global Climate Change Response Fund to act as a mechanism for United States contributions to assist global efforts in mitigating and adapting to global climate change," *id.* § 13388.

Essentially, the Act requires only research, planning and strategizing, technology development, assessments, and monitoring, but no real action to abate emissions. According to the House Committee Report recommending its enactment, "[t]he green-house title requires several *reports and analyses*, establishes a greenhouse gas reduction technology *transfer program*, and establishes an *accounting system for voluntary* gas reductions." H.R.Rep. No. 102-474, pt. 1, at 152-53 (1992), U.S.Code Cong. & Admin.News 1992, pp. 1954, 1975 (Rep. of H. Comm. on Energy and Commerce) (emphases added). In particular, "[t]he studies will advance the greenhouse warming debate significantly by giving Congress the information it needs to make the important choices it *will* need to make, perhaps soon, on greenhouse warming policy." *Id.* (emphasis added).

Similarly, the Energy Policy Act of 2005, Pub.L. No. 109-58, 119 Stat. 594 (codified at 42 U.S.C. § 13389), requires that:

- the President "*establish a Committee* on Climate Change Technology to—*integrate* Federal climate *reports*; and *coordinate* Federal climate change technology activities and programs," 42 U.S.C. § 13389(b)(1), and to "submit . . . a national *strategy to promote* the deployment and commercialization of greenhouse gas intensity reducing technologies and practices," *id.* § 13389(c)(1) (emphases added).
- the Secretary of Energy "establish . . . the Climate Change Technology Program to—*assist* the Committee in the *interagency coordination* of climate change technology research, development, demonstration, and

deployment," *id.* § 13389(d) (emphases added);

- the Secretary "conduct and make public *an inventory and evaluation* of greenhouse gas intensity reducing technologies . . . *to determine* which technologies are suitable for commercialization and deployment," report on the results of the inventory to Congress, and "use the results . . . as guidance in the commercialization and deployment of greenhouse gas intensity reducing technologies," *id.* § 13389(e) (emphases added);
- the Secretary "may establish . . . a Climate Change Technology Advisory Committee to *identify . . . barriers* to the commercialization and deployment of [such] technologies," *id.* § 13389(f) (emphasis added), and "*develop recommendations* that would provide for the removal of domestic barriers," *id.* § 13389(g) (emphasis added);
- the Secretary "shall *develop standards and best practices for calculating, monitoring, and analyzing* greenhouse gas intensity," *id.* § 13389(h) (emphasis added); and
- the Secretary "shall . . . *support demonstration projects* that . . . increase the reduction of greenhouse gas intensity," *id.* § 13389(i)(1) (emphasis added).

As Senators debating the 2005 Act stressed, "the bill does not include any provisions to address global warming." 151 Cong. Rec. S9335, 9339 (daily ed. July 29, 2005) (statement of Sen. Leahy) (stating also that "[t]his bill's refusal to take any steps to combat global warming is not only disappointing, but dangerous to

our future generations"); *see also id.* at 9353 (statement of Sen. Mikulski) ("I am also disappointed that the bill does not include . . . steps to deal with global warming . . . ."); *id.* at 9360 (statement of Sen. McCain) ("[This bill] won't assure the growing threat of global warming is addressed in any meaningful way. . . .").

This review of the statutes cited by Defendants shows that Congress has not acted to regulate greenhouse gas emissions in any real way. Congress has prescribed research, reports, technology development, and monitoring, but—as we discuss below—has not enacted any legislation that "addresses" the problem that climate change presents to Plaintiffs.

b. Analysis: All Statutes "Touching" on Greenhouse Gases

Seizing on language from this Court's decision in *Oswego Barge*, Defendants claim that federal common law is displaced if Congress has "legislated on the subject." *Oswego Barge*, 664 F.2d at 335. Defendants interpret the terms "legislate" and "subject" as broadly as possible and conclude that Congress's passage of the statutes described above indicates that the common law cause of action in this case has been displaced. Defendants make the related argument that displacement does not require a "comprehensive and effective remedial scheme" and that Congress "need not provide substitute remedies to displace a judicially-created one." These arguments miss the mark.

The language from *Oswego Barge* upon which Defendants rely for their displacement argument must be interpreted in the context of that case, as well as alongside the other language the Supreme Court and

this Court have employed when determining whether federal common law has been displaced. The phrase from *Oswego Barge* relied upon by Defendants—that displacement occurs when Congress has "legislated on the subject"—does not describe the standard for displacement, but rather is a comment on when the presumption in favor of displacement should be employed. *Oswego Barge*, 664 F.2d at 335 ("[S]eparation of powers concerns create a presumption *in favor* of preemption of federal common law whenever it can be said that Congress has legislated on the subject." (emphasis added)). The relevant inquiry, as set out in *Milwaukee II*, is whether the statute "speak[s] directly to a question." *Milwaukee II*, 451 U.S. at 315, 101 S.Ct. 1784 (quoting *Mobil Oil v. Higginbotham*, 436 U.S. 618, 625, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978)). And when Congress has not "spoken to a particular issue," the federal courts may apply federal common law. *Id.* at 313, 101 S.Ct. 1784. This Court in *Oswego Barge* acknowledged as much. *Oswego Barge*, 664 F.2d at 335 ("[W]e are to conclude that federal common law has been preempted as to every question to which the legislative scheme 'spoke directly,' and every problem that Congress has 'addressed.'").

This articulation focuses narrowly on the issue at hand. *See, e.g., United States v. Texas*, 507 U.S. 529, 534-35, 113 S.Ct. 1631, 123 L.Ed.2d 245 (1993) (holding that federal common law was not displaced by the Debt Collection Act because the Act did not speak directly to the issue, *i.e.*, the government's right to collect prejudgment interest on debts owed to it by the States, and opining that Congress's "mere refusal to legislate with respect to [that issue] falls far short of an expression of legislative intent to supplant the existing common law in that area" (internal quota-

tion marks omitted)); *County of Oneida*, 470 U.S. at 235-40, 105 S.Ct. 1245 (holding that the Nonintercourse Act of 1793 did not displace the Oneidas' federal common law right to sue to enforce their aboriginal land rights because the Act did "not speak directly to the question of remedies for unlawful conveyances of Indian land"); *Higginbotham*, 436 U.S. at 625, 98 S.Ct. 2010 (concluding that a federal maritime tort remedy allowing recovery for loss of society was displaced by Death on High Seas Act ("DOHSA") with respect to deaths occurring outside of state territorial waters because Congress in DOHSA had expressly limited damages for deaths to recovery of pecuniary losses; while the Act did "not address every issue of wrongful-death law," "when it does speak directly to a question, the courts are not free to 'supplement' Congress' answer"); *Matter of Oswego Barge*, 673 F.2d at 48 (dismissing petition for rehearing and finding displacement of maritime tort remedy for nuisance only because of "the precise and comprehensive statutory damage remedy Congress has created"). The "particular" issues here concern whether Congress has regulated emissions of greenhouse gases and whether it has legislated a remedy for the injuries caused by such emissions. The statutes cited by Defendants, together or separately, do not "speak directly" to those "particular issues."

The linchpin in the displacement analysis concerns whether the legislation *actually regulates* the nuisance at issue. Study is not enough. The FWPCA Amendments actually regulated the very discharges at issue in *Milwaukee II*. The Court in *Milwaukee I* and *II* underscored the importance of regulation of the particular nuisance in displacing federal common law by averring that federal common law would apply "[u]ntil the field has been made the subject of com-

prehensive legislation or authorized administrative standards." *Milwaukee II*, 451 U.S. at 314, 101 S.Ct. 1784 (quoting *Texas v. Pankey*, 441 F.2d 236, 241 (10th Cir.1971)). These statements indicate that in a federal nuisance cause of action, unless the statute regulates the nuisance itself, the federal common law that would otherwise be invoked to abate the particular nuisance applies. A collection of non-regulatory statutes focused on studying the issue is insufficient to displace the common law.

Furthermore, even at the time of *Milwaukee I*, as discussed above, "Congress ha[d] enacted numerous laws touching interstate waters," but those laws did not displace the federal common law cause of action. *Milwaukee I*, 406 U.S. at 101, 92 S.Ct. 1385. We see a parallel between the posture of the instant cases and that of *Milwaukee I*. The various laws that currently "touch[ ]" greenhouse gas emissions—but do not regulate them—more closely resemble the hodgepodge of legislation relating to water pollution that the Supreme Court found did not displace the common law in *Milwaukee I*, than they do the comprehensive regulation of the amended FWPCA. *See id.*

Moreover, Defendants' argument that displacement can be found here even though Congress has not enacted a remedy misses the point and is undercut by Supreme Court case law. In *Milwaukee I*, the Court surveyed the existing statute, concluded that "[t]he remedy sought by Illinois is not within the precise scope of remedies prescribed by Congress," 406 U.S. at 103, 92 S.Ct. 1385, and went on to point the way to the creation of federal common law remedies. In *County of Oneida*, the Court focused on remedies when determining whether federal common law was displaced. It held that because the statute at issue

did not "speak directly to the question of remedies for unlawful conveyances of Indian land," and there was no indication in the legislative history of the statute that Congress intended to "pre-empt common-law remedies," the plaintiffs' "right of action under the federal common law was not pre-empted by the passage of the [statute]." *County of Oneida*, 470 U.S. at 237, 240, 105 S.Ct. 1245 (emphasis added). The Oneida Court distinguished the statute at issue, which "did not establish a comprehensive remedial plan for dealing with violations of Indian property rights," with the FWPCA discussed in *Milwaukee II*, which provided "a comprehensive solution to the problem of interstate water pollution." *Id.* at 237, 105 S.Ct. 1245.[50]

---

[50] Defendants selectively quote language from *Illinois v Outboard Marine*, 680 F.2d 473 (7th Cir.1982) to support their contention that "Congress need not provide substitute remedies to displace a judicially-created one" They assert that the *Outboard Marine* Court rejected the State's request "to find that Congress has not 'addressed the question' because it has not enacted a remedy against polluters," *id.* at 478, adopting instead the defendant's position that "Congress has 'addressed the question,' since it has addressed the broader problem of pre-1972 pollution, even if it has not done so by means of remedies against the polluters themselves" *Id.* at 477.

The issue in *Outboard Marine* was whether the State retained its right under federal common law to abate a nuisance resulting from discharge of pollutants prior to the 1972 amendments to the FWPCA. *Id.* at 474. The Court held that due to the comprehensive nature of the FWPCA, which addressed *all* aspects of water pollution, and given the fact that (1) Congress "obviously considered the problem of pre-1972 discharges" when it wrote the legislation and (2) "*Milwaukee II* and *Sea Clammers*, taken together, establish that the 'question' Congress 'addressed' in the 1972 Amendments was the entire question of water pollution," *id* at 478, the FWPCA displaced *all* issues related to water pollution. That same result cannot, by

We hold that neither Congress nor EPA has regulated greenhouse gas emissions from stationary sources in such a way as to "speak directly" to the "particular issue" raised by Plaintiffs. If and when a statute or administrative regulation "speaks directly" to the question of whether stationary sources are required to control greenhouse gas emissions, then the parties may very well find themselves in circumstances similar to those of the parties in *Milwaukee II*, 451 U.S. 304, 101 S.Ct. 1784, 68 L.Ed.2d 114. But until that occurs, Plaintiffs have stated a viable cause of action under federal common law.

C. Displacement on Foreign Policy Grounds

Finally, Defendants argue that this lawsuit would undermine the nation's strategy concerning global climate change, thereby reducing the bargaining leverage the President needs to implement that strategy. Defendants reason that because the Supreme Court has held that state law is preempted when it gives the President "less to offer" other countries, and because displacement of federal common law is more readily found than preemption of state law, it follows that a federal common law cause of action that undermines the President's ability to implement Congress's approach to addressing climate change would also be "necessarily displaced." This argument—essentially that Plaintiffs' federal common law cause of action has been displaced by the President's

---

extrapolation, be reached with regard to the Clean Air Act, which is not as comprehensive as the FWPCA, and does not benefit from a Supreme Court case stating that all air pollution issues and remedies are subsumed under it. The reasoning and holding governing *Outboard Marine* cannot be imported into this case to dispose of the air pollution claims here.

conduct of foreign affairs—simply reiterates their political question argument and must be rejected for similar reasons.

VI. Defendant Tennessee Valley Authority's Separate Arguments

Defendant Tennessee Valley Authority ("TVA") urges that the district court's dismissal of the complaints against it should be affirmed on political question grounds. It also asserts that the discretionary function exception (also called the discretionary function doctrine) provides an additional reason for dismissal of the complaints.

A. Background

In 1933, Congress passed the TVA Enabling Act which created TVA "in the interest of the national defense and for agricultural and industrial development, and to improve navigation in the Tennessee River and to control the destructive flood waters in the Tennessee River and Mississippi River Basins." 16 U.S.C. § 831. The Act also empowered TVA to dispose of "surplus power" generated as an incident to navigation and flood control. *See id.* §§ 831i; 831h-1. Currently, TVA operates fossil-fuel fired electric generating facilities located in Alabama, Kentucky, Tennessee, and Mississippi. Due to the growth in TVA's power business, Congress made all of TVA's power programs self-financed. *See id.* § 831n-4. In charging its customers for power, TVA may set rates, with the caveat that it sell power at rates "as low as are feasible." *Id.* § 831n-4(f).

"TVA is a hybrid creature. It was created by Congressional charter in 1933, yet structured to operate much like a private corporation." *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 439 F.Supp.2d

486, 490 (W.D.N.C.2006), *aff'd*, 515 F.3d 344 (4th Cir.2008). Congress "intend[ed] that [TVA] shall have much of the essential freedom and elasticity of a private business corporation," H.R.Rep. No. 73-130, at 19 (1933), and this Court has observed that TVA "operates in much the same way as an ordinary business corporation, under the control of its directors in Tennessee, and not under that of a cabinet officer or independent agency headquartered in Washington," *Natural Resources Defense Council, Inc. v. Tennessee Valley Authority*, 459 F.2d 255, 257 (2d Cir.1972).

While Congress "endowed TVA with some features governmental in nature, [it] deprived it the benefit of others. One of the governmental features specifically denied to TVA was the right to sovereign immunity, which Congress withheld by virtue of the TVA Act's 'sue-and-be-sued' clause. 16 U.S.C. § 831c(b)." *North Carolina*, 439 F.Supp.2d at 490 (citation omitted). In *Grant v. Tennessee Valley Authority*, 49 F.Supp. 564 (E.D.Tenn.1942), the district court distinguished between TVA's governmental and commercial activities, finding immunity in the former case and liability in the latter case. Liability was premised on the government "respond[ing] in damages for wrongs committed when it is engaged in the same activities as its citizens," which included "all wrongs committed for conduct pertaining to its generating, use and sale of electric energy made from the power created by its dams." *Id.* at 566. Over the years, courts have continued to draw a distinction between TVA's performance of government functions, such as flood control, where it is immune from suit, *see Edwards v. Tennessee Valley Authority*, 255 F.3d 318, 322 (6th Cir.2001); *Peoples National Bank of Huntsville v. Meredith*, 812 F.2d 682, 685 (11th Cir.1987); *Queen v.*

Tennessee Valley Authority, 689 F.2d 80, 85-86 (6th Cir.1982), and its commercial or nongovernmental functions, where it has no immunity, *see Latch v. Tennessee Valley Authority*, 312 F.Supp. 1069, 1072 (N.D.Miss.1970); *Adams v. Tennessee Valley Authority*, 254 F.Supp. 78, 80 (E.D.Tenn.1966).

In addressing TVA's arguments for dismissal, we rely on the *North Carolina* district court's and Fourth Circuit's decisions in *North Carolina* for guidance. That case largely parallels this one; the primary difference is that North Carolina sued TVA under *state* public nuisance law, alleging that the emissions from TVA's coal-burning electric generating plants in a number of states adversely affected the health of its citizens, damaged the state's natural resources, and harmed the state's finances. The State sought an injunction to abate the alleged nuisance. TVA raised both political question and discretionary function exception issues in seeking dismissal of the complaint. The district court did not accept those arguments, and the Fourth Circuit affirmed that holding. In this case, TVA has made many of the same arguments and cited many of the same cases that the *North Carolina* district and appellate courts rejected.

B. Political Question Arguments

TVA contends that the political question doctrine precludes review of Plaintiffs' complaints against it, not only for the reasons stated by the district court, but because there are additional reasons, "unique to TVA, based on TVA's status as a Federal agency charged with the multipurpose development of the Tennessee Valley region for the public good," that warrant dismissal. TVA grounds its political question argument in the Property Clause of the Constitution (art. IV, § 3, cl.2), which provides that "[t]he Congress

shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." This Clause grants Congress the "full power in the United States to protect its lands [and] to control their use." *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404, 37 S.Ct. 387, 61 L.Ed. 791 (1917). Because Congress has "expressly authorized TVA to acquire and hold real property in the name of the United States (16 U.S.C. § 831c(h)), and to construct and operate 'power houses' . . . on that real property as TVA deems necessary," TVA posits that the Property Clause serves as a "textually demonstrable constitutional commitment" that relegates the emission issue to the legislative branch, thereby satisfying the first *Baker* factor and rendering the complaints against it non-justiciable.

The flaw in TVA's "textual commitment" argument is that TVA is not the United States or Congress. The Supreme Court has unequivocally held that TVA is "a corporate entity, separate and distinct from the Federal Government itself." *Pierce v. United States*, 314 U.S. 306, 310, 62 S.Ct. 237, 86 L.Ed. 226 (1941). TVA maintains "a separate corporate identity, a separate legal staff, and a separate headquarters"; it is "removed from centralized control in Washington"; and enjoys numerous "marks of independence which Congress has provided" it. *North Carolina ex rel Cooper v. Tenn. Valley Auth.*, 515 F.3d at 348-49. Tellingly, this federally-chartered corporation has taken positions adverse to the United States in a number of cases. *See, e.g., Tenn. Valley Auth. v. EPA*, 278 F.3d 1184 (11th Cir.2002); *Tenn. Valley Auth. v. United States*, 13 Cl.Ct. 692 (1987). TVA acts in the name of the United States only when it condemns real property. *Tenn. Valley Auth.*, 13 Cl.Ct. at 697,

698 (citing 16 U.S.C. §§ 831c(h), 831x). TVA's reliance on cases against the United States upholding Congress's power over public land and rejecting the input of the courts is therefore misplaced. *See, e.g., United States v. City of San Francisco*, 310 U.S. 16, 29, 60 S.Ct. 749, 84 L.Ed. 1050 (1940); *see also North Carolina*, 515 F.3d at 349 (affirming district court's holding that separation of powers concerns did not bar North Carolina from suing TVA on nuisance cause of action and observing "[b]ecause the TVA is so far removed from the control of the Executive Branch, operating as the functional equivalent of a private corporation, the judiciary does not run the same risk of overstepping its bounds and prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions" (internal quotation marks omitted)).

We find TVA's other political question arguments unpersuasive, and therefore reject TVA's contention that the complaints present non-justiciable political questions.

C. The Discretionary Function Exception

The discretionary function exception "insulates the Government from liability if the action challenged . . . involves the permissible exercise of policy judgment." *Berkovitz v. United States*, 486 U.S. 531, 537, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988). TVA contends that because it is an executive agency with governmental status, the sue-and-be-sued clause in the TVA Enabling Act does not apply to it when it engages in the government functions of its power program. Plaintiffs respond that the discretionary function exception only applies to the federal government and agencies that engage in governmental functions. They further respond that if the function is non-

governmental (e.g., commercial), even if performed by a federal agency, then the exception does not apply. Because TVA's electricity generating activities are commercial functions, Plaintiffs argue that TVA has no immunity from suit with respect to those activities.

Sue-and-be-sued clauses "have long been recognized as broad waivers of sovereign immunity and the 'sue-and-be-sued' clause was specifically intended to be a broad waiver when included in the TVA Act." *North Carolina*, 439 F.Supp.2d at 490 (citing cases). Accordingly, "there is certainly no indication that Congress included or intended to include any express 'discretionary function' exemption in the TVA Act." *Id.* Even so, Congress has, in limited circumstances, recognized that broad waivers of immunity may be circumscribed. In order to determine whether this kind of implied limitation on immunity pertains here, we apply the test to which the Supreme Court refers in *Loeffler v. Frank*, 486 U.S. 549, 108 S.Ct. 1965, 100 L.Ed.2d 549 (1988):

> [W]hen Congress establishes [a sue and be sued] agency, authorizes it to engage in commercial and business transactions with the public, and permits it to 'sue and be sued,' it cannot be lightly assumed that restrictions on that authority are to be implied. Rather if the general authority to 'sue and be sued' is to be delimited by implied exceptions, it must be clearly shown that [(1)] certain types of suits are not consistent with the statutory or constitutional scheme, [(2)] that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or [(3)] that for other reasons it was plain-

> ly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense. In the absence of such showing, it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue or be sued,' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be.

Id. at 554-55, 108 S.Ct. 1965 (internal quotation marks omitted).

On the first prong of the *Loeffler* test—whether a nuisance suit relating to TVA's emission of air pollutants is inconsistent with the statutory or constitutional scheme—the *North Carolina* district court could find no such inconsistencies, and TVA had not identified any. *North Carolina*, 439 F.Supp.2d at 491. The same circumstances exist here.

As to the second prong of the test—whether an implied limitation must be recognized to avoid grave interference with a governmental function—the *North Carolina* Court found unpersuasive TVA's argument that "it must be considered as always performing a governmental function." *Id.* at 491. TVA relied on the language of tax and other cases from the early and mid-1900s where the Supreme Court "evidenced an unwillingness . . . to give effect to a 'governmental' versus 'non-governmental' distinction." *Id.* The *North Carolina* Court reasoned that where a broad waiver of sovereign immunity had been authorized in the TVA statute, and Congress "clearly indicated its intention that the entity be subject to suit as if it were privately owned," the plain language of *Loeffler* required that a governmental versus non-governmental distinction *should* be made. *Id.* at 491-92. It further found that TVA had

not established that its production of electricity by operating coal-burning power plants was a "governmental function," nor had it explained how allowing the lawsuit to proceed would "gravely interfere" with that function. The district court held that TVA had failed to meet the second prong of the test. *Id.* at 492.

The *North Carolina* Court's analysis is squarely on point. In this case, as in *North Carolina*, TVA has made many of the same arguments and cited many of the same cases[51] in arguing that the discretionary function exception applies. But as was the case in *North Carolina*, TVA has not identified any "grave interference" with the performance of a governmental function. In their complaints, Plaintiffs have alleged that Defendants had "available to them practical, feasible and economically viable options for reducing carbon dioxide emissions without significantly increasing the cost of electricity to their customers." Given that those allegations must be taken as true, no "grave interference" would occur.

The third prong of the *Loeffler* test requires a determination that Congress plainly intended to use the sue-and-be-sued clause in a narrow sense. The *North Carolina* Court opined that "all available evidence points to the conclusion that Congress intended TVA's waiver of sovereign immunity to be as *broad* as possible." *Id.* (emphasis in original). The decision quoted *Queen v. Tennessee Valley Authority*,

---

[51] Also, as Plaintiffs note, TVA's citations to cases construing the discretionary function exception to the Federal Tort Claims Act ("FTCA") are not relevant, as the FTCA expressly states that it does not apply to "[a]ny claim arising from the activities of the [TVA]." 28 U.S.C. § 2680(1). Cases discussing the exception in the context of liability of the U.S. Postal Service are similarly beside the point.

689 F.2d 80, 85 (6th Cir.1982), in which the Sixth Circuit referred to the legislative history of the sue-and-be-sued clause in the TVA statute as "plac[ing] no limitations whatever upon the suability of the [TVA], so that all persons who had a cause of action against the corporation might have their day in court." *Id.* (internal quotation marks omitted). We agree with the North Carolina Court that TVA has not met the requirements of this prong of the *Loeffler* test.

In sum, we hold that neither the political question doctrine or the discretionary function exception warrant dismissal of Plaintiffs' claims against TVA.

VII. State Law Claims

In the alternative, the States and New York City have alleged that "[D]efendants are liable under the statutory and/or common law of public nuisance of each of the States where their fossil-fuel fired electric generating facilities are located." The Trusts have also alleged "[i]n the alternative, if federal common law were not to apply, Defendants are liable to Plaintiffs under the statutory and/or common law of private and public nuisance of each of the states where they own, manage, direct, and/or operate fossil fuel-fired electric generating facilities."

In *Milwaukee II*, the Supreme Court observed that federal and state nuisance law could not both apply to the case. "If state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used." *Milwaukee II*, 451 U.S. at 314 n. 7, 101 S.Ct. 1784. Accordingly, since we hold that the federal common law of nuisance applies in this case, we do not ad-

dress the States' and Trusts' alternative claims based on state public nuisance law.

CONCLUSION

As we have explained, *supra*, the district court erred in dismissing the two complaints on the ground that they presented non-justiciable political questions. We now review our additional holdings. The States have *parens patriae* and Article III standing, in their quasi-sovereign and proprietary capacities respectively, and New York City and the Trusts have Article III standing. All parties have stated a claim under the federal common law of nuisance, which we find is grounded in the definition of "public nuisance" found in the Restatement (Second) of Torts § 821B. Federal statutes have not displaced Plaintiffs' federal common law of nuisance claim. The complaints against Defendant-Appellant TVA may not be dismissed on the grounds of the political question doctrine or the discretionary function exception. Finally, because we apply the federal common law of nuisance, we do not adjudicate Plaintiffs-Appellants' alternative state law public nuisance claims.

With regard to air pollution, particularly greenhouse gases, this case occupies a niche similar to the one *Milwaukee I* occupied with respect to water pollution. With that in mind, the concluding words of *Milwaukee I* have an eerie resonance almost forty years later. To paraphrase: "It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance" by greenhouse gases. *Milwaukee I*, 406 U.S. at 106, 92 S.Ct. 1385.

The judgment of the district court is VACATED, and the cases are REMANDED for further proceedings.

APPENDIX B

UNITED STATES DISTRICT COURT,
S.D. NEW YORK

Nos. 04 Civ. 5669(LAP)
04 Civ. 5670(LAP)

STATE OF CONNECTICUT, *et al.*,
Plaintiffs,

v.

AMERICAN ELECTRIC POWER COMPANY, INC., *et al.*,
Defendants.

OPEN SPACE INSTITUTE, *et al.*,
Plaintiffs,

v.

AMERICAN ELECTRIC POWER COMPANY, INC., *et al.*,
Defendants.

Sept. 22, 2005

AMENDED OPINION AND ORDER

PRESKA, *District Judge*.

The Framers based our Constitution on the idea that a separation of powers enables a system of checks and balances, allowing our Nation to thrive under a Legislature and Executive that are accountable to the People, subject to judicial review by an independent Judiciary. *See Federalist Paper* No. 47 (1788); U.S. Const. arts. I, II, III. While, at times, some judges have become involved with the most

critical issues affecting America, political questions are not the proper domain of judges. *See, e.g., Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); *Nixon v. United States*, 506 U.S. 224, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993). Were judges to resolve political questions, there would be no check on their resolutions because the Judiciary is not accountable to any other branch or to the People. Thus, when cases present political questions, "judicial review would be inconsistent with the Framers' insistence that our system be one of checks and balances." *Nixon*, 506 U.S. at 234-35, 113 S.Ct. 732. As set out below, cases presenting political questions are consigned to the political branches that are accountable to the People, not to the Judiciary, and the Judiciary is without power to resolve them. This is one of those cases.

BACKGROUND[1]

The States of Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, and Wisconsin and the City of New York (the "State Plaintiffs") and the Open Space Institute, Inc. ("OSI"), the Open Space Conservancy, Inc., and the Audubon Society of New Hampshire (the "Private Plaintiffs") (collectively, "Plaintiffs") bring the above-captioned actions against American Electric Power Company, Inc., American Electric Power Service Corporation (together, "AEP"), the Southern Company ("Southern"), Tennessee Valley Authority ("TVA"), Xcel Energy Inc. ("Xcel"), and Cinergy Corporation

---

[1] For the purposes of these motions, the allegations of the complaints are accepted as true. *See Tarshis v. Riese Org.*, 211 F 3d 30, 35 (2d Cir.2000); *Desiderio v. National Ass'n of Secs. Dealers, Inc* , 191 F.3d 198, 202 (2d Cir.1999); *Jaghory v. New York State Dep't of Educ.*, 131 F 3d 326, 329 (2d Cir.1997)

("Cinergy") (collectively, "Defendants") under federal common law or, in the alternative, state law, to abate what Plaintiffs describe as the "public nuisance" of "global warming." State Compl. ¶ 1;[2] OSI Compl. ¶ 1.[3] Defendants now move to dismiss the complaints for, *inter alia*, lack of jurisdiction and failure to state a claim upon which relief can be granted. For the reasons set forth below, Defendants' motions are granted.

The State Plaintiffs, claiming to represent the interests of more than 77 million people and their related environments, natural resources, and economies, and the Private Plaintiffs, non-profit land trusts, bring these federal common law public nuisance actions to abate what they allege to be Defendants' contributions to the phenomenon commonly known as global warming. State Compl. ¶¶ 1, 146; OSI Compl. ¶¶ 1, 92, 103. Plaintiffs assert that the Defendants collectively emit approximately 650 million tons of carbon dioxide annually, State Compl. ¶ 2; OSI Compl. ¶ 3, that carbon dioxide is the primary greenhouse gas, State Compl. ¶ 1; OSI Compl. ¶ 2, and that greenhouse gases trap atmospheric heat and cause global warming, State Compl. ¶ 1; OSI Compl. ¶ 2.

As part of their venue allegations, Plaintiffs maintain that global warming will cause irreparable harm to property in New York State and New York City and that it threatens the health, safety, and well-being of New York's citizens, residents, and environ-

---

[2] "State Compl." refers to the complaint filed by the State Plaintiffs (captioned 04 Civ. 5669(LAP)) on July 22, 2004.

[3] "OSI Compl." refers to the complaint filed by the Private Plaintiffs (captioned 04 Civ. 5670(LAP)) on July 22, 2004.

ment. State Compl. ¶¶ 2, 20, 24, 26, 30, 34, 159; OSI Compl. ¶¶ 80-88, 93.

According to the complaints, Defendants "are the five largest emitters of carbon dioxide in the United States" and their emissions "constitute approximately one quarter of the U.S. electric power sector's carbon dioxide emissions." State Compl. ¶ 98; OSI Compl. ¶ 55. According to the complaints, U.S. electric power plants are responsible for "ten percent of worldwide carbon dioxide emissions from human activities." State Compl. ¶ 100; OSI Compl. ¶ 53.

State Plaintiffs assert that global warming has already occurred in the form of a documented increase in average temperatures in the United States of between .74 and 5 degrees Fahrenheit since 1900, State Compl. ¶¶ 103, 104, and a decline in snowfall and the duration of snow cover in recent decades, State Compl. ¶ 105, 106. In addition to what State Plaintiffs say are these already-documented climate changes, the United States Environmental Protection Agency (the "EPA") projects an increase in temperature of approximately 4 to 5 degrees by the year 2100. State Compl. ¶ 106. Private Plaintiffs assert that the Intergovernmental Panel on Climate Change projects that the global average surface air temperature will increase approximately 2.5 to 10.4 degrees Fahrenheit from the year 1990 to 2100. OSI Compl. ¶ 61.

Plaintiffs say the natural processes that remove carbon dioxide from the atmosphere now are unable to keep pace with the level of carbon dioxide emissions. State Compl. ¶ 87; OSI Compl. ¶ 51. As a result, Plaintiffs allege, carbon dioxide levels have increased approximately 34% since the industrial revolution began, causing increased temperatures.

State Compl. ¶ 88; OSI Compl. ¶ 50. Plaintiffs further allege that because the planet's natural systems take hundreds of years to absorb carbon dioxide, Defendants' past, present, and future emissions will remain in the atmosphere and contribute to global warming for many decades and, possibly, centuries. State Compl. ¶ 102; OSI Compl. ¶ 56. Although Plaintiffs acknowledge that there is some dispute about the rate and intensity of the process of global climate change, Plaintiffs say official reports from American and international scientific bodies demonstrate the clear scientific consensus that global warming has begun, is altering the natural world, and will accelerate over the coming decades unless action is taken to reduce emissions of carbon dioxide. State Compl. ¶¶ 80, 81; OSI Compl. ¶¶ 44-47.

Congress has recognized that carbon dioxide emissions cause global warming and that global warming will have severe adverse impacts in the United States, but it has declined to impose any formal limits on such emissions. *See, e.g.*, The Global Climate Protection Act of 1987, P.L. 100-204, Title XI, §§ 1102-03, reprinted at 15 U.S.C. § 2901 note. However, Congress and the Executive Branch have taken several steps to better understand and address the complex issue of global warming. As early as 1978, Congress established a "national climate program" to improve understanding of global climate change through research, data collection, assessments, information dissemination, and international cooperation. *See* National Climate Program Act of 1978, 15 U.S.C. §§ 2901, *et seq.* Two years later, in the Energy Security Act, Pub.L. No. 96-294, tit. VII, § 711, 94 Stat. 611, 774-75 (1980), Congress directed the Office of Science and Technology Policy to engage the National Academy of Sciences in a study of the

"projected impact, on the level of carbon dioxide in the atmosphere, of fossil fuel combustion, coal-conversion and related synthetic fuels activities" authorized by the Energy Security Act. In the Global Climate Protection Act of 1987, Congress directed the Secretary of State to coordinate U.S. negotiations concerning global climate change. *See* 15 U.S.C. § 2901 note; *see also id.* § 2952(a) (directing the President and Secretary of State in 1990 to "initiate discussions" with other nations for agreements on climate research).

In 1990, Congress enacted the Global Change Research Act, 15 U.S.C. §§ 2931-2938, which established a ten-year research program for global climate issues, *id.* § 2932, directed the President to establish a research program to "improve understanding of global change," *id.* § 2933, and provided for scientific assessments every four years that "analyze[ ] current trends in global change," *id.* § 2936(3). Congress also established a program to research agricultural issues related to global climate change, Pub.L. No. 101-624, tit. XXIV, § 2402, 104 Stat. 4058, 4058-59 (1990), and, two years later, directed the Secretary of Energy to conduct several assessments related to greenhouse gases and report to Congress, Energy Policy Act of 1992, Pub.L. No. 102-486, § 1604, 106 Stat. 2776, 3002.

In 1992, as a result of the negotiations authorized by the Global Climate Protection Act of 1987, President George H.W. Bush signed, and the Senate ratified, the United Nations Framework Convention on Climate Change ("UNFCCC"), which brought together a coalition of countries to work toward a coordinated approach to address the international issue of global warming. Following ratification of the

UNFCCC, member nations negotiated the Kyoto Protocol, which called for mandatory reductions in the greenhouse gas emissions of developed nations. *See* UNFCCC, Kyoto Protocol (Dec. 11, 1997).

Although President William Jefferson Clinton signed the Kyoto Protocol, it was not presented to the Senate, which formally expressed misgivings over the prospect that the potential economic burdens of carbon dioxide reductions would be shouldered exclusively by developed nations, such as the United States. S. Res. 98, 105th Cong. (1997) (resolving by vote of 95-0 to urge the President not to sign any agreement that would result in serious harm to the economy or that did not include provisions regarding the emissions of developing nations). Thereafter, Congress passed a series of bills that affirmatively barred the EPA from implementing the Protocol. *See* Pub.L. No. 105-276, 112 Stat. 2461, 2496 (1998); Pub.L. No. 106-74, 113 Stat. 1047, 1080 (1999); Pub.L. No. 106-377, 114 Stat. 1141, 1441A-41 (2000). The EPA has ruled that the Clean Air Act does not authorize carbon dioxide regulation. Control of Emissions from New Highway Vehicles and Engines, 68 Fed.Reg. 52,922 (Sept. 8, 2003).

President George W. Bush opposes the Protocol because it exempts developing nations who are major emitters, fails to address two major pollutants, and would have a negative economic impact on the United States. *See* Transcript, President Bush Discusses Global Climate Change (Jun. 11, 2001). Instead, the policy of the current administration "emphasizes international cooperation and promotes working with other nations to develop an efficient and coordinated response to global climate change," which the EPA describes as a "prudent," "realistic and effective long-

term approach to the global climate change issue." 68 Fed.Reg. at 52933.

Here, to curtail Defendants' contribution to global warming, Plaintiffs "seek an order (i) holding each of the Defendants jointly and severally liable for contributing to an ongoing public nuisance, global warming, and (ii) enjoining each of the Defendants to abate its contribution to the nuisance by capping its emissions of carbon dioxide and then reducing those emissions by a specified percentage each year for at least a decade." State Compl. ¶ 6; OSI Compl. ¶ 10. According to Plaintiffs, the unspecified reductions they seek "will contribute to a reduction in the risk and threat of injury to the plaintiffs and their citizens and residents from global warming." State Compl. ¶ 148; OSI Compl. ¶ 90.

By way of a variety of motions, supported by Unions for Jobs, as amicus, Defendants move to dismiss the complaints against them on several grounds. First, Defendants contend that Plaintiffs have failed to state a claim upon which relief can be granted because: (1) there is no recognized federal common law cause of action to abate greenhouse gas emissions that allegedly contribute to global warming; (2) separation of powers principles preclude this Court from adjudicating these actions; and (3) Congress has displaced any federal common law cause of action to address the issue of global warming. Second, Defendants contend that this Court lacks jurisdiction over Plaintiffs' claims because: (1) Plaintiffs do not have standing to sue on account of global warming and (2) Plaintiffs' failure to state a claim under federal law divests the Court of § 1331

jurisdiction. Def. Memo. at 27.[4] In addition to advancing these primary arguments, Defendants Southern, TVA, Xcel, and Cinergy move to dismiss for lack of personal jurisdiction, and TVA moves to dismiss because, as an agency and instrumentality of the United States, it claims that it cannot be sued for a tort when the subject of the lawsuit is the actions it performs as part of its discretionary functions. TVA Memo. at 11-12.[5]

DISCUSSION

Rule 12(b)(6) of the Federal Rules of Civil Procedure requires dismissal of complaints that are not legally sufficient. *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir.1985). Rule 12(b)(1) requires dismissal when "the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir.2000). A "plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Makarova*, 201 F.3d at 113 (citing *Malik v. Meissner*, 82 F.3d 560, 562 (2d Cir.1996)). Under both rules, as noted above, this Court must accept the allegations of the complaints as true and construe all reasonable inferences in favor of Plaintiffs. *See supra* note 1.

---

[4] "Def. Memo." refers to the Memorandum of Law in Support of Defendants' Motions to Dismiss the Complaints for Lack of Subject Matter Jurisdiction and for Failure to State a Claim Upon Which Relief Can Be Granted filed on September 30, 2004.

[5] "TVA Memo." refers to the Memorandum of Law in Support of Tennessee Valley Authority's Motions to Dismiss on Federal Discretionary Function Grounds filed on September 30, 2004.

Because federal courts are courts of limited jurisdiction, whether a court has jurisdiction is an issue generally to be addressed first. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 95, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). "The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" *Id.* at 94-95, 118 S.Ct. 1003 (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382, 4 S.Ct. 510, 28 L.Ed. 462 (1884)). "[E]ither the absence of standing or the presence of a political question suffices to prevent the power of the federal judiciary from being invoked by the complaining party." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 215, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974) (internal citations omitted).

The threshold jurisdictional question in this case is whether the complaints raise non-justiciable political questions that are beyond the limits of this Court's jurisdiction.[6] Defendants argue that "separation-of-powers principles foreclose recognition of the unprecedented 'nuisance' action plaintiffs assert," *see* Def.

---

[6] The extraordinary allegations and relief sought in this case render it one in which an analysis of Plaintiffs' standing would involve an analysis of the merits of Plaintiffs' claims. For example, determining causation and redressibility in the context of alleged global warming would require me to make judgments that could have an impact on the other branches' responses to what is plainly a political question. Accordingly, because the issue of Plaintiffs' standing is so intertwined with the merits and because the federal courts lack jurisdiction over this patently political question, I do not address the question of Plaintiffs' standing.

Reply Memo. at 7,[7] which I take to be an argument that Plaintiffs raise a non-justiciable political question. At oral argument, counsel for AEP and Cinergy argued that by "asking this Court to resolve an environmental policy question with sweeping implications for the nation's economy, its foreign relations, and even potentially its national security," Plaintiffs "have put the cart before the horse." Tr. 6:1-6:5; 11:11.[8] Defendants AEP and Cinergy also note that the Supreme Court imposes on courts "an unflagging duty" to exercise their jurisdiction appropriately and refrain from resolving questions of high policy, which are for the political branches. Tr. 10:22-10:25; 11:17-11:19. Accordingly, this issue will be addressed first.

To determine if a case is justiciable in light of the separation of powers ordained by the Constitution, a court must decide "whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Baker v. Carr*, 369 U.S. 186, 198, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). Six situations have been recognized as indicating the existence of a non-justiciable political question:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an

---

[7] "Def Reply Memo." refers to the Reply in Support of Defendants' Motions to Dismiss the Complaints for Lack of Subject Matter Jurisdiction and for Failure to State a Claim Upon Which Relief Can Be Granted filed on December 17, 2004.

[8] "Tr." refers to the transcript of the oral arguments held on August 12, 2005.

> initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Vieth v. Jubelirer, 541 U.S. 267, 277-78, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (quoting *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)). Although several of these indicia have formed the basis for finding that Plaintiffs raise a non-justiciable political question, the third indicator is particularly pertinent to this case.

As noted above, a non-justiciable political question exists when a court confronts "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Vieth*, 541 U.S. at 278, 124 S.Ct. 1769. As the Supreme Court has recognized, to resolve typical air pollution cases, courts must strike a balance "between interests seeking strict schemes to reduce pollution rapidly to eliminate its social costs and interests advancing the economic concern that strict schemes [will] retard industrial development with attendant social costs." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 847, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). In this case, balancing those interests, together with the other interests involved, is impossible without an "initial policy determination" first having been made by the elected branches to which

our system commits such policy decisions, *viz.*, Congress and the President.

Plaintiffs advance a number of arguments why theirs is a simple nuisance claim of the kind courts have adjudicated in the past, but none of the pollution-as-public-nuisance cases[9] cited by Plaintiffs has touched on so many areas of national and international policy. The scope and magnitude of the relief Plaintiffs seek reveals the transcendently legislative nature of this litigation. Plaintiffs ask this Court to cap carbon dioxide emissions and mandate annual reductions of an as-yet-unspecified percentage. State Compl., Prayer for Relief ¶ b. Such relief would, at a minimum, require this Court to: (1) determine the appropriate level at which to cap the carbon dioxide emissions of these Defendants; (2) determine the appropriate percentage reduction to impose upon Defendants; (3) create a schedule to implement those reductions; (4) determine and balance the implications of such relief on the United States' ongoing negotiations with other nations concerning global climate change; (5) assess and measure available alternative energy resources; and (6) determine and balance the implications of such relief on the United States' energy sufficiency and thus its national secu-

---

[9] Plaintiffs rely on, for example, *New Jersey v. New York City*, 283 U.S. 473, 476-77, 51 S.Ct. 519, 75 L.Ed. 1176 (1931) (involving garbage dumped into the ocean that polluted New Jersey beaches); *Georgia v. Tennessee Copper Co*, 206 U.S. 230, 236, 27 S.Ct. 618, 51 L.Ed 1038 (1907) (involving a company discharging noxious gas that threatened forests, orchards, and crops in five counties); *State of New York v Shore Realty Corp.*, 759 F.2d 1032, 1038 (2d Cir.1984) (involving more than eleven tanks and 400 drums of substances that are considered "hazardous" within the meaning of CERCLA).

rity—all without an "initial policy determination" having been made by the elected branches.

Defendants have set forth just a few of the difficult "initial policy determination[s]" that would have to be made by the elected branches before any court could address these issues:

> [G]iven the numerous contributors of greenhouse gases, should the societal costs of reducing such emissions be borne by just a segment of the electricity-generating industry and their industrial and other consumers?
>
> Should those costs be spread across the entire electricity-generating industry (including utilities in the plaintiff States)? Other industries?
>
> What are the economic implications of these choices?
>
> What are the implications for the nation's energy independence and, by extension, its national security?

Def. Memo. at 7-8.

If there is any doubt as to the complexity of the "initial policy determination[s]" that must be made by the elected branches before a non-elected court can properly adjudicate a global warming nuisance claim, one need only look to the statements of the EPA, the agency in which "Congress has vested administrative authority" over the "technically complex area of environmental law," *New England Legal Foundation v. Costle*, 666 F.2d 30, 33 (2d Cir.1981), and which has been grappling with the proper approach to the issue of global climate change for years. For example:

> It is hard to imagine any issue in the environmental area having greater "economic and politi-

cal significance" than regulation of activities that might lead to global climate change. 68 Fed.Reg. 52922, 52928 (Sept. 8, 2003).

> The issue of global climate change . . . has been discussed extensively during the last three Presidential campaigns; it is the subject of debate and negotiation in several international bodies; and numerous bills have been introduced in Congress over the last 15 years to address the issue. 68 Fed.Reg. at 52928.
>
> Unilateral [regulation of carbon dioxide emissions in the United States] could also weaken U.S. efforts to persuade key developing countries to reduce the [greenhouse gas] intensity of their economies. 68 Fed.Reg. at 52931.
>
> Unavoidably, climate change raises important foreign policy issues, and it is the President's prerogative to address them. 68 Fed.Reg. at 52931.
>
> Virtually every sector of the U.S. economy is either directly or indirectly a source of [greenhouse gas] emissions, and the countries of the world are involved in scientific, technical, and political-level discussions about climate change. 68 Fed.Reg. at 52928.

Considering these statements in no way undermines the longstanding principle that the judicial branch, not the political branches, determines, on a case-by-case basis, when a political question is raised. Looking at the past and current actions (and deliberate inactions) of Congress and the Executive within the United States and globally in response to the issue of climate change merely reinforces my opinion

that the questions raised by Plaintiffs' complaints are non-judiciable political questions.

The parties dispute what effect, if any, the relief sought by Plaintiffs would have on United States foreign relations. Plaintiffs contend that there would no effect because the "[o]fficial United States policy is to reduce domestic emissions." Pl. Opp. at 20.[10] Plaintiffs cite, *inter alia*, EPA and DOE's promotion of voluntary efforts to reduce greenhouse gas emissions, the President's statement that "[we] can make great progress in reducing emissions, and we will. Yet, even that isn't enough," Congress' commissioning of research on technologies to reduce carbon dioxide emissions, and the UNFCCC's references to limiting emissions. Pl. Opp. at 21. However, official United States policy is expressed by statutes and treaties in force, not press releases. And in interpreting a statute, "[o]ne must . . . listen attentively to what it does not say." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L.Rev. 527, 535-36 (1947). The explicit statements of Congress and the Executive on the issue of global climate change in general and their specific refusal to impose the limits on carbon dioxide emissions Plaintiffs now seek to impose by judicial fiat confirm that making the "initial policy determination[s]" addressing global climate change is an undertaking for the political branches.

---

[10] "Pl. Opp." refers to the Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions to Dismiss the Complaints for Lack of Subject Matter Jurisdiction and for Failure to State a Claim Upon Which Relief Can Be Granted filed on November 19, 2004.

Because resolution of the issues presented here requires identification and balancing of economic, environmental, foreign policy, and national security interests, "an initial policy determination of a kind clearly for non-judicial discretion" is required. *Vieth*, 541 U.S. at 278, 124 S.Ct. 1769 (quoting *Baker*, 369 U.S. at 212, 82 S.Ct. 691). Indeed, the questions presented here "uniquely demand single-voiced statement of the Government's views." *Baker*, 369 U.S. at 211, 82 S.Ct. 691. Thus, these actions present non-justiciable political questions that are consigned to the political branches, not the Judiciary.

CONCLUSION

For the reasons set forth above, the complaints are dismissed. The Clerk of the Court shall mark these actions closed and all pending motions denied as moot.

SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 5th day of March, two thousand ten.

Docket No. 05-5104–cv

STATE OF CONNECTICUT, STATE OF NEW YORK, PEOPLE OF THE STATE OF CALIFORNIA EX REL. ATTORNEY GENERAL BILL LOCKYER, STATE OF IOWA, STATE OF NEW JERSEY, STATE OF RHODE ISLAND, STATE OF VERMONT STATE OF WISCONSIN, AND CITY OF NEW YORK,

Plaintiffs-Appellants,

-v.-

AMERICAN ELECTRIC POWER COMPANY INC., AMERICAN ELECTRIC POWER SERVICE CORPORATION, SOUTHERN COMPANY, TENNESSEE VALLEY AUTHORITY, XCEL ENERGY, INC., AND CINERGY CORPORATION,

Defendants-Appellees.

Appellees American Electric Power Company Inc., American Electric Power Service Corporation, Southern Company, Tennessee Valley Authority, Xcel Energy, Inc. and Cinergy Corporation having filed a petition for panel rehearing, or, in the alternative, for

rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

[DIGITAL SIGNATURE IMAGE]

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 10th day of March, two thousand and ten.

Docket No. 05-5119-cv

OPEN SPACE INSTITUTE, INC.,
OPEN SPACE CONSERVANCY, INC.,
AUDUBON SOCIETY OF NEW HAMPSHIRE,
Plaintiffs-Appellants,

-v.-

AMERICAN ELECTRIC POWER COMPANY INC., AMERICAN ELECTRIC POWER SERVICE CORPORATION, SOUTHERN COMPANY, TENNESSEE VALLEY AUTHORITY, XCEL ENERGY, INC., AND CINERGY CORPORATION,
Defendants-Appellees.

American Electric Power Company Inc., American Electric Power Service Corporation, and Cinergy Corporation having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT,
Catherine O'Hagan Wolfe, Clerk of Court

[DIGITAL SIGNATURE IMAGE]

APPENDIX E

FEDERAL STATUTES

42 U.S.C. § 7401. Congressional findings and declaration of purpose

(a) Findings

The Congress finds—

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

(b) Declaration

The purposes of this subchapter are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution prevention and control programs.

(c) Pollution prevention

A primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention.

42 U.S.C. § 7521. Emission standards for new motor vehicles or new motor vehicle engines

(a) Authority of Administrator to prescribe by regulation

Except as otherwise provided in subsection (b) of this section—

(1) The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes

of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. Such standards shall be applicable to such vehicles and engines for their useful life (as determined under subsection (d) of this section, relating to useful life of vehicles for purposes of certification), whether such vehicles and engines are designed as complete systems or incorporate devices to prevent or control such pollution.

(2) Any regulation prescribed under paragraph (1) of this subsection (and any revision thereof) shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.

(3)(A) In general

(i) Unless the standard is changed as provided in subparagraph (B), regulations under paragraph (1) of this subsection applicable to emissions of hydrocarbons, carbon monoxide, oxides of nitrogen, and particulate matter from classes or categories of heavy-duty vehicles or engines manufactured during or after model year 1983 shall contain standards which reflect the greatest degree of emission reduction achievable through the application of technology which the Administrator determines will be available for the model year to which such standards apply, giving appropriate consideration to cost, energy, and safety factors associated with the application of such technology.

(ii) In establishing classes or categories of vehicles or engines for purposes of regulations under this paragraph, the Administrator may base such classes or categories on gross vehicle weight, horsepower, type of fuel used, or other appropriate factors.

(B) Revised standards for heavy duty trucks

(i) On the basis of information available to the Administrator concerning the effects of air pollutants emitted from heavy-duty vehicles or engines and from other sources of mobile source related pollutants on the public health and welfare, and taking costs into account, the Administrator may promulgate regulations under paragraph (1) of this subsection revising any standard promulgated under, or before the date of, the enactment of the Clean Air Act Amendments of 1990 (or previously revised under this subparagraph) and applicable to classes or categories of heavy-duty vehicles or engines.

(ii) Effective for the model year 1998 and thereafter, the regulations under paragraph (1) of this subsection applicable to emissions of oxides of nitrogen (NOx) from gasoline and diesel-fueled heavy duty trucks shall contain standards which provide that such emissions may not exceed 4.0 grams per brake horsepower hour (gbh).

(C) Lead time and stability

Any standard promulgated or revised under this paragraph and applicable to classes or categories of heavy-duty vehicles or engines shall apply for a period of no less than 3 model years beginning

no earlier than the model year commencing 4 years after such revised standard is promulgated.

(D) Rebuilding practices

The Administrator shall study the practice of rebuilding heavy-duty engines and the impact rebuilding has on engine emissions. On the basis of that study and other information available to the Administrator, the Administrator may prescribe requirements to control rebuilding practices, including standards applicable to emissions from any rebuilt heavy-duty engines (whether or not the engine is past its statutory useful life), which in the Administrator's judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare taking costs into account. Any regulation shall take effect after a period the Administrator finds necessary to permit the development and application of the requisite control measures, giving appropriate consideration to the cost of compliance within the period and energy and safety factors.

(E) Motorcycles

For purposes of this paragraph, motorcycles and motorcycle engines shall be treated in the same manner as heavy-duty vehicles and engines (except as otherwise permitted under section 7525(f)(1) of this title) unless the Administrator promulgates a rule reclassifying motorcycles as light-duty vehicles within the meaning of this section or unless the Administrator promulgates regulations under subsection (a) of this section applying standards applicable to the emission of

air pollutants from motorcycles as a separate class or category. In any case in which such standards are promulgated for such emissions from motorcycles as a separate class or category, the Administrator, in promulgating such standards, shall consider the need to achieve equivalency of emission reductions between motorcycles and other motor vehicles to the maximum extent practicable.

(4)(A) Effective with respect to vehicles and engines manufactured after model year 1978, no emission control device, system, or element of design shall be used in a new motor vehicle or new motor vehicle engine for purposes of complying with requirements prescribed under this subchapter if such device, system, or element of design will cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation or function.

(B) In determining whether an unreasonable risk exists under subparagraph (A), the Administrator shall consider, among other factors, (i) whether and to what extent the use of any device, system, or element of design causes, increases, reduces, or eliminates emissions of any unregulated pollutants; (ii) available methods for reducing or eliminating any risk to public health, welfare, or safety which may be associated with the use of such device, system, or element of design, and (iii) the availability of other devices, systems, or elements of design which may be used to conform to requirements prescribed under this subchapter without causing or contributing to such unreasonable risk. The Administrator shall include in the consideration required by this paragraph all relevant informa-

tion developed pursuant to section 7548 of this title.

(5)(A) If the Administrator promulgates final regulations which define the degree of control required and the test procedures by which compliance could be determined for gasoline vapor recovery of uncontrolled emissions from the fueling of motor vehicles, the Administrator shall, after consultation with the Secretary of Transportation with respect to motor vehicle safety, prescribe, by regulation, fill pipe standards for new motor vehicles in order to insure effective connection between such fill pipe and any vapor recovery system which the Administrator determines may be required to comply with such vapor recovery regulations. In promulgating such standards the Administrator shall take into consideration limits on fill pipe diameter, minimum design criteria for nozzle retainer lips, limits on the location of the unleaded fuel restrictors, a minimum access zone surrounding a fill pipe, a minimum pipe or nozzle insertion angle, and such other factors as he deems pertinent.

(B) Regulations prescribing standards under subparagraph (A) shall not become effective until the introduction of the model year for which it would be feasible to implement such standards, taking into consideration the restraints of an adequate leadtime for design and production.

(C) Nothing in subparagraph (A) shall (i) prevent the Administrator from specifying different nozzle and fill neck sizes for gasoline with additives and gasoline without additives or (ii) permit the Administrator to require a specific location, configuration, modeling, or styling of

the motor vehicle body with respect to the fuel tank fill neck or fill nozzle clearance envelope.

(D) For the purpose of this paragraph, the term "fill pipe" shall include the fuel tank fill pipe, fill neck, fill inlet, and closure.

(6) Onboard vapor recovery

Within 1 year after November 15, 1990, the Administrator shall, after consultation with the Secretary of Transportation regarding the safety of vehicle-based ("onboard") systems for the control of vehicle refueling emissions, promulgate standards under this section requiring that new light-duty vehicles manufactured beginning in the fourth model year after the model year in which the standards are promulgated and thereafter shall be equipped with such systems. The standards required under this paragraph shall apply to a percentage of each manufacturer's fleet of new light-duty vehicles beginning with the fourth model year after the model year in which the standards are promulgated. The percentage shall be as specified in the following table:

IMPLEMENTATION SCHEDULE FOR ONBOARD VAPOR RECOVERY REQUIREMENTS

Model year commencing after standards promulgated	Percentage*
Fourth	40
Fifth	80
After Fifth	100

*Percentages in the table refer to a percentage of the manufacturer's sales volume.

The standards shall require that such systems provide a minimum evaporative emission capture efficiency of 95 percent. The requirements of section 7511a(b)(3) of this title (relating to stage II gasoline vapor recovery) for areas classified under section 7511 of this title as moderate for ozone shall not apply after promulgation of such standards and the Administrator may, by rule, revise or waive the application of the requirements of such section 7511a(b)(3) of this title for areas classified under section 7511 of this title as Serious, Severe, or Extreme for ozone, as appropriate, after such time as the Administrator determines that onboard emissions control systems required under this paragraph are in widespread use throughout the motor vehicle fleet.

* * * *

42 U.S.C. § 7601. Administration

(a) Regulations; delegation of powers and duties; regional officers and employees

(1) The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter. The Administrator may delegate to any officer or employee of the Environmental Protection Agency such of his powers and duties under this chapter, except the making of regulations subject to section 7607(d) of this title, as he may deem necessary or expedient.

(2) Not later than one year after August 7, 1977, the Administrator shall promulgate regulations establishing general applicable procedures and policies for regional officers and employees (including the Regional Administrator) to follow in carrying out a delegation

under paragraph (1), if any. Such regulations shall be designed—

(A) to assure fairness and uniformity in the criteria, procedures, and policies applied by the various regions in implementing and enforcing the chapter;

(B) to assure at least an adequate quality audit of each State's performance and adherence to the requirements of this chapter in implementing and enforcing the chapter, particularly in the review of new sources and in enforcement of the chapter; and

(C) to provide a mechanism for identifying and standardizing inconsistent or varying criteria, procedures, and policies being employed by such officers and employees in implementing and enforcing the chapter.

(b) Detail of Environmental Protection Agency personnel to air pollution control agencies

Upon the request of an air pollution control agency, personnel of the Environmental Protection Agency may be detailed to such agency for the purpose of carrying out the provisions of this chapter.

(c) Payments under grants; installments; advances or reimbursements

Payments under grants made under this chapter may be made in installments, and in advance or by way of reimbursement, as may be determined by the Administrator.

(d) Tribal authority

(1) Subject to the provisions of paragraph (2), the Administrator—

(A) is authorized to treat Indian tribes as States under this chapter, except for purposes of the requirement that makes available for application by each State no less than one-half of 1 percent of annual appropriations under section 7405 of this title; and

(B) may provide any such Indian tribe grant and contract assistance to carry out functions provided by this chapter.

(2) The Administrator shall promulgate regulations within 18 months after November 15, 1990, specifying those provisions of this chapter for which it is appropriate to treat Indian tribes as States. Such treatment shall be authorized only if—

(A) the Indian tribe has a governing body carrying out substantial governmental duties and powers;

(B) the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and

(C) the Indian tribe is reasonably expected to be capable, in the judgment of the Administrator, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and all applicable regulations.

(3) The Administrator may promulgate regulations which establish the elements of tribal implementation plans and procedures for approval or disapproval of tribal implementation plans and portions thereof.

(4) In any case in which the Administrator determines that the treatment of Indian tribes as identical to States is inappropriate or administratively infeasible, the Administrator may provide, by regulation, other means by which the Administrator will directly administer such provisions so as to achieve the appropriate purpose.

(5) Until such time as the Administrator promulgates regulations pursuant to this subsection, the Administrator may continue to provide financial assistance to eligible Indian tribes under section 7405 of this title.

42 U.S.C. § 7602. Definitions

When used in this chapter—

* * * *

(g) The term "air pollutant" means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term "air pollutant" is used.

* * * *

42 U.S.C. § 7604. Citizen suits

(a) Authority to bring civil action; jurisdiction

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties (except for actions under paragraph (2)). The district courts of the United States shall have jurisdiction to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed, except that an action to compel agency action referred to in section 7607(b) of this title which

is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 7607(b) of this title. In any such action for unreasonable delay, notice to the entities referred to in subsection (b)(1)(A) of this section shall be provided 180 days before commencing such action.

(b) Notice

No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to 60 days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 7412(i)(3)(A) or (f)(4) of this title or an order issued by the Administrator pursuant to section 7413(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator; service of complaint; consent judgment

(1) Any action respecting a violation by a stationary source of an emission standard or limitation or an order respecting such standard or limitation may be brought only in the judicial district in which such source is located.

(2) In any action under this section, the Administrator, if not a party, may intervene as a matter of right at any time in the proceeding. A judgment in an action under this section to which the United States is not a party shall not, however, have any binding effect upon the United States.

(3) Whenever any action is brought under this section the plaintiff shall serve a copy of the complaint on the Attorney General of the United States and on the Administrator. No consent judgment shall be entered in an action brought under this section in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator during which time the Government may submit its comments on the proposed consent judgment to the court and parties or may intervene as a matter of right.

(d) Award of costs; security

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of

a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Nonrestriction of other rights

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency). Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from—

(1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court, or

(2) bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality,

against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee thereof under State or local law respecting control and abatement of air pollution. For provisions requiring compliance by the United States, departments, agencies, instrumentalities, officers, agents, and employees in the same manner as nongovernmental entities, see section 7418 of this title.

(f) "Emission standard or limitation under this chapter" defined

For purposes of this section, the term "emission standard or limitation under this chapter" means—

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard,

(2) a control or prohibition respecting a motor vehicle fuel or fuel additive, or [1]

(3) any condition or requirement of a permit under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment),, [2] section 7419 of this title (relating to primary nonferrous smelter orders), any condition or requirement under an applicable implementation plan relating to transportation control measures, air quality maintenance plans, vehicle inspection and maintenance programs or vapor recovery requirements, section 7545(e) and (f) of this title (relating to fuels and fuel additives), section 7491 of this title (relating to visibility protection), any condition or requirement under subchapter VI of this chapter (relating to ozone protection), or any requirement under section 7411 or 7412 of this title (without regard to whether such requirement is expressed as an emission standard or otherwise); [3] or

(4) any other standard, limitation, or schedule established under any permit issued pursuant to subchapter V of this chapter or under any applicable State implementation plan approved by the Administrator, any permit term or condition, and any

---

[1] So in original. The word "or" probably should not appear.

[2] So in original.

[3] So in original. The semicolon probably should be comma.

requirement to obtain a permit as a condition of operations. [4]

which is in effect under this chapter (including a requirement applicable by reason of section 7418 of this title) or under an applicable implementation plan.

(g) Penalty fund

(1) Penalties received under subsection (a) of this section shall be deposited in a special fund in the United States Treasury for licensing and other services. Amounts in such fund are authorized to be appropriated and shall remain available until expended, for use by the Administrator to finance air compliance and enforcement activities. The Administrator shall annually report to the Congress about the sums deposited into the fund, the sources thereof, and the actual and proposed uses thereof.

(2) Notwithstanding paragraph (1) the court in any action under this subsection to apply civil penalties shall have discretion to order that such civil penalties, in lieu of being deposited in the fund referred to in paragraph (1), be used in beneficial mitigation projects which are consistent with this chapter and enhance the public health or the environment. The court shall obtain the view of the Administrator in exercising such discretion and selecting any such projects. The amount of any such payment in any such action shall not exceed $100,000.

---

[4] So in original The period probably should be a comma.

42 U.S.C. § 7607. Administrative proceedings and judicial review

* * * *

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Admin-istrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title,, [2] under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter

---

[2] So in original

(including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

* * * *

42 U.S.C § 7661. Definitions

As used in this subchapter—

(1) Affected source

The term "affected source" shall have the meaning given such term in subchapter IV-A of this chapter.

(2) Major source

The term "major source" means any stationary source (or any group of stationary sources located within a contiguous area and under common control) that is either of the following:

(A) A major source as defined in section 7412 of this title.

(B) A major stationary source as defined in section 7602 of this title or part D of subchapter I of this chapter.

(3) Schedule of compliance

The term "schedule of compliance" means a schedule of remedial measures, including an enforceable sequence of actions or operations, leading to compliance with an applicable implementation plan, emission standard, emission limitation, or emission prohibition.

(4) Permitting authority

The term "permitting authority" means the Administrator or the air pollution control agency authorized by the Administrator to carry out a permit program under this subchapter.

42 U.S.C. § 7661a. Permit programs

(a) Violations

After the effective date of any permit program approved or promulgated under this subchapter, it

shall be unlawful for any person to violate any requirement of a permit issued under this subchapter, or to operate an affected source (as provided in subchapter IV-A of this chapter), a major source, any other source (including an area source) subject to standards or regulations under section 7411 or 7412 of this title, any other source required to have a permit under parts [1] C or D of subchapter I of this chapter, or any other stationary source in a category designated (in whole or in part) by regulations promulgated by the Administrator (after notice and public comment) which shall include a finding setting forth the basis for such designation, except in compliance with a permit issued by a permitting authority under this subchapter. (Nothing in this subsection shall be construed to alter the applicable requirements of this chapter that a permit be obtained before construction or modification.) The Administrator may, in the Administrator's discretion and consistent with the applicable provisions of this chapter, promulgate regulations to exempt one or more source categories (in whole or in part) from the requirements of this subsection if the Administrator finds that compliance with such requirements is impracticable, infeasible, or unnecessarily burdensome on such categories, except that the Administrator may not exempt any major source from such requirements.

* * * *

42 U.S.C. § 7661b. Permit applications

(a) Applicable date

Any source specified in section 7661a(a) of this title shall become subject to a permit program, and

---

[1] So in original. Probably should be "part".

required to have a permit, on the later of the following dates—

(1) the effective date of a permit program or partial or interim permit program applicable to the source; or

(2) the date such source becomes subject to section 7661a(a) of this title.

* * * *

OPPOSITION BRIEF

(17)

No. 10-174

Supreme Court, U.S.
FILED
NOV 3 - 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY INC., ET AL.,

Petitioners,

v.

STATE OF CONNECTICUT, ET AL.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

ANDREW M. CUOMO
Attorney General of New York

BARBARA D. UNDERWOOD*
Solicitor General
BENJAMIN N. GUTMAN
Deputy Solicitor General
MONICA WAGNER
Assistant Solicitor General
MICHAEL J. MYERS
MORGAN A. COSTELLO
Assistant Attorneys General
120 Broadway, 25th Floor
New York, NY 10271
(212) 416-6351
barbara.underwood@ag.ny.gov

* *Counsel of Record*

Additional attorneys listed on inside cover.

283161

CP

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

EDMUND G. BROWN JR.
Attorney General of California
CALIFORNIA DEPARTMENT OF JUSTICE
P.O. Box 70550, 1515 Clay Street
Oakland, CA 94612-0550

RICHARD BLUMENTHAL
Attorney General of Connecticut
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120

THOMAS J. MILLER
Attorney General of Iowa
1305 E. Walnut Street
Des Moines, IA 50319

PAULA T. DOW
Attorney General of New Jersey
R.J. Hughes Justice Complex
25 Market Street
Trenton, NJ 08625

PATRICK C. LYNCH
Attorney General of Rhode Island
150 South Main Street
Providence, RI 02903

WILLIAM H. SORRELL
Attorney General of Vermont
109 State Street
Montpelier, VT 05609-1001

CAROL T. NGUYEN
THOMAS H. GEOHEGAN
Attorneys for the State of Wisconsin
77 W. Washington Street,
Suite 711
Chicago, IL 60602

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
100 Church Street
New York, NY 10007

MATTHEW F. PAWA
LAW OFFICES OF
MATTHEW F. PAWA, P.C.
1280 Centre Street,
Suite 230
Newton Centre, MA 02459

DAVID D. DONIGER
GERALD GOLDMAN
NATURAL RESOURCES
DEFENSE COUNCIL
1200 New York Avenue, NW
Washington, DC 20005

Counsel for Open Space Institute, Inc., Open Space Conservancy, Inc., and Audubon Society of New Hampshire

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether respondent States and other property-owners may bring a federal-common-law action to abate petitioners' carbon-dioxide emissions, which contribute to a public nuisance, when neither the Clean Air Act itself nor the Environmental Protection Agency currently regulates emissions from existing power plants like petitioners' plants.

2. Whether respondents' allegations that petitioners' carbon-dioxide emissions have contributed to a public nuisance causing tangible injuries to respondents affecting public health, property, and natural resources and that a reduction in the emissions will reduce respondents' injuries are sufficient to establish standing under Article III at this interlocutory stage of the case.

3. Whether respondents' common-law claims can be resolved based on judicially manageable standards without the kinds of policy determinations that would require dismissal of the claims at the outset as non-justiciable political questions.

4. Whether this Court should vacate the decision of the court of appeals and remand for consideration of whether respondents have prudential standing and whether recent regulatory actions have displaced respondents' federal-common-law claims, when the Tennessee Valley Authority has raised those issues for the first time in this Court, and when the court of appeals' remand of the case to the district court already permits such issues to be raised in any event.

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iv

STATEMENT 1

REASONS FOR DENYING THE PETITION 5

I. There Is No Conflict Warranting This Court's Review At This Time 8

II. The Court Should Not Decide the Statutory Displacement Issue At This Time Due to the Current Regulatory Flux 10

III. Respondents' Standing Under Article III Does Not Warrant the Court's Review At This Time Because There Has Not Been Any Factual Development 15

IV. Petitioners' Political Question Argument Is Based on Premature Speculation About the Remedy 20

Table of Contents

Page

V. Because the Court of Appeals Remanded This Case to the District Court, TVA Does Not Need a Remand from This Court to Make Its Displacement or Prudential Standing Arguments 26

CONCLUSION 30

TABLE OF CITED AUTHORITIES

Page

Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592 (1982) 16, 17, 29

Arkansas v. Oklahoma, 503 U.S. 91 (1992) 14

Baker v. Carr, 369 U.S. 186 (1962) ..... *passim*

California v. Gen. Motors Corp., No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) 8

City of Milwaukee v. Illinois, 451 U.S. 304 (1981) ..... *passim*

Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009), *opinion vacated pending reh'g en banc*, 598 F.3d 208, *appeal dismissed*, 607 F.3d 1049 (2010), *petition for mandamus filed*, No. 10-294 ..... 8-9, 21

Cox v. City of Dallas, 256 F.3d 281 (5th Cir. 2001) 20

Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149 (4th Cir. 2000) 19

Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907) 13

Cited Authorities

Page

Illinois v. City of Milwaukee,
406 U.S. 91 (1972) ..... *passim*

Int'l Paper Co. v. Ouellette,
479 U.S. 481 (1987) 24

Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund,
500 U.S. 72 (1991) 20

Japan Whaling Ass'n v. Am. Cetacean Soc'y,
478 U.S. 221 (1986) 25-26

Lawrence v. Chater,
516 U.S. 163 (1966) 27, 29

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 16, 17, 19

Massachusetts v. EPA,
549 U.S. 497 (2007) 3, 5, 18, 19

Mattoon v. City of Pittsfield,
775 N.E.2d 770 (Mass. App. Ct. 2002) 13

Mattoon v. City of Pittsfield,
980 F.2d 1 (1st Cir. 1992) 13

McMahon v. Presidential Airways, Inc.,
502 F.3d 1331 (11th Cir. 2007) 22

Cited Authorities

Page

Missouri v. Illinois,
180 U.S. 208 (1901) 13

Missouri v. Illinois,
200 U.S. 496 (1906) 14

Native Village of Kivalina,
663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal pending*, No. 09-17490 (9th Cir.) 6, 8, 9, 21

New York v. EPA,
No. 06-1322 (D.C. Cir. Sept. 24, 2007) 5

North Carolina v. TVA,
593 F. Supp. 2d 812 (W.D.N.C. 2009) 24

North Carolina v. TVA,
No. 09-1623, 2010 WL 2891572
(4th Cir. July 26, 2010) 23, 24

North Dakota v. Minnesota,
263 U.S. 365 (1923) 14

Norwalk CORE v. Norwalk Redevelopment Agency,
395 F.2d 920 (2d Cir. 1968) 22

Pub. Interest Research Grp. of N.J., Inc. v. Powell Duffryn Terminals Inc.,
913 F.2d 64 (3d Cir. 1990) 19, 20

Cited Authorities

Page

Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546 (5th Cir. 1996) 19

Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) 14

United States v. Munoz-Flores, 495 U.S. 385 (1990) 24

Utility Air Regulatory Grp. v. EPA, Nos. 10-1042 (D.C. Cir) 4

Va. Military Inst. v. United States, 508 U.S. 946 (1993) 6, 23

Vieth v. Jubelirer, 541 U.S. 267 (2004) 25

Warth v. Seldin, 422 U.S. 490 (1975) 16

STATUTES

42 U.S.C. § 300f 13

42 U.S.C. § 7411 ..... 4, 5, 11

42 U.S.C. § 7475 4

42 U.S.C. § 7604 24

Sup. Ct. R. 12.6 1

Cited Authorities

Page

RULES AND REGULATIONS

71 Fed. Reg. 9866 (Feb. 27, 2006) 5

74 Fed. Reg. 66,496 (Dec. 15, 2009) 3

75 Fed. Reg. 25,324 (May 7, 2010) 3-4

75 Fed. Reg. 17,004 (April 2, 2010) 4

75 Fed. Reg. 31,514 (June 3, 2010) 4

OTHER AUTHORITIES

U.S. EPA, EPA and NHTSA Propose First-Ever Program to Reduce Greenhouse Gas Emissions and Improve Fuel Efficiency of Medium- and Heavy-Duty Vehicles: Regulatory Announcement (Oct. 25, 2010) 10

STATEMENT

1. In 2004, respondents—Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, Wisconsin, the City of New York, Open Space Institute, Inc., Open Space Conservancy, Inc., and Audubon Society of New Hampshire[1]—sued petitioners and the Tennessee Valley Authority ("TVA") in the United States District Court for the Southern District of New York, alleging that carbon-dioxide emissions from petitioners' and TVA's power plants had contributed to global warming, creating a public nuisance under federal and state common law. Respondents alleged that those emissions have caused a wide range of current and threatened injuries, including increased injuries and death due to intensified heat waves and smog, a decreased supply of fresh water as a result of lost snow pack in California, and erosion of publicly and privately owned coastal land as a result of a rise in sea levels. Respondent States sued in two capacities: as *parens patriae*—to protect the health and welfare of their citizens—and as property owners. *See* Pet. App. 54a. The other respondents sued as property owners. *See id.* at 57a. Respondents seek injunctive relief to reduce petitioners' and TVA's carbon-dioxide emissions, but not damages.

---

1. For simplicity's sake, this brief uses the term "respondents" to refer to the States, City, and land trust property owners (Open Space Institute, Open Space Conservancy, Inc., and Audubon Society of New Hampshire), all of which were plaintiffs in the district court. Although defendant TVA is also technically a respondent, *see* Sup. Ct. R. 12.6, it is aligned with petitioners and supports the petition in part.

2. Petitioners and TVA moved to dismiss respondents' claims but did not raise the political question doctrine as a basis for dismissal. Pet. App. 178a-181a. Indeed, petitioners claimed that the test for political questions in *Baker v. Carr*, 369 U.S. 186, 208-17 (1962), was "wholly irrelevant" to this case.[2] The district court nonetheless dismissed the case on the ground that the relief sought by respondents—reductions in petitioners' carbon-dioxide emissions—raised non-justiciable political questions that the district court believed would require it to make complex policy determinations that should be made by the legislative and executive branches. Pet. App. 180a-181a, 183a-187a. The district court did not reach any of the other grounds on which petitioners and TVA sought dismissal, including Article III standing and failure to state a claim. *Id.* at 178a-179a, 187a. Neither TVA nor petitioners raised prudential standing in their motions to dismiss.

3. The court of appeals reversed, holding that respondents' public-nuisance claims do not involve political questions because the claims can be decided based on well-settled principles of tort and public-nuisance law and would not require the district court to make policy determinations of a kind clearly for nonjudicial discretion. *Id.* at 17a-41a. The court held further that respondents' allegations were sufficient at the pleading stage to establish standing and to state a public-nuisance claim under federal common law. *Id.* at 41a-76a, 88a-94a. It emphasized that it was making only

---

2. Reply Memorandum of Law in Further Support of the Motions of the Southern Company, Tennessee Valley Authority, Xcel Energy Inc., and Cinergy Corp. to Dismiss for Lack of Personal Jurisdiction, at 10 (December 17, 2004).

a threshold determination as to standing based on the pleadings, and that a greater evidentiary showing would be required as discovery progressed and at summary judgment. *Id.* at 42a-44a. The court also held that respondents' common-law claims had not been displaced, because the Environmental Protection Agency had not exercised its authority under the Clean Air Act to regulate carbon-dioxide emissions from petitioners' and TVA's power plants. *Id.* at 131a-144a. The court remanded the case to the district court, noting that it was not deciding how, if at all, future EPA regulatory actions would affect its displacement analysis. *Id.* at 159a, 169a-170a. The court denied petitions for panel or *en banc* rehearing. *Id.* at 188a-190a.

4. At the time that the court of appeals decided this case in 2009, EPA had not exercised its authority under the Clean Air Act to regulate carbon-dioxide emissions from existing power plants like petitioners' and TVA's plants, nor has it done so as of the date of this filing. But EPA may do so in the near future, as it did earlier this year for certain other sources of carbon-dioxide emissions.

First, in December 2009, EPA issued a finding, in response to *Massachusetts v. EPA*, 549 U.S. 497, 532, 535 (2007), that emissions from motor vehicles of carbon dioxide and other greenhouse gases—*i.e.*, gases that create a greenhouse effect by preventing heat from escaping from the Earth's atmosphere—endanger human health and welfare. 74 Fed. Reg. 66,496, 64,496-99 (Dec. 15, 2009). In March 2010, as a result of that finding, EPA established carbon-dioxide limitations for the first time for light-duty motor vehicles. 75 Fed. Reg.

25,324 (May 7, 2010). Second, in March and May 2010, EPA took two actions under which particularly large stationary sources that are newly constructed or modified will be required to obtain permits that include greenhouse-gas emission limitations beginning in 2011. 42 U.S.C. § 7475; 75 Fed. Reg. 17,004, 17,009 (April 2, 2010); 75 Fed. Reg. 31,514, 31,523-24 (June 3, 2010). Petitioners have filed a series of cases aimed at blocking EPA's greenhouse-gas regulations. *See Utility Air Regulatory Grp. v. EPA*, Nos. 10-1042, 10-1122, 10-1161 (D.C. Cir).

EPA has not yet issued regulations that limit emissions of carbon dioxide and other greenhouse gases from existing stationary sources like petitioners' and TVA's plants. Although those plants will be required to obtain a permit limiting their greenhouse-gas emissions if they undergo a sufficiently large "modification"—the term the Clean Air Act uses to refer to a renovation or expansion project that increases a plant's emissions, 42 U.S.C. § 7411(a)(4)—petitioners acknowledge that "federal law currently imposes no relevant restrictions on their emissions." Pet. 18; *see also* Brief for the Tennessee Valley Authority in Support of Petitioners ("TVA Br.") 31.

But as TVA emphasizes, EPA is actively considering whether to establish performance standards under the Clean Air Act, 42 U.S.C. § 7411. If issued, those standards would directly limit greenhouse-gas emissions from all new and modified power plants under § 7411(b) and set in motion a requirement for the States or EPA to set limits on greenhouse-gas emissions from existing power plants, including petitioners' and TVA's plants,

under § 7411(d). *See* TVA Br. 29. Although EPA announced in 2006 that it did not have authority to issue performance standards for greenhouse gases, 71 Fed. Reg. 9866, 9869 (Feb. 27, 2006), it is currently reconsidering that determination pursuant to a remand from the United States Court of Appeals for the D.C. Circuit directing it to do so in light of *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (holding that EPA has authority to regulate greenhouse-gas emissions from motor vehicles). *See New York v. EPA*, No. 06-1322 (D.C. Cir. Sept. 24, 2007).

Although no action has yet been taken limiting emissions from existing sources, including petitioners' and TVA's plants, under § 7411(d), respondents do not dispute that, once such action has been taken, their claims for injunctive relief under federal common law would be displaced under *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) *(Milwaukee II)*.

REASONS FOR DENYING THE PETITON

As TVA emphasizes, "[k]ey features of this case counsel against plenary review by this Court at this time." TVA Br. 9. First, this case does not implicate a conflict among the courts of appeals. The Second Circuit is the only appellate court that has addressed the particular issues at hand. There is, at most, a conflict between the Second Circuit's decision and the decisions of three district courts. That kind of conflict does not typically warrant this Court's review and certainly does not warrant its review here since two of the decisions were in a circuit where an appeal of one is pending, and the third was an oral ruling. And, contrary to petitioners'

predictions of widespread litigation involving greenhouse-gas emissions under federal common law, the only pending suit they identify is the district court case currently on appeal. *Native Village of Kivalina*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal pending*, No. 09-17490 (9th Cir.).

Second, the displacement questions that petitioners and TVA raise may be affected by forthcoming EPA regulation of greenhouse gases under the Clean Air Act. Petitioners ask the Court to consider whether the Clean Air Act by itself, without any implementing regulations, displaces respondents' federal-common-law claims. It would be imprudent for the Court to decide that issue at this time because, as TVA makes clear, TVA Br. 29, EPA is currently considering whether to take regulatory action that would trigger control of greenhouse-gas emissions from petitioners' existing stationary sources. Such action would, at the very least, have a significant effect on the displacement issue and might even resolve it because, as respondents concede, EPA regulation of greenhouse-gas emissions from existing power plants would displace their federal-common-law nuisance cause of action for injunctive relief.

Third, the current procedural posture of the case makes it inappropriate for the Court to review the Article III standing question raised by petitioners. The case is in an interlocutory posture which, as TVA acknowledges, "is itself often a sufficient reason to deny certiorari." TVA Br. 9 (citing *Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring in the denial of certiorari)). Indeed, the court of appeals itself made it clear that further development of the facts

and intervening regulatory developments could affect the threshold rulings made in its decision. Petitioners ask the Court to consider whether respondents' injuries are traceable to petitioners' emissions and redressable by a favorable decision. That argument effectively seeks to challenge the truth of the allegations in the complaint, and accordingly requires an evidentiary record that has not yet been developed.

Fourth, petitioners' political question argument depends on speculation about what remedy the district court might fashion. In the case's current interlocutory posture, any arguments about the nature of the remedy or the impact the remedy might have on petitioners or *amici* are premature and cannot be the subject of meaningful review by this Court.

TVA agrees that plenary review of the case by this Court is unwarranted at this time, and further does not challenge the court of appeals' disposition of several key issues. For example, TVA dismisses the relevance of the political question and Article III standing arguments—two of the principal bases of the petition—suggesting instead that "[a]s a legal matter, petitioners' concerns are best expressed as defects in demonstrating prudential standing." TVA Br. 11; *id.* at 18 n.10 ("[W]idely shared environmental harms may establish injury for Article III purposes."). Nor does TVA argue that the Second Circuit analyzed the displacement issue incorrectly in light of the then-existing state of EPA regulation of greenhouse gases. Rather, TVA says that those "predicates" for the Second Circuit's decision "are no longer true" and urges reconsideration of the displacement question in light of EPA's actions "[i]n the

11 months since the court issued its decision." TVA Br. 23. TVA argues that the Court should vacate the decision of the court of appeals and remand the case for consideration of EPA's recent regulatory actions—none of which limit carbon-dioxide emissions from existing power plants—and respondents' prudential standing. But, as TVA concedes, these arguments were not raised to either of the courts below, either before or after the decision under review. Nor is a vacatur required for the arguments to be asserted before the courts below. Because the court of appeals' order remands the case to the district court, TVA will have an opportunity to raise those questions on remand. And prudential standing—which TVA raises for the first time in this Court—is not an intervening development justifying a remand.

I. There Is No Conflict Warranting This Court's Review At This Time.

1. As TVA observes, "the courts of appeals are not, at present, in conflict on the questions presented." TVA Br. 9. Petitioners claim that there are "demonstrable conflicts" between the Second Circuit's decision and other decisions, Pet. 12, but the decisions to which they refer are district court decisions and, in any event, of particularly limited precedential value. *Native Village of Kivalina*, 663 F. Supp. 2d 863, is on appeal. *California v. General Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), *appeal voluntarily dismissed*, No. 07-16908 (June 24, 2009), was unpublished, and California voluntarily dismissed its appeal. In *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *opinion vacated pending reh'g en banc*,

598 F.3d 208, *appeal dismissed*, 607 F.3d 1049 (2010), *petition for mandamus filed*, No. 10-294, the district court's oral ruling was originally reversed by a panel of the Fifth Circuit and then reinstated only after the *en banc* court vacated the panel decision for rehearing and subsequently dismissed the appeal when it lost the *en banc* quorum as a result of recusals. None of those rulings creates the kind of conflict with the Second Circuit's decision justifying resolution by this Court.

2. Nor, contrary to the assertions of petitioners and TVA, Pet. 5; TVA Br. 14-15, is there a spate of litigation making this Court's immediate review of this case necessary despite the absence of a conflict among the circuits. The only pending federal-common-law climate-change case cited by petitioners and TVA is *Native Village of Kivalina*. Although TVA predicts that the Second Circuit's decision in this case will induce plaintiffs in climate-change suits to file in the Second Circuit, thereby forestalling percolation in other circuits, TVA Br. 10, neither petitioners nor TVA have identified a single case that has been filed in the Second Circuit—or in any other circuit for that matter—since the Second Circuit ruled more than a year ago.

Amici curiae's predictions of widespread litigation are also unsubstantiated. *Amici* State of Indiana *et al.* express concern that the decision of the court of appeals makes lawsuits against States likely, *see* Brief of the States of Indiana *et al.* as *Amici Curiae* in Support of the Petition ("Indiana Br.") 20-22, but they fail to identify even a single lawsuit that has been filed against a State. Even more unfounded are *amici* automobile manufacturers' concerns about federal-common-law

challenges to emissions from motor vehicles. *See* Brief of the Association of International Automobile Manufacturers *et al.* as *Amici Curiae* in Support of Petitioners ("AIAM Br.") 2-3, 14. EPA has issued emission limitations for light-duty motor vehicles, thus displacing federal-common-law claims as to those emissions, and has proposed limitations for medium and heavy-duty trucks, *see* U.S. EPA, EPA and NHTSA Propose First-Ever Program to Reduce Greenhouse Gas Emissions and Improve Fuel Efficiency of Medium- and Heavy-Duty Vehicles: Regulatory Announcement (Oct. 25, 2010).[3]

Contrary to the dire predictions of petitioners, TVA, and *amici*—including the implausible specter of lawsuits claiming that human beings create a public nuisance by exhaling carbon dioxide, Brief *Amicus Curiae* of the Chamber of Commerce of the United States of America in Support of Petitioners 5—greenhouse-gas emission claims under federal common law are decidedly uncommon and are at such an early stage of percolation in the federal courts that they do not warrant this Court's review at this time.

II. The Court Should Not Decide the Statutory Displacement Issue At This Time Due to the Current Regulatory Flux.

1. The Court's review is also improper because the quickly shifting regulatory landscape may eliminate any dispute between the parties on displacement and, indeed, on any of the questions presented. Petitioners—

3. *Available at* http://www.epa.gov/otaq/climate/regulations/420f10901.htm.

but not TVA, *see* TVA Br. 24—argue that the Clean Air Act itself displaces respondents' claims, even in the absence of any regulatory action by EPA. Pet. 21-22. But it would be imprudent for the Court to consider that question at this time because EPA is actively considering whether to issue performance standards limiting greenhouse-gas emissions from new and modified power plants, which would require States or EPA to limit greenhouse-gas emissions from existing power plants. 42 U.S.C. § 7411(b), (d). If and when carbon-dioxide emissions from petitioners' existing plants are limited, respondents agree that their request for emission reductions under federal common law would be displaced, obviating any need for review not only of displacement but also of the other questions presented. Nor do petitioners identify any other area of the law that would be aided by the Court's review of the displacement question as presented here. Indeed, that question is essentially *sui generis*.

2. Moreover, petitioners are participating in a broad set of industry challenges to EPA's recent greenhouse-gas rulemakings. See p. 4 *supra*. If petitioners successfully block those regulations, it would place the displacement question in a very different light, making it imprudent for this Court to consider this case in its current form.

3. In any event, the court of appeals' ruling that the Clean Air Act does not displace respondents' federal-common-law claims in the absence of any regulatory action by EPA was based on well-settled law, as established in *Illinois v. City of Milwaukee*, 406 U.S. 91, 104-08 (1972) (*Milwaukee I*), and *Milwaukee II*, 451

U.S. at 317-20. In *Milwaukee I*, the Court held that Illinois' federal-common-law challenge to Milwaukee's discharges of sewage into Lake Michigan was "not inconsistent with" the pre-1972 Federal Water Pollution Control Act and thus not displaced. *Id.* at 102-04. That version of the Federal Water Pollution Control Act required the States—or, if they failed to do so, EPA—to establish water-quality standards, but did not require limits on Milwaukee's discharges or provide any remedy to Illinois unless and until EPA determined that the discharges endangered human health or welfare and sought to abate it. *Id.*

The Court heard the case again after Congress amended the Federal Water Pollution Control Act (now called the Clean Water Act) to prohibit *every* discharge of water pollutants except as authorized by a permit. Under the new regime, Milwaukee could not discharge sewage except subject to limitations established by a permit issued under the Act. *Milwaukee II*, 451 U.S. at 319-20. As a result, Illinois' federal-common-law claims regarding the discharges "ha[d] been thoroughly addressed through the administrative scheme established by Congress, as contemplated by Congress," and thus displaced. *Id.* at 318.

The Clean Air Act, like the pre-1972 Federal Water Pollution Control Act reviewed in *Milwaukee I*, does not itself prohibit or limit emissions of air pollutants, including carbon dioxide, unless and until EPA takes regulatory action to control emissions. At the time that the court of appeals issued its decision here, EPA had issued no greenhouse-gas limitations on any source of greenhouse gases, much less limited petitioners'

discharges as it had in *Milwaukee II*. As a result, the court of appeals ruled correctly that the Clean Air Act itself did not displace respondents' federal-common-law claims. Nor, contrary to petitioners' suggestion, *see* Pet. 22-23, is there a conflict between that ruling and *Mattoon v. City of Pittsfield*, 980 F.2d 1 (1st Cir. 1992), which involved a different federal statute, the Safe Drinking Water Act, 42 U.S.C. §§ 300f *et seq.*, and an entirely intrastate water pollution issue—the presence of bacteria in a local reservoir—not generally cognizable under federal common law. The case was eventually refiled and resolved in state court under state law. *See Mattoon v. City of Pittsfield*, 775 N.E.2d 770 (Mass. App. Ct. 2002).

4. Petitioners—but not TVA—also ask the Court to consider whether federal common law encompasses public-nuisance claims seeking injunctive relief for emissions that contribute to climate change. Again, there is no reason for the Court to consider that question at this time because that federal-common-law remedy may be displaced in the foreseeable future. In any event, the question is not an unsettled one requiring the Court's resolution. Petitioners frame the issue as whether "[t]o imply a new common law cause of action to address climate change." Pet. 24 (emphasis added). But the cause of action is not a *new* one. *Milwaukee I*, 406 U.S. at 103, made it clear that a long line of cases, including *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 236 (1907), and *Missouri v. Illinois*, 180 U.S. 208, 241 (1901), had established an interstate-pollution public-nuisance claim under federal common law. As *Milwaukee I* stated, "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common

law." 406 U.S. at 103; *accord Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 n.13 (1981); *Arkansas v. Oklahoma*, 503 U.S. 91, 98-101, 110 (1992). Petitioners further suggest that the federal common law of nuisance was developed at a time when "the Constitution was thought to preclude any branch of government other than the judiciary from addressing interstate pollution," thus making it no longer viable, Pet. 24, but, as discussed above, *Milwaukee I* was decided *after* Congress had enacted the original version of the Federal Water Pollution Control Act.

Nor is the federal common law of nuisance limited, as petitioners claim, Pet. 25, to "simple type" nuisances. Petitioners' argument mistakenly construes *North Dakota v. Minnesota*, 263 U.S. 365, 372 (1923), where the Court stated that interstate flooding of land was "a public nuisance of simple type for which a state may properly ask an injunction" directly from the Court. *Id.* at 374. *North Dakota* did not hold that only "simple" nuisances are cognizable under federal common law, and in that case itself, the Court engaged in an in-depth review of complex expert testimony. *Id.* at 379-87.

Indeed, from its inception, federal nuisance law has involved complex nuisances. For example, when the Court decided the merits of Missouri's federal-common-law challenge to the discharge of sewage into the Mississippi watershed by Illinois in *Missouri v. Illinois*, 200 U.S. 496, 518, 522 (1906), the Court observed that "the actual facts have required for their establishment the most ingenious experiments, and for their interpretation the most subtle speculations, of modern science," and emphasized that the case did *not* involve

"a nuisance of the simple kind that was known to the older common law."

Petitioners also argue that federal common law is limited to "noxious or harmful substances that caused severe, localized harms directly traceable to an out-of-state source," Pet. 24-25, but as the court of appeals held, there is "no case law" supporting that argument, Pet. App. 91a. And, in any event, petitioners' contention is essentially an argument that respondents have failed to allege injuries traceable to petitioners' emissions, as required for Article III standing, which is discussed below.

Nor is there any basis for petitioners' fear that the courts will establish standards that conflict with regulations issued by EPA. Pet. 20. That will not happen, because once EPA issues regulations that would create that kind of conflict, any contrary standards established under federal common law would be displaced.

III. Respondents' Standing Under Article III Does Not Warrant the Court's Review At This Time Because There Has Not Been Any Factual Development.

1. The Court should also decline to consider respondents' Article III standing at this juncture because the matter is still at the pleading stage and the standing issues raised by petitioners will require an evidentiary record to resolve. As the court of appeals observed, "the procedural posture of a case is important when assessing standing." Pet. App. 42a. At the pleading stage, a case is subject to dismissal for lack of standing

only if, accepting the allegations in the complaint as true and construing them in favor of the plaintiffs, the plaintiffs would not have standing. *Warth v. Seldin*, 422 U.S. 490, 501 (1975). But petitioners' argument does not accept respondents' allegations as true. Instead, they contend that respondents will not be able to prove their allegations showing that, as required under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), their injuries are traceable to petitioners' plants and redressable by a favorable decision. Those are factual contentions that can be resolved only on a motion for summary judgment or at trial. If the Court declines review at this juncture, petitioners are free, as the defendants did in *Lujan*, 504 U.S. at 561, to seek summary judgment on standing, which would require respondents to set forth specific facts, provide petitioners an opportunity to submit their own facts, and establish an informed basis on which to decide standing. The Court should await that evidentiary development rather than engage in a premature review of standing that would leave key questions unresolved.

2. Two sets of requirements govern respondents' standing, and respondents' allegations satisfy both of them. First, to establish Article III standing, a plaintiff must generally show (1) an injury that is (2) fairly traceable to the defendant's actions and (3) will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61. Second, a State may sue in its *parens patriae* capacity based on a quasi-sovereign interest that is "apart from the interests of particular private parties" and involves "a sufficiently substantial segment of its population." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 603 (1982); *see also* Pet. App. 48a.

The court of appeals held that all the respondents meet the *Lujan* test, and that the respondent States meet the *Snapp* test. *Id.* at 54a-76a. Petitioners do not contest the court's ruling under *Snapp*, or that respondents' alleged injuries are sufficient under *Lujan*, but contend that respondents' allegations fail to meet *Lujan*'s traceability and redressability requirements. The Court cannot fully review those contentions without an evidentiary record.

Respondents have alleged that (1) they have suffered or will suffer a wide range of injuries from climate change, including erosion of coastal land as a result of a rise in sea levels, decreased access to fresh water as a result of lost snowpack, and increased injuries and death due to intensified heat waves; (2) petitioners and TVA—the five largest sources of carbon dioxide in the United States and among the largest in the world, emitting 650 million tons of carbon dioxide annually—have contributed to climate change; and (3) climate-change related injuries will be reduced if petitioners and TVA reduce their emissions. *See id.* at 8a-11a, 68a, 173a. Those allegations, which must be accepted as true at this stage, establish that respondents' injuries are traceable to petitioners' and TVA's carbon-dioxide emissions and will be redressed by a reduction in those emissions.

Petitioners contend that "[c]limate change is not traceable to any of these defendants, and would not be redressed by the imposition of carbon dioxide emissions caps on them." Pet. 13. But the complaint alleges that "emissions of carbon dioxide contribute to global warming and to the resulting injuries and threatened

injuries to the plaintiffs, their citizens and residents, and their environment" and that "[r]eductions in the carbon dioxide emissions of the defendants will contribute to a reduction in the risk and threat of injury to the plaintiffs and their citizens and residents from global warming." Compl. ¶¶ 148, 157, No. 04-5669 (July 21, 2004). Petitioners' contrary contentions are factual, at least in part, and at this stage of the litigation there is as yet no factual record. *See* TVA Br. 21 n.12 (contending that respondents will need to produce evidence showing that petitioners' emissions will reduce the magnitude of respondents' injuries).

To the extent that petitioners are, in effect, asking the Court to take judicial notice that a reduction in carbon-dioxide emissions from their plants would have *no* impact on respondents' injuries, that would be inconsistent with *Massachusetts*. In that case, EPA argued, based on a factual record, that the plaintiffs lacked standing because EPA's decision not to regulate motor-vehicle greenhouse-gas emissions made only an insignificant contribution to the plaintiffs' injuries. 549 U.S. at 523. Indeed, EPA made an argument strikingly similar to petitioners', "maintain[ing] that because greenhouse gas emissions inflict widespread harm, the doctrine of standing presents an insuperable jurisdictional obstacle." *Id.* at 517. The Court disagreed after reviewing evidence that showed, among other things, that the United States transportation sector emitted 1.7 billion metric tons of carbon-dioxide annually, *id.* at 524—a level comparable to the 650 million tons of annual emissions that respondents allege here, Pet. App. 173a—and ruled that "[w]hile it may be true that regulating motor-vehicle emissions will not by itself

reverse global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it." *Id.* at 524-25 (emphasis in original).

Petitioners mistakenly argue that the standing analysis in *Massachusetts* is irrelevant here because that case involved a petition challenging EPA's failure to regulate rather than a federal-common-law claim. Pet. 16. But *Lujan* makes it clear that standing is not harder to establish in a case directly against a tortfeasor, such as this one, than in a case against a regulator, such as *Massachusetts*. *See* 504 U.S. at 562. Furthermore, *Massachusetts* held that the petitioners' assertions had "satisfied the most demanding standards of the adversarial process." 549 U.S. at 521. In any event, regardless of whether *Massachusetts* controls the outcome here, it counsels strongly in favor of the Court's waiting to consider respondents' standing until it can review a factual record, as it did there.

Petitioners also argue that the decision of the court of appeals is "plainly inconsistent" with the Third Circuit's decision in *Public Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64 (3d Cir. 1990), and with two decisions from other circuits relying on it, *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000), and *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 558 (5th Cir. 1996). Pet. 18. But far from disagreeing with this line of decisions, the Second Circuit took into account this "widely accepted case law," which is consistent with the long-established principle that a defendant can be held liable for contributing to a

common-law nuisance, *see Cox v. City of Dallas*, 256 F.3d 281, 292 n.19 (5th Cir. 2001). Pet. App. 69a-72a. Petitioners argue that the court of appeals should not have relied in any way on the standing analysis in *Powell Duffryn* and its progeny because those cases involved violations of permits issued under the Clean Water Act, and this case does not involve a statutory permitting process. Pet. 18-20. But there is no dispute among the circuits as to the underlying common-law causal principle, and the court of appeals cannot be faulted for examining a line of cases in an analogous statutory context. As this Court has recognized, standing must be "gauged by the specific common-law, statutory or constitutional claims that a party presents," *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 76 (1991), and the court of appeals properly did so here.

IV. Petitioners' Political Question Argument Is Based on Premature Speculation About the Remedy.

1. Petitioners—but again, not TVA—also ask the Court to consider whether respondents' federal-common-law claims raise non-justiciable political questions. That issue does not warrant this Court's review. This case falls into none of the categories—particularly foreign relations and constitutional questions—where the Court has typically found political questions. *See Baker*, 369 U.S. at 208-17. Instead, petitioners ask the Court to rule that the unique attributes of greenhouse-gas emissions raise political questions. Pet. 28. It would be premature for the Court to weigh in on that issue at this time in the absence of a

circuit split, or even sufficient percolation in the lower courts. The only two courts of appeals that have addressed the issue—the Second Circuit in this case and the now-vacated Fifth Circuit panel opinion in *Comer*—both concluded that there was no political question, and the issue is currently pending before the Ninth Circuit in *Native Village of Kivalina*.

2. The interlocutory posture of this case also counsels against this Court's review of the political question issue at this time. Although petitioners asserted in the district court that the *Baker v. Carr* test for political questions is irrelevant to this case, see p. 2 *supra*, they now rely on that test, arguing that respondents' claims cannot be resolved using "judicially discoverable and manageable standards," and instead require "an initial policy determination of a kind clearly for nonjudicial discretion," *Baker*, 369 U.S. at 217. Pet. 26. But petitioners' political question arguments rest on speculation about how the district court *might* fashion a remedy, speculating that the court would need to establish global emission levels, nation-by-nation levels, and industry-by-industry levels before proceeding finally to establish carbon-dioxide emission levels for petitioners' plants. Pet. 28. There is no way for petitioners—or, for that matter, respondents—to predict the nature of any remedy the district court might fashion. As a result, it would be premature for the Court to consider whether deciding relief will require the district court to make policy determinations that a court should not make.

Nor can petitioners make informed predictions about how any eventual remedy might affect them.

Without knowing what relief the court will order, they have no basis for claiming that that relief will threaten their financial health and security, or that of other sectors of the economy, or that they may have to shut down their facilities. Pet. 2, 4. Nor is there any basis for the electric industry *amici* to predict that the emission reductions imposed by the court would be "vastly more expensive" than reductions imposed by EPA, *see* Brief for the Edison Electric Institute *et al.* as Amici Curiae in Support of Petitioners 19-20, or for the *amici* States of Indiana *et al.* to predict that the remedy would cause the court to lose credibility and stature, *see* Indiana Br. 5. These speculative predictions are particularly dubious given that, as petitioners acknowledge, Pet. 3, the district court will be guided by long-established principles of tort law regarding the fashioning of injunctive relief that require it to order relief that is reasonable, taking into account the burden of such relief on petitioners.

Because—as petitioners themselves frame the issue—the question whether respondents have raised political questions turns on how a remedy would be fashioned, the case does not warrant this Court's review in its current posture. *See McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1365 (11th Cir. 2007) ("[i]t would be inappropriate to dismiss the case on the mere chance that a political question may eventually present itself"); *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 929 (2d Cir. 1968) (rejecting a political question argument because "[w]ith this case only at the pleadings stage, we do not think that we should speculate on what specific remedies might be appropriate if the plaintiffs' allegations are proved");

cf. Va. Military Inst., 508 U.S. at 946 (denying certiorari because the lower court had not yet had an opportunity to determine an appropriate remedy).

3. Petitioners argue that the Court should decide the issue now in order to avoid a "confused patchwork of standards, to the detriment of industry and the environment alike," quoting the Fourth Circuit's ruling in *North Carolina v. TVA*, No. 09-1623, 2010 WL 2891572, at *1 (4th Cir. July 26, 2010).[4] Pet. 32. But federal common law provides a uniform standard and was fashioned for that very reason, preventing the conflicting standards that petitioners predict. *See Milwaukee II*, 406 U.S. 91, 105 n.6. Although there is a theoretical possibility that different federal courts would impose different injunctive relief under federal common law, there is little risk that that will happen here if the Court declines to review this case before relief is ordered because, to respondents' knowledge, this case is the only pending federal-common-law case seeking injunctive relief to reduce greenhouse-gas emissions.

Moreover, the Fourth Circuit case on which petitioners rely involved neither greenhouse gases nor federal common law. North Carolina challenged emissions by TVA of pollutants that have been regulated by EPA for decades—sulfur dioxide and nitrous

4. Ironically, *amici* States of Indiana *et al.* support the petition for certiorari because they would like to impose their own standards, arguing that resolution of respondents' claims under federal common law would prevent States from instituting different environmental policies reflecting their diversity. Indiana Br. 15. That is an argument *in favor* of a patchwork of standards.

oxides—under the common law of the States where the plants were located. The district court granted North Carolina's request for an order directing TVA to install or maintain equipment designed to control the emissions. *See North Carolina v. TVA*, 593 F. Supp. 2d 812, 822-25, 829-31 (W.D.N.C. 2009). Even though the Clean Air Act's savings clause expressly preserves state-common-law claims like North Carolina's, 42 U.S.C. § 7604(e); *see Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 495-96 (1987) (interpreting the identical savings clause in the Clean Water Act to preserve a public-nuisance claim brought under the common law of the state where a pollution source is located), the Fourth Circuit reversed the district court on the ground, among others, that the Act preempts state-common-law claims. *North Carolina v. TVA*, 2010 WL 2891572 at *8-*10, *13-*14. Whether or not that holding is correct under *Ouellette*, the court's concern that *state*-common-law claims could lead to different standards in different States has no application in this *federal*-common-law case. If anything, the prospect of varying standards under state common law bolsters the case for applying federal rather than state common law in this realm.

4. In any event, respondents' claims do not raise political questions. The political question doctrine is "primarily a function of the separation of powers," *Baker*, 369 U.S. at 210, "designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government," *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990). But respondents make claims under common law, which is the essence of the business of the judiciary, requiring it "to act in the manner traditional for English and

American courts." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion). As the court of appeals recognized, there is "a long line of federal common law of nuisance cases where federal courts employed familiar public nuisance precepts, grappled with complex scientific evidence, and resolved the issues presented, based on a fully developed record." Pet. App. 30a-31a.

Petitioners argue that, because public-nuisance law requires the district court to weigh the gravity of the harm caused by petitioners' carbon-dioxide emissions against the utility of their conduct in order to fashion a remedy, this case "involve[s] policy tradeoffs." Pet. 27. But that policy tradeoff—if it can be called that—is a standard established by the courts themselves, not one committed to the other branches. It makes no sense to say that a judicially established standard cannot be applied by a court because it involves a determination that can be characterized as involving policy.

Petitioners' argument fails to recognize that the political question doctrine prohibits only policy determinations of "a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. If weighing the equities to determine relief in a common-law case is indeed a policy determination, it is one long entrusted to the courts.

Nor does the fact that this case may arise in a politically sensitive context mean that it involves political questions. The Court made it clear in *Baker*, 369 U.S. at 217, that "[t]he doctrine of which we treat is one of 'political questions,' not one of 'political cases.'" *See also Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S.

221, 230 (1986) (a case does not present a political question merely because it has "significant political overtones").

V. Because the Court of Appeals Remanded This Case to the District Court, TVA Does Not Need a Remand from This Court to Make Its Displacement or Prudential Standing Arguments.

1. TVA asks the Court to grant the writ of certiorari, vacate the decision of the court of appeals, and remand for consideration of whether the regulatory actions EPA has taken since the court of appeals issued its decision have displaced respondents' federal-common-law claims and whether respondents meet prudential standing requirements. It is not clear that TVA may raise prudential standing for the first time in this Court, without having preserved the issue in the lower courts, and respondents do not concede that TVA can do so. In any event, there is no reason for the Court to remand the case to the court of appeals to consider the displacement and prudential standing issues TVA has raised because TVA will have the opportunity to raise those arguments below without a remand from this Court.

2. Unlike petitioners, TVA does not claim that the Clean Air Act by itself displaces respondents' federal common law claims. Rather, TVA argues that the regulatory actions EPA has taken since the court of appeals issued its decision—including the motor-vehicle endangerment finding, light-duty motor-vehicle emission standards, and permitting requirements for

new and modified sources—create a "'reasonable probability'" of displacement, and therefore warrant a remand for consideration of that possibility. TVA Br. 32 (quoting *Lawrence v. Chater*, 516 U.S. 163, 167 (1966) (per curiam)). But because this case is in an interlocutory posture, no action by this Court is required to give TVA the opportunity to argue to the courts below that respondents' claims have been displaced by EPA's recent regulatory actions. If the Court denies the writ of certiorari, the case will be remanded to the district court under the court of appeals' order, TVA may then make its argument to the district court, the Second Circuit may consider it in due course, and TVA will have the opportunity to seek this Court's review.

That approach is particularly warranted here because, as TVA itself emphasizes, TVA Br. 29, EPA's regulation of greenhouse gases is currently in flux and there may soon be more regulatory action. The court of appeals' remand to the district court will appropriately allow the district court to address future regulatory developments as they occur. Particularly given that respondents have acknowledged that regulatory action limiting carbon-dioxide emissions from existing power plants would, under *Milwaukee II*, 451 U.S. at 317-20, displace their federal-common-law remedy, and that may occur here in the foreseeable future, it would be imprudent to require the court of appeals to determine whether displacement has already occurred when such further regulatory action is anticipated.

3. Nor is TVA correct that EPA's recent regulatory actions have displaced respondents' federal-common-law claims for injunctive relief. TVA recognizes that EPA

has not yet regulated emissions from existing sources but argues nonetheless, quoting *Milwaukee II*, 451 U.S. at 324, that EPA's regulation of other sources has displaced respondents' claims because "[t]he question is whether the field has been occupied, not whether it has been occupied in a particular manner." TVA Br. 31. TVA quotes *Milwaukee II* out of context: the Court was responding to Illinois's argument that, even after a permit had been issued regulating Milwaukee's sewage overflows, Illinois could rely on federal common law to contest how effectively or adequately the overflows were being regulated. 451 U.S. at 323. Here, in contrast, respondents have brought their federal-common-law claims not because they disagree with how well EPA is regulating greenhouse-gas emissions from existing stationary sources, but in the absence of any EPA regulation of those emissions at all, as in *Milwaukee I*.

Indeed, the present state of regulatory flux is strikingly similar to that existing when *Milwaukee I* was decided in April 1972. At that time, Congress was in the process of amending the Federal Water Pollution Control Act to limit discharges from sewage treatment plants, and the Senate had already passed the amendments. *See Milwaukee II*, 451 U.S. at 310, 327 n.19. But because the discharges were not yet limited, there was no basis for the Court to conclude that Illinois' federal-common-law claims had been displaced. Likewise, respondents' federal-common-law claims will not be displaced until EPA actually limits greenhouse-gas emissions from petitioners' and TVA's plants.

4. Unlike petitioners, TVA does not contest whether respondents have Article III standing. Instead, TVA

argues that the concerns petitioners raise with respect to Article III standing and political questions "are best expressed as defects in demonstrating prudential standing," TVA Br. 11, and seeks a remand requiring the court of appeals to consider that issue. Even if TVA can raise that issue for the first time here, as it concedes it is seeking to do, *id.* at 21, the Court should not vacate and remand for consideration of prudential standing.

First, TVA's argument is incorrect. It contends that respondents do not have prudential standing because they raise "generalized grievances." *Id.* at 17. But grievances shared by a substantial segment of the population are the *raison d'etre* of suits like this one that are brought by States in their *parens patriae* capacity. *See Snapp*, 458 U.S. at 607. Neither TVA nor petitioners challenge the court of appeals' ruling that respondent States meet the *Snapp* test. Nor does TVA cite any decisions barring a State, on prudential standing grounds, from suing as *parens patriae* to protect the health and welfare of its citizens.

Second, because this petition is interlocutory, TVA may present its novel argument to the district court and, should the case be appealed again, by the court of appeals without a remand. It would be particularly unwarranted for the Court to vacate and remand for consideration of an argument that was raised for the first time in response to a petition for certiorari and that is not based on any intervening development. *See Lawrence*, 516 U.S. at 192 (Scalia, J., dissenting). When, as here, a party belatedly discovers a new argument, it should make that argument in due course under normal procedures, rather than seek to vacate a decision that

did not consider the argument because the party did not raise it.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

ANDREW M. CUOMO
Attorney General of New York

BARBARA D. UNDERWOOD*
Solicitor General
BENJAMIN N. GUTMAN
Deputy Solicitor General
MONICA WAGNER
Assistant Solicitor General
MICHAEL J. MYERS
MORGAN A. COSTELLO
Assistant Attorneys General
120 Broadway, 25th Floor
New York, NY 10271
(212) 416-6351
barbara.underwood@ag.ny.gov

**Counsel of Record*

November 2010

EDMUND G. BROWN JR.
Attorney General of California
CALIFORNIA DEPARTMENT OF JUSTICE
P.O. Box 70550, 1515 Clay Street
Oakland, CA 94612-0550

RICHARD BLUMENTHAL
Attorney General of Connecticut
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120

THOMAS J. MILLER
Attorney General of Iowa
1305 E. Walnut Street
Des Moines, IA 50319

PAULA T. DOW
Attorney General of New Jersey
R.J. Hughes Justice Complex
25 Market Street
Trenton, NJ 08625

PATRICK C. LYNCH
Attorney General of Rhode Island
150 South Main Street
Providence, RI 02903

WILLIAM H. SORRELL
Attorney General of Vermont
109 State Street
Montpelier, VT 05609-1001

CAROL T. NGUYEN
THOMAS H. GEOHEGAN
Attorneys for the State of Wisconsin
77 W. Washington Street,
Suite 711
Chicago, IL 60602

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
100 Church Street
New York, NY 10007

MATTHEW F. PAWA
LAW OFFICES OF
MATTHEW F. PAWA, P.C.
1280 Centre Street,
Suite 230
Newton Centre, MA 02459

DAVID D. DONIGER
GERALD GOLDMAN
NATURAL RESOURCES
DEFENSE COUNCIL
1200 New York Avenue, NW
Washington, DC 20005

Counsel for Open Space Institute, Inc., Open Space Conservancy, Inc., and Audubon Society of New Hampshire

REPLY BRIEF

Supreme Court, U.S.
FILED
NOV 12 2010
OFFICE OF THE CLERK

No. 10-174

IN THE

Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY INC., *et al.*,
Petitioners,

v.

STATE OF CONNECTICUT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF

F. WILLIAM BROWNELL
NORMAN W. FICHTHORN
ALLISON D. WOOD
HUNTON & WILLIAMS LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 955-1500

Counsel for Petitioner Southern Company

PETER D. KEISLER*
CARTER G. PHILLIPS
DAVID T. BUENTE JR.
QUIN M. SORENSON
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
pkeisler@sidley.com
(202) 736-8000

Counsel for Petitioners

* Counsel of Record
[Additional Counsel Listed On Inside Cover]

November 12, 2010

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

SHAWN PATRICK REGAN
HUNTON & WILLIAMS LLP
200 Park Avenue
52nd Floor
New York, N.Y. 10166
(212) 309-1000

Counsel for Petitioner Southern Company

MARTIN H. REDISH
NORTHWESTERN UNIVERSITY SCHOOL OF LAW
375 East Chicago Avenue
Chicago, Illinois 60611
(312) 503-8545

Counsel for Petitioners

DONALD B. AYER
KEVIN P. HOLEWINSKI
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

THOMAS E. FENNELL
MICHAEL L. RICE
JONES DAY
2727 North Harwood Street
Dallas, Texas 75201
(214) 220-3939

Counsel for Petitioner Xcel Energy Inc.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF	1
I. THIS CASE IMPLICATES CONFLICTS AMONG THE FEDERAL COURTS	2
II. THIS CASE WARRANTS IMMEDIATE REVIEW	6
III. THERE IS NO REASON TO REMAND TO THE COURT OF APPEALS	9
CONCLUSION	12

TABLE OF AUTHORITIES

CASES Page

Allen v. *Wright*, 468 U.S. 737 (1984) 7
Ashcroft v. *Iqbal*, 129 S. Ct. 1937 (2009) 7
Baker v. *Carr*, 369 U.S. 186 (1962) 9
Bell Atl. Corp. v. *Twombly*, 550 U.S. 544 (2007) 7
City of Milwaukee v. *Illinois*, 451 U.S. 304 (1981) 5, 6
Illinois v. *City of Milwaukee*, 406 U.S. 91 (1972) 5
Illinois v. *Outboard Marine Corp.*, 680 F.2d 473 (7th Cir. 1982) 6
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 4
Massachusetts v. *EPA*, 549 U.S. 497 (2007) 3, 4
Massachusetts v. *United States*, 435 U.S. 444 (1978) 3
Mattoon v. *City of Pittsfield*, 980 F.2d 1 (1st Cir. 1992) 6
Nixon v. *United States*, 506 U.S. 224 (1993) 9
North Dakota v. *Minnesota*, 263 U.S. 365 (1923) 5
PIRG v. *Powell Duffryn Terminals Inc.*, 913 F.2d 64 (3d Cir. 1990) 3, 4
Warth v. *Seldin*, 422 U.S. 490 (1975) 10

STATUTES

33 U.S.C. § 1160 (1970) 5

SCHOLARLY AUTHORITIES

Eugene Gressman et al., *Supreme Court Practice* (9th ed. 2007) 3, 7, 11

TABLE OF AUTHORITIES—continued

OTHER AUTHORITIES

Page

Press Release, N.Y. Office of Att'y Gen., Eight States & NYC Sue Top Five U.S. Global Warming Polluters (July 21, 2004), http://www.ag.ny.gov/media_center/2004/jul/jul21a_04.html 2

REPLY BRIEF

The issues presented in the petition fully satisfy this Court's criteria for certiorari. The federal courts are in conflict, and the issues presented are important and recurring. The breathtaking scope and implications of the Second Circuit's decision heighten the need for immediate review. That decision holds that federal courts have authority to (i) entertain a supposed federal common law cause of action for contributing to the alleged "nuisance" of climate change, (ii) determine the permissible level of greenhouse gas emissions, and (iii) grant relief in favor of anyone allegedly affected by global warming against any enterprise that emits greenhouse gases. And, it views such remarkable claims as viable even in the face of Congress's statutory delegation of responsibility to the Environmental Protection Agency ("EPA") to address regulation of greenhouse gas emissions.

The urgent need for review and exceptional national importance of the Second Circuit's decision are confirmed in the brief of the Acting Solicitor General and in 14 briefs filed by labor and business organizations and a group of States as *amici curiae*. These briefs describe the detrimental effects of the Second Circuit's holding on this vast array of *amici* and urge prompt review. Allowing common law litigation to set national emissions policy on an *ad hoc* basis circumvents the Clean Air Act ("CAA") and subjects virtually all enterprises to suits for injunctive relief and damages based on their alleged "contributions" to climate change.

In their brief in opposition, respondents do not dispute the importance of the issues presented.[1] Indeed, they elsewhere correctly characterize this as a "huge" and "historic" case that "opens a new legal frontier."[2] They do, however, claim that the petition should be denied because the acknowledged split among federal courts is not of the right "kind," and because review will be "premature" unless and until there is further factual development, an end to an asserted "flux" in EPA regulations, and a final judicial remedy. Opp. 7, 9-10, 16. Respondents are wrong. The split among federal courts is pronounced and broad; the standing and political question arguments present issues of law that can and should be decided on the basis of the facts alleged and the remedy sought on the face of respondents' pleadings; and displacement of common law is properly assessed based on the governing statute, without regard to EPA regulations. Particularly in light of the costs, uncertainty, and interference with public policy that would be imposed if resolution of these threshold dispositive issues is delayed, immediate review is warranted.

I. THIS CASE IMPLICATES CONFLICTS AMONG THE FEDERAL COURTS.

Four district courts have considered the justiciability of climate change "nuisance" claims under common law. Pet. 8-10. All concluded that such claims are precluded because the plaintiffs lack standing or the claims present political questions. *Id.*

---

[1] Petitioners use the term "respondents" to refer to all respondents other than TVA.

[2] Press Release, N.Y. Office of Att'y Gen., Eight States & NYC Sue Top Five U.S. Global Warming Polluters (July 21, 2004), http://www.ag.ny.gov/media_center/2004/jul/jul21a_04.html.

Although respondents denigrate the split because it is based on a conflict between a circuit and district courts, Opp. 5-9, this Court has long recognized that such a conflict warrants review where, as here, the issues are of exceptional importance. Eugene Gressman et al., *Supreme Court Practice* §§ 4.8, 4.11, 4.13, 6.31(b), at 256-58, 262-63, 267-70, 479 (9th ed. 2007); see, *e.g.*, *Massachusetts* v. *United States*, 435 U.S. 444, 453 (1978).

Respondents also suggest that the conflict here is not substantial enough to justify this Court's attention, because the Second Circuit's decision has not yet spawned more climate change lawsuits. Opp. 9-10. But the Second Circuit stayed its mandate pending action on this petition, and potential litigants await this Court's decision. If review is denied, the decision below will undoubtedly generate significant climate change litigation. See Pet. 5. And district courts in the Second Circuit will be the logical venue for those claims in light of that decision, thereby "forestalling percolation of similar issues in other circuits." TVA Br. 10.

The Second Circuit's judgment not only conflicts with all district court climate change decisions; it also contravenes decisions of this Court and other courts of appeals. Respondents argue that *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), and *PIRG* v. *Powell Duffryn Terminals Inc.*, 913 F.2d 64 (3d Cir. 1990), support the Second Circuit's holding that, to establish standing, a party asserting harms relating to climate change need allege only that the defendant "contribute[d]" to global warming. Opp. 13-20. In fact, neither case can be reconciled with the decision below.

Massachusetts did not approve a general standing theory under which any plaintiff allegedly harmed by

climate change may bring a tort claim against any enterprise that allegedly "contributes" to climate change through greenhouse gas emissions. *Id.* at 13-17. Rather, it held that, in the particular context of a challenge to EPA's decision not to regulate greenhouse gas emissions, and when the CAA granted an express right of judicial review, the plaintiff had standing to bring that challenge in federal court. 549 U.S. at 516-18 (describing that statutory right of review as "of critical importance to the standing inquiry," which allowed the State to bring the claims "without meeting all the normal standards for redressability and immediacy").[3] Similarly, *Powell Duffryn* held that, under the Clean Water Act ("CWA"), an individual injured by water pollution has standing to bring suit against any party whose discharge exceeded CWA permit levels. 913 F.2d at 72. The court made clear that its holding applies only in cases where the defendant's discharge exceeds federally prescribed limits. *Id.*

Here, in contrast, there is neither a statutory right of action nor a regulatory limit that has been violated. Pet. 15-20; see also TVA Br. 12 ("[t]his would be a different case if there were, for example, a 'constitutional or statutory provision' that 'properly can be understood as granting persons in the plaintiff[s'] position a right to judicial relief") (alteration in original). The Second Circuit's decision

---

[3] *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992), does not support respondents' claim, Opp. 19, that the standing inquiry in common law tort cases and regulatory cases is identical. *See Massachusetts*, 549 U.S. at 516 ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.") (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring)).

is a novel, unjustified expansion of justiciability principles in conflict with the cases cited above.

Respondents' argument that their climate change "nuisance" claims are cognizable under federal common law also contradicts *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981) ("*Milwaukee II*"). That case demonstrates that, even if respondents' claims could otherwise have been implied under federal common law, they are displaced by the comprehensive legislative scheme of the CAA. See *id.* at 324.

Respondents counter that their common law claims are not displaced unless and until EPA implements regulations that provide the particular form of relief they seek—*i.e.*, restrictions on greenhouse gas emissions against the particular defendants named in their suit and those defendants' facilities. Opp. 11-13.[4] But, as *Milwaukee II* recognizes, the displacement inquiry turns not on the agency's actions but on Congress's enactments: "[d]emanding specific regulations of general applicability before

---

[4] Respondents rely on *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee I*"), as supporting the Second Circuit's holding that federal common law is not displaced. Opp. 11-13. That reliance is misplaced. Unlike the CAA, the statute at issue in *Milwaukee I* expressly *preserved* "interstate action[s] to abate pollution" against displacement. 33 U.S.C. § 1160(b) (1970). It did not create a permitting system as the CAA does, but instead established an *ad hoc* enforcement scheme, in which EPA would file abatement actions, akin to nuisance actions, against alleged polluters. *Id.* § 1160(g), (h).

Moreover, the "nuisance" addressed in *Milwaukee I* was "of simple type," *North Dakota* v. *Minnesota*, 263 U.S. 365, 374 (1923), wholly distinct from respondents' claims which have incomparably broader scope and more far-reaching implications than those in *Milwaukee I* or any previous common law nuisance action. Pet. 24-26.

concluding that Congress has addressed the problem to the exclusion of federal common law asks the wrong question[; t]he question is whether the field has been occupied, not whether it has been occupied in a particular manner." 451 U.S. at 324. Respondents' argument that displacement occurs only when there is a direct "conflict" between the particular relief sought in a federal common law claim and an existing regulation ignores the holdings of *Milwaukee II* and other cases, and improperly places the judiciary in direct competition with Congress on climate change regulation. *E.g.*, *Mattoon* v. *City of Pittsfield*, 980 F.2d 1, 5 (1st Cir. 1992); *Illinois* v. *Outboard Marine Corp.*, 680 F.2d 473, 478 (7th Cir. 1982).[5]

II. THIS CASE WARRANTS IMMEDIATE REVIEW.

For each question presented by the petition, respondents propose a reason this Court should defer review. They claim that (i) resolution of their standing must await "factual development," (ii) the scope of the federal court's common law authority should not be determined while EPA's CAA regulations are in "flux," and (iii) consideration of the political question doctrine would be "speculati[ve]" until the remedy phase commences. Opp. 6-7, 10-11, 15-16, 20-21. These contentions are meritless.

1. As the Acting Solicitor General explains, under the unprecedented "contribution" theory endorsed by the Second Circuit, "essentially any potential plaintiff' would have standing to sue any one or more of an "equally capacious" range of potential

---

[5] *See also* Pet. 26-31 (discussing conflicts between Second Circuit's decision and this Court's political question doctrine decisions).

defendants for relief from alleged climate change harms. TVA Br. 13-15. There is no reason to await further "factual development" to review that theory. Opp. 6-7, 15-16. Standing is properly assessed as a facial matter based on the allegations of the complaint upon a motion to dismiss. *E.g.*, *Allen* v. *Wright*, 468 U.S. 737, 752 (1984). The petition does not dispute the factual allegations of the complaints, as respondents suggest, Opp. 16; rather, it challenges the legal conclusion that the complaints' allegations establish a cognizable causal connection between the challenged conduct and the alleged harm.

Indeed, respondents are making the same argument that this Court rejected in *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009), and *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007)—that, if plaintiffs make allegations, their truth must be assumed until the evidentiary record is built by discovery. *Iqbal* and *Twombly* tightened pleading requirements to avoid the costs and burdens inherent in the discovery process. *E.g.*, *Iqbal*, 129 S. Ct. at 1949-51. Conclusory allegations, including those on key jurisdictional facts such as traceability and redressability, are not assumed to be true. *Id.* Respondents' allegations that petitioners contributed in unknown measure to a global phenomenon over decades must be viewed through this lens, and cannot pass muster.

"[T]he interlocutory status of the case [is] no impediment to certiorari where the opinion of the court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation." Gressman et al., *supra*, § 4.18, at 282. An important issue worthy of review—namely, whether the allegations of respondents' complaints

may properly be adjudicated in light of fundamental doctrines limiting federal courts' jurisdiction—is presented here at an interlocutory stage. Accordingly, this Court's intervention is warranted now.

2. Respondents are also incorrect in suggesting that the "present state of regulatory flux," and the possibility that EPA someday may impose additional limits on greenhouse gas emissions, militate against review of whether respondents' common law cause of action exists. Opp. 27-28. Both the existence and the displacement of respondents' cause of action are questions of law. Displacement, moreover, is a statutory question, and the claims here are displaced without regard to what regulations EPA has issued or will issue and whether those regulations precisely mirror respondents' request for relief. *Supra* pp. 5-6. In any event, EPA has been highly active, and already has issued extensive greenhouse gas rules that subject petitioners' facilities to regulation under Title V of the CAA and the CAA's prevention-of-significant-deterioration provisions. TVA Br. 26-28. If EPA's evolving regulatory program were a reason to deny review, review would never be granted. See *infra* pp. 11-12.

3. Finally, there is no reason to wait until the district court "fashion[s] a remedy" to determine whether the political question doctrine bars this suit. Opp. 21. Political questions do not arise in this case from "speculation" about respondents' proposed remedy. *Id.* They are inherent in any decision regarding liability in this case (a decision that would necessitate the making of pure policy choices by the court) and arise inevitably as a result of the relief sought in respondents' complaints—an injunction

directing petitioners to reduce their greenhouse gas emissions. Pet. 26-31.

Adjudication of respondents' claims would require the district court to determine, *inter alia*, "how much of the burden of reducing the Nation's contributions to global climate change should be borne by the electric-utility industry, ... which segments of that industry should make which changes to accommodate the Nation's need to reduce carbon-dioxide emissions, [and] at what rate such reductions should occur." TVA Br. 15-16. Respondents never explain how a court could, as their complaints demand, Pet. App. 182a-84a, determine petitioners' "reasonable" level of greenhouse gas emissions or whether petitioners have historically emitted "unreasonable" levels without first deciding what level of global reductions, if any, would be a reasonable response to respondents' claimed injuries and how those reductions should be allocated among petitioners' facilities and the innumerable other greenhouse gas emission sources around the globe. This "difficulty of fashioning relief," *Nixon* v. *United States*, 506 U.S. 224, 236 (1993), reinforces the political nature of the claims. On respondents' theory, the judge would make "initial policy determination[s] of a kind clearly for nonjudicial discretion," *Baker* v. *Carr*, 369 U.S. 186, 217 (1962)—that is, decisions about how to address climate change that are reserved for the politically accountable branches.

III. THERE IS NO REASON TO REMAND TO THE COURT OF APPEALS.

The Acting Solicitor General agrees that this Court should grant the petition,[6] but suggests that it

---

[6] Contrary to respondents' assertion, Opp. 7, 26, 28, the Acting Solicitor General's brief does not "dismiss" any of the

remand to the Second Circuit with instructions to consider (i) the issue of "prudential standing" (which the Acting Solicitor General asserts was not previously raised), and (ii) whether EPA regulations issued after the Second Circuit's decision displace respondents' claims. TVA Br. 9-11. Neither point warrants summary remand.

1. The issue of "prudential" standing was presented to and passed upon by the lower courts. Although the parties did not explicitly distinguish the "core" and "prudential" components of standing doctrine, they cited prudential standing cases, including *Allen* and *Warth* v. *Seldin*, 422 U.S. 490 (1975), and quoted language describing prudential standing principles—including the prohibition against adjudication of "abstract questions of wide public significance [that] other governmental institutions may be more competent to address"—in the "standing" and "political question" sections of their briefs. *E.g.*, Cinergy Br. 11, No. 05-5104 (2d Cir.); AEP Br. 57-59, No. 05-5119 (2d Cir.); AEP Br. 37-38, No. 04-5669 (S.D.N.Y.). The Second Circuit rejected these arguments, citing the same cases in its opinion. *E.g.*, Pet. App. 57a-59a. Thus, while the Acting Solicitor General states that the threshold barriers to respondents' claims may be "best expressed" under the rubric of "prudential standing," TVA Br. 11, these principles, however labeled, were considered and the issue resolved by the Second Circuit.

This Court has recognized that remand for summary reconsideration is inappropriate when the

---

petition's arguments; indeed, it expressly takes no position on whether respondents have Article III standing and whether the CAA alone displaces any common law cause of action. TVA Br. 11, 24.

court of appeals has addressed the relevant issues and authorities, and the only question is whether it did so correctly. See Gressman et al., *supra*, § 5.12(b), at 345-49. The Second Circuit addressed all aspects of prudential standing, and this Court can and should resolve that issue.

2. For several reasons, this Court should not remand for reconsideration of whether respondents' claims are displaced by recently issued EPA regulations. TVA Br. 22-32. First, as stated above, *supra* pp. 5-6, the relevant questions are whether respondents have a federal common law cause of action and whether, if such a cause of action existed, it has been displaced. Congress, not EPA, has the power to create and eliminate federal causes of action, and whether respondents' claims are displaced depends upon interpretation of federal statutory law, not EPA regulations. The petition presents those pure legal questions, and this Court should resolve them.

Second, the promulgation of the most recent set of CAA regulations is no reason to deny plenary review. CAA regulations are always subject to change; new regulations may be issued at any time, while extant regulations may be modified with scientific and technological developments and political shifts. Petitioners contend that the displacement of respondents' claims does not turn on the current state of CAA regulations and is not subject to reconsideration based on changes in those regulations. But, even if the content of the current regulatory regime were germane to displacement, the possibility of modification—which is always present—is no argument against review. Instead, that ever-present possibility illustrates how critical it is for this Court to decide whether the content of agency

regulations, rather than congressional enactments, is relevant to displacement. If this Court summarily vacates and remands, that question will remain unresolved, and lower courts may continue to treat displacement as a temporary status, subject to reconsideration (and conflicting judicial decisions) with each regulatory change.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

F. WILLIAM BROWNELL
NORMAN W. FICHTHORN
ALLISON D. WOOD
HUNTON & WILLIAMS LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 955-1500

Counsel for Petitioner Southern Company

PETER D. KEISLER*
CARTER G. PHILLIPS
DAVID T. BUENTE JR.
QUIN M. SORENSON
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
pkeisler@sidley.com
(202) 736-8000

Counsel for Petitioners

SHAWN PATRICK REGAN
HUNTON & WILLIAMS LLP
200 Park Avenue
52nd Floor
New York, N.Y. 10166
(212) 309-1000

Counsel for Petitioner Southern Company

MARTIN H. REDISH
NORTHWESTERN UNIVERSITY SCHOOL OF LAW
375 East Chicago Avenue
Chicago, Illinois 60611
(312) 503-8545

Counsel for Petitioners

DONALD B. AYER
KEVIN P. HOLEWINSKI
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

THOMAS E. FENNELL
MICHAEL L. RICE
JONES DAY
2727 North Harwood Street
Dallas, Texas 75201
(214) 220-3939

Counsel for Petitioner Xcel Energy Inc.

November 12, 2010

* Counsel of Record

AMICUS CURIAE BRIEF

170

(15)

No. 10-174

Supreme Court, U.S.
FILED
SEP 2 - 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

AMERICAN ELECTRIC
POWER COMPANY, INC., *et al.*,

Petitioners,

v.

STATE OF CONNECTICUT, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR AMERICAN CHEMISTRY COUNCIL, AMERICAN COATINGS ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL PETROCHEMICAL AND REFINERS ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AND PUBLIC NUISANCE FAIRNESS COALITION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

RICHARD O. FAULK*
JOHN S. GRAY
GARDERE WYNNE SEWELL LLP
1000 Louisiana, Suite 3400
Houston, TX 77002-5007
(713) 276-5500
rfaulk@gardere.com
Counsel for Amici Curiae
American Chemistry Council,
American Coatings Association,
National Association of Manufacturers,
National Petrochemical and Refiners Association,
Property Casualty Insurers Association of America,
and Public Nuisance Fairness Coalition

September 2, 2010 **Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

The court of appeals held that governmental and private plaintiffs may pursue public nuisance actions under federal common law to cap defendants' greenhouse gas emissions at judicially-determined levels. This brief addresses the following questions:

1. Whether climate change tort claims are non-justiciable "political questions" because courts lack the resources and tools to resolve them in a principled manner.

2. Whether plaintiffs lacked standing to pursue such claims without pleading specific allegations of conduct traceable to each particular defendant and which plausibly demonstrated both the necessity and efficacy of abatement.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	I
AMICI CURIAE BRIEF	1
IDENTITY AND INTERESTS OF *AMICI CURIAE*	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	5
I. Political Question Analyses Require Courts To Consider Whether They Have The Resources And Tools To Render Principled Judgments	5
II. Courts Lack The Resources And Tools To Develop Guiding Standards For Resolving Public Nuisance Cases Involving Global Climate Change	6
A. Only the Political Branches Are Adequately Equipped to Resolve this Complex and Dynamic Issue	6
B. Global Climate Change Claims Exceed the Boundaries of Traditional Public Nuisance Litigation	12
C. Using Public Nuisance as an Aggregative Tort Creates "Standardless" Liability and Is Barred by the Political Question Doctrine	17
D. Lack of Action by the Political Branches Does Not Empower Common Law Creativity	21

TABLE OF CONTENTS – Continued

Page

III. The Second Circuit's Standing Analysis Conflicts With The Substantive Law Of Public Nuisance And Equitable Maxims 23

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

Ashcroft v. Iqbal, ___ U.S. ___, 129 S. Ct. 1938 (2009) 25

Baker v. Carr, 369 U.S. 186 (1962) 5

Bartnicki v. Vopper, 532 U.S. 514 (2001) 9

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) 25

Carver v. Nixon, 72 F.3d 633 (8th Cir. 1995) 10

City of Milwaukee v. Illinois, 451 U.S. 304 (1981) 8

Cleveland v. United States, 329 U.S. 14 (1946) 22

Connecticut v. Am. Elec. Power Co., 582 F.3d 309 (2d Cir. 2009) 12, 13, 17, 18, 23

Foster v. Mansfield, 146 U.S. 88 (1892) 25

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167 (2000) 23

Helvering v. Davis, 301 U.S. 619 (1937) 9

Helvering v. Hallock, 309 U.S. 106 (1940) 22

Hillsborough County v. Automated Med. Laboratories, Inc., 471 U.S. 707 (1985) 8

Hines v. Davidowitz, 312 U.S. 52 (1941) 8

In re Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990) 17

In re Lead Paint Litig., 924 A.2d 484 (N.J. 2007) 26

TABLE OF AUTHORITIES – Continued

Page

Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987) 8

Massachusetts v. EPA, 549 U.S. 497 (2007).....7, 16, 24

Native Vill. of Kivalina v. ExxonMobil Corp., 663 F.Supp. 2d 863 (N.D. Cal. 2009) 13, 15

Negusie v. Holder, 555 U.S. ___, 129 S. Ct. 1159 (2009) 11

New York Times Co. v. United States, 403 U.S. 713 (1971) 25

North Carolina v. TVA, No. 09-1623, 2010 WL 2891572 (4th Cir. July 26, 2010) 8, 11

People ex rel. Gallo v. Acuna, 929 P.2d 596 (Cal.), *cert. denied*, 521 U.S. 1120 (1997) 20

People v. Lim, 118 P.2d 472 (Cal. 1941) 19, 20

Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917) 26

Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co., 984 F.2d 915 (8th Cir. 1993) 26

Turner Broadcasting Sys., Inc. v. Federal Communications Comm'n, 512 U.S. 622 (1994).....9

Vieth v. Jubelirer, 541 U.S. 267 (2004).....5, 6, 15, 16, 23

Zuber v. Allen, 396 U.S. 168 (1969) 22

STATUTES

42 U.S.C. § 7401 *et seq.* 7

42 U.S.C. § 7401(a)(3).....7

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 7408(b)(1) 8

42 U.S.C. § 7409(a)(1)(B) 9

42 U.S.C. §§ 7409(b)(1) & (2) 9

42 U.S.C. § 7426(a)(1) 9

42 U.S.C. § 7602(g) 7

REGULATIONS

Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 FED. REG. 66496 (Dec. 15, 2009) 7

Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 FED. REG. 25324 (May 7, 2010) 7

Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 FED. REG. 31514 (June 3, 2010) 7

OTHER AUTHORITIES

BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113 (1921) 26

Charles H. Mollenberg, Jr., *No Gap Left: Getting Public Nuisance Out of Environmental Regulation and Public Policy,* 7 EXPERT EVIDENCE REPORT 474 (Sept. 24, 2007) 20

TABLE OF AUTHORITIES – Continued

Page

Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L. Q. 755 (2001).....15

Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741 (2003).....13

Eckardt C. Beck, *The Love Canal Tragedy*, EPA Journal (January, 1979).....20

Edwin S. Mack, *Revival of Criminal Equity*, 16 HARV. L. REV. 389 (1903) 19

FRANCIS HILLIARD, THE LAW OF TORTS FOR PRIVATE WRONGS 631 (2d ed. 1861).....16

Hans A. Linde, *Courts and Torts: "Public Policy" Without Public Politics?*, 28 VAL. U. L. REV. 821 (1994).....10, 11

HENRY DAVID THOREAU, EARLY SPRING IN MASSACHUSETTS (1881).....5

J.R. Spencer, *Public Nuisance: A Critical Examination*, 48(1) CAMBRIDGE L. J. 55 (1989).....17

James A. Henderson, Jr., *The Lawlessness of Aggregative Torts*, 34 HOFSTRA L. REV. 329 (2005).....18

TABLE OF AUTHORITIES – Continued

Page

Laurence H. Tribe, *Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine,* WASH. LEGAL FOUND. CRITICAL ISSUES SERIES (Jan. 2010) 12

Laurence H. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515 (1982) 22

PATRICK J. HURLEY, A CONCISE INTRODUCTION TO LOGIC (2008) 5

RESTATEMENT (SECOND) OF TORTS § 821B 17, 24

Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 MICH. ST. L. REV. 941 (2007) 14, 19, 24

Richard O. Faulk & John S. Gray, *A Lawyer's Look at the Science of Global Climate Change,* 44 WORLD CLIMATE CHANGE REPORT 2 (BNA, March 10, 2009) 14, 15

Richard O. Faulk & John S. Gray, *Premature Burial? The Resuscitation of Public Nuisance Litigation*, 24 TOXICS L. REPT. 1231 (October 22, 2009) 12

Thomas Reed Powell, *The Still Small Voice of the Commerce Clause in* 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW 931 (Ass'n of American Law Schools, 1938) 22

TABLE OF AUTHORITIES – Continued

Page

Timothy D. Lytton, *Lawsuit Against the Gun Industry: A Comparative Institutional Analysis*, 12 CONN. L. REV. 1247 (2000) 9

WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 71 (1941) 15

William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 1002-03 (1966) 16

White House, *Presidential Memorandum Regarding Fuel Efficiency Standards* (May 21, 2010) 7

AMICI CURIAE BRIEF

Amici Curiae American Chemistry Council, American Coatings Association, National Association of Manufacturers, National Petrochemical and Refiners Association, Property Casualty Insurers Association of America, and Public Nuisance Fairness Coalition, respectfully submit this *amici curiae* brief, on behalf of themselves and their members, in support of Petitioners. Pursuant to Supreme Court Rule 37.2(a), this *amici curiae* brief is filed with the consent of all the parties.[1]

IDENTITY AND INTERESTS OF *AMICI CURIAE*

Amicus Curiae American Chemistry Council ("ACC"), represents the leading companies engaged in the business and science of chemistry to make innovative products and services that make people's lives better, healthier and safer. *See* ACC's website, http://www.americanchemistry.com. *Amicus Curiae* American Coatings Association ("ACA") represents both

[1] Pursuant to Supreme Court Rule 37, letters indicating the intent to file this *amici curiae* brief were received by counsel of record for all parties at least 10 days prior to the due date of this brief. All parties have issued blanket consents to the filing of *amicus* briefs. Finally, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part, or made a monetary contribution specifically for the preparation or submission of this brief.

companies and professionals working in the paint and coatings industry. *See* ACA's website, http://www.paint.org. *Amicus Curiae* the National Association of Manufacturers (the "NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. *See* the NAM's website, http://www.nam.org/. *Amicus Curiae* National Petrochemical and Refiners Association ("NPRA") is a national trade association, representing nearly 500 members of the domestic refining industry. *See* NPRA's website, http://www.npra.org. *Amicus Curiae* Property Casualty Insurers Association of America ("PCIAA") is a national trade association comprised of more than 1,000 member companies, representing the broadest cross-section of insurers of any national trade association. *See* PCIAA's website, http://www.pciaa.net/. *Amicus Curiae* Public Nuisance Fairness Coalition ("PNFC") is a coalition composed of major corporations, industry organizations, legal reform organizations and legal experts concerned with the growing misuse of public nuisance lawsuits. *See* PNFC's website, http://www.publicnuisancefairness.org.

Amici curiae are coalitions and trade organizations whose members include organizations and companies doing business in the United States including some companies that are both directly and indirectly affected by the public nuisance litigation governed by this Court's decisions. *Amici* share the concerns expressed by the parties and, in particular, those stated by the Solicitor General, namely, that

the courts are inappropriate forums to address the complex issues raised by global warming.[2] As regulated entities, *Amici's* members are especially concerned by the intrusion of standardless public nuisance litigation into areas traditionally reserved for the political branches of government. Such forays threaten the regulatory clarity and predictability necessary for successful business planning and operations.

SUMMARY OF THE ARGUMENT

Amici curiae submit this brief to highlight particular problems raised by the Second Circuit's decision that merit this Court's review, particularly the application of the "political question" doctrine in public nuisance cases involving climate change. The history of public nuisance reflects a clear reluctance to approve its use when liability criteria are not constrained by geographical boundaries and are not governed by definitive standards. Similar reasoning applies to the "political question" doctrine, which requires dismissal of claims not subject to judicially discoverable and manageable standards. As this action is framed, these principles are inseparably intertwined. Far from being an "ordinary tort suit,"

[2] *See* Brief for the Tennessee Valley Authority in support of Petitioners, *Am. Elec. Power Co. v. Connecticut,* No 10-174 (2010)

this expansive claim sits squarely at the "crossroads" of substantive law and justiciability.

The extraordinarily broad and standardless public nuisance claims alleged here involve issues where courts lack the tools and resources to reach results that are principled, rational, and based upon reasoned distinctions. When such political questions are raised, courts must decide whether they have the technical and scientific expertise necessary to create standards and rules to resolve the controversy justly. Such inquiries go to the very heart of the political question analysis. In public nuisance cases of global dimension, courts should defer to the political branches of government – branches that, unlike the judiciary, are equipped to amass and evaluate vast amounts of data bearing upon complex and dynamic issues and to engage in the international diplomacy necessary to deal with an inherently global phenomenon – to set and adjust, if warranted, the standards and rules by which courts judge the reasonableness of defendants' actions.

Under controlling Supreme Court authority, even when the political branches have not acted, common law courts are not necessarily free to "fill the void." Irrespective of whether the executive or legislative branches have yet spoken, due respect for their constitutional responsibilities – combined with awareness of the judiciary's own limitations – should motivate judicial restraint. Although the ancients

concluded that "nature abhors a vacuum,"[3] there are circumstances in the law, as here, where uncharted voids should be eschewed.

ARGUMENT

I. Political Question Analyses Require Courts To Consider Whether They Have The Resources And Tools To Render Principled Judgments

In *Baker v. Carr*,[4] and its progeny,[5] this Court held that lower courts should not entertain a dispute when it lacks "judicially discoverable and manageable standards for resolving it."[6] As Justice Scalia stated in *Vieth v. Jubelirer*, "[o]ne of the most obvious limitations imposed by that requirement is that judicial action must be governed by *standard*, by *rule*."

---

[3] Attributed to Aristotle, *see generally*, PATRICK J. HURLEY, A CONCISE INTRODUCTION TO LOGIC (2008) at 551-52. The saying perhaps offers wisdom for public nuisance cases. As Thoreau observed, "Nature abhors a vacuum, and if I can only walk with sufficient carelessness, I am sure to be filled." HENRY DAVID THOREAU, EARLY SPRING IN MASSACHUSETTS (1881) at 34-35 In the absence of guiding principles, errors are as likely to fill the jurisprudential void as wisdom.

[4] 369 U.S. 186 (1962)

[5] *See, e.g., Vieth v. Jubelirer*, 541 U.S. 267 (2004) (plurality)

[6] This requirement is one of the most critical tests listed in *Baker v. Carr*. *See id.* at 278 ("These tests are probably listed in descending order of both importance and certainty")

541 U.S. at 278. "Laws promulgated by the Legislative Branch can be inconsistent, illogical, and *ad hoc*; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions." *Id.* (emphasis in original). Thus, the crux of the political question inquiry is not whether the case is unmanageable because it is too large, complicated, or otherwise difficult from a logistical standpoint. Rather, the inquiry is whether the court has the legal tools to grant relief in a way that is "principled, rational, and based upon reasoned distinctions."[7] At this time, courts lack those tools.[8]

II. Courts Lack The Resources And Tools To Develop Guiding Standards For Resolving Public Nuisance Cases Involving Global Climate Change

A. Only the Political Branches Are Adequately Equipped to Resolve this Complex and Dynamic Issue

In a "political question" inquiry, respect for the political spheres is critical. In public nuisance cases based upon global climate change, where no standards presently exist to assess or measure responsibility or

---

[7] As Justice Scalia observed, "it is the function of the courts to provide relief, not hope." *Vieth*, 541 U.S. at 304.

[8] The possibility that manageable standards may be developed as a result of Congressional or Executive action does not change the fact that they do not exist today. *Id.* at 306 (Kennedy, J., concurring).

to determine appropriate reductions in greenhouse gas emissions, "political question" arguments necessarily require a comparative evaluation of the resources needed to craft appropriate rules.

Through the Clean Air Act,[9] Congress found that air pollution prevention control are "the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3). The greenhouse gases involved in this case are considered "air pollutants"[10] under the broad language of the Clean Air Act. *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007). In response to this Court's decision in *Massachusetts v. EPA*, the executive branch has found that greenhouse gas emissions "endanger public health and welfare" and should be regulated. EPA has actively promulgated rules necessary to establish a program to regulate these pollutants – including those emitted by sources involved in this case.[11]

---

[9] 42 U.S.C. 7401 *et seq*

[10] The Clean Air Act defines "air pollutant" to include "any air pollution agent or combination of such agents, . . . emitted into or otherwise enters the ambient air." 42 U.S C. § 7602(g)

[11] Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 FED. REG 66496 (Dec. 15, 2009); *see also* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 FED. REG. 25324 (May 7, 2010); White House, *Presidential Memorandum Regarding Fuel Efficiency Standards* (May 21, 2010); Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 FED. REG. 31514 (June 3, 2010).

The executive and legislative branches of the federal government have a lengthy and comprehensive record of regulating air pollutants. Given EPA's regulatory scheme to control air pollution, as well as its recent endangerment finding and regulatory efforts crafted to limit greenhouse gas emissions, interstate public nuisance suits stand as "'an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) (quoting *Hillsborough County v. Automated Med. Laboratories, Inc.*, 471 U.S. 707, 713 (1985), quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). The *Ouellette* court admonished against the "tolerat[ion]" of "common-law suits that have the potential to undermine this regulatory structure," *id.* at 497, and singled out nuisance standards in particular as "vague" and "indeterminate." *Id.* at 496 (quoting *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981)) (internal quotation marks omitted); *see also North Carolina v. TVA*, No. 09-1623, 2010 WL 2891572, at *7 (4th Cir. July 26, 2010).

Congress also entrusted EPA with the responsibility for obtaining and making scientific and other judgments necessary to reduce air pollution. 42 U.S.C. § 7408(b)(1). Courts should respect both Congress' decision and EPA's ability to fulfill its properly delegated authority. "As an institution, . . . Congress

is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon [complex and dynamic issues]."[12] Unlike courts, the political branches can consider all pertinent issues in their entirety either through hearings or during required notice and comment periods. *See, e.g.*, 42 U.S.C. §§ 7409(a)(1)(B), (b)(1) & (2), 7426(a)(1). As a result, policy choices can strike fair and effective balances between competing interests because they can be based on broader perspectives and ample information rather than being limited to issues raised only by litigants.[13] Moreover, in contrast to courts, which lose jurisdiction upon rendition of final judgment, political branches have continuing authority to revisit statutes and rules to modify or tailor their provisions.[14]

Political branches are also better equipped to deal with broad issues because they, unlike trial and appellate courts, represent a quorum of the people. While the process of enacting a statute is "perhaps not always perfect, [it] includes deliberation and an

---

[12] *Turner Broadcasting Sys., Inc v. Federal Communications Comm'n*, 512 U.S. 622, 665-66 (1994) (Kennedy, J., plurality)

[13] *See Helvering v. Davis*, 301 U.S 619, 642-44 (1937) (Cardozo, J); *see also* Timothy D. Lytton, *Lawsuit Against the Gun Industry: A Comparative Institutional Analysis*, 12 CONN. L REV. 1247, 1271 (2000).

[14] *See Bartnicki v. Vopper*, 532 U.S. 514, 541 (2001) (Breyer, J. concurring)

opportunity for compromise and amendment and usually committee studies and hearings." *Carver v. Nixon*, 72 F.3d 633, 645 (8th Cir. 1995). Before any law is enacted, it must garner the support of a majority of the people's elected representatives and then is subject to executive veto and judicial review. These "checks and balances" ensure the efficacy of our democracy. When courts bypass these safeguards to implement their own common law solutions, the judiciary – the least political branch of government – declares policy unilaterally and the "will of the people" is expressed not through their elected representatives, but through a plebiscite of jurors or a single fact-finder judge.[15]

Courts and juries play an enormously important role in our system of government, but they are not a substitute for decisions by democratically-elected representatives. As the Fourth Circuit recently observed: "[W]e doubt seriously that Congress thought that a judge holding a twelve-day bench trial could evaluate more than a mere fraction of the information that regulatory bodies can consider. 'Courts are expert at statutory construction, while agencies are

---

[15] As Justice Linde explained in his critical article, the court must "identify a public source of policy outside the court itself, if the decision is to be judicial rather than legislative. A court may determine some facts as well [as] or better than legislators, but it cannot derive public policy from a recital of facts." Hans A. Linde, *Courts and Torts: "Public Policy" Without Public Politics?*, 28 VAL. U. L. REV 821, 852 (1994).

expert at statutory implementation.'" *North Carolina v. TVA*, 2010 WL 2891572, at *11. (quoting *Negusie v. Holder*, 555 U.S. ___, 129 S. Ct. 1159, 1171 (2009)). For these reasons, it is crucial that courts respect the strengths of the rulemaking processes in which Congress placed its imprimatur. Unlike *ad hoc* lawsuits, regulations and permits provide opportunities for predictable, adjustable standards that are scientifically grounded. *Id.*

In the public nuisance context, these considerations call for judicial deference – not "common law" policy making. They expose "the limits within which courts, lacking the tools of regulation and inspection, of taxation and subsidies, and of direct social services, can tackle large-scale problems. . . ."[16] Given the planetary scope of this controversy, the depth of the inquiries needed to develop fair standards for its resolution, the comparative resources available to the judiciary and the political branches, and the extreme difficulty, if not impossibility, of fair adjudication – the primacy of political solutions is apparent. Indeed, as Professor Tribe recently wrote, "[w]hatever one's position in the . . . debate over the extent or . . . reality of anthropogenic climate change, one thing is clear: legislators, armed with the best economic and scientific analysis, and with the capability of binding or at least strongly incentivizing, all involved parties,

---

[16] Linde, *supra* note 15, at 853.

are the only ones constitutionally entitled to fight that battle."[17]

B. Global Climate Change Claims Exceed the Boundaries of Traditional Public Nuisance Litigation

The Second Circuit trivializes the significance and scope of this action by proclaiming it to be an "ordinary tort suit" – no more complex than the localized discharge of raw sewage into a river or a lake, the kind of simple nuisance claim that courts have adjudicated for years under our existing legal framework.[18] Far from an "ordinary tort suit," this case frames wholly new claims – and asks the judiciary to bypass international and Congressional deliberations by setting emissions standards unilaterally.

These allegations are plainly extraordinary – and labeling them otherwise is not a helpful exercise.[19]

---

[17] *See* Laurence H Tribe, *et al.*, *Too Hot for Courts to Handle. Fuel Temperatures, Global Warming, and the Political Question Doctrine,* WASH. LEGAL FOUND. CRITICAL ISSUES SERIES (Jan. 2010) at 23

[18] *See Connecticut v. Am Elec. Power Co.*, 582 F.3d 309, 330-31 (2d Cir. 2009). *See generally,* Richard O. Faulk & John S. Gray, *Premature Burial? The Resuscitation of Public Nuisance Litigation*, 24 TOXICS L. REPT. 1231 (Oct. 22, 2009).

[19] *See* Laurence H. Tribe, *et al* , *supra* note 17, at 13-14 ("The political question doctrine is about more than word-play. . [T]he Second Circuit – essentially confusing a label with an argument – concluded that it was an 'ordinary tort suit' and therefore justiciable")

The judiciary has no experience dealing with public nuisance litigation created by a *global* phenomenon resulting from the release of greenhouse gases by millions, if not billions, of sources (including natural events) worldwide – very few of which are subject to the jurisdiction of American courts or under the control of these defendants. The judiciary's past experience provides no guidance for determining what standards and rules should be applied to resolve this controversy in a principled, rational and reasoned manner.

Viable public nuisance cases, even those involving interstate issues, have always been contained within well-defined geographic borders. They are localized and linked to impairment of property, or to injuries resulting from such effects.[20] Significantly, each precedent upon which the court of appeals relied are within that tradition. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d at 326-29. Although the Second Circuit cited authorities that noted that nuisance actions were "the common law backbone of modern environmental law," *id.* at 328, it failed to recognize that each of those cases involved acts that occurred within a circumscribed "zone of discharge," affected defined geographic locations, and the full range of defendants was either known or could be identified.[21]

---

[20] *See* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U CIN. L REV. 741, 830-33 (2003)

[21] *See Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F.Supp 2d 863, 875 (N.D. Cal. 2009) ("The common thread

(Continued on following page)

Unlike here, the alleged nuisance in each case was entirely man-made and created over a relatively short period of time.[22]

Global climate change, by contrast, is boundless and, according to scientists, is caused by a universal and unlimited range of actors and events that allegedly began more than 150 years ago at the start of the Industrial Revolution.[23] Nothing in the law of public nuisance allows plaintiffs to single out these few defendants and require them to "abate" their "contributions" to a condition that spans the globe and jointly took the entire industrialized world – in combination with natural forces – more than 150 years to create. Currently, it is impossible to distinguish one exhalant's contribution from vehicular or industrial emissions today, much less since the start of the Industrial Revolution. There are also no processes to calculate and account for the impact of biological emissions by the trillions of organisms which inhabit the planet. Nor can the role of titanic

---

running through each of those cases is that they involved a discrete number of 'polluters' that were identified as causing a specific injury to a specific area").

[22] *See generally*, Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 MICH. ST. L. REV. 941, 949-50, 955-57 (2007).

[23] *See generally*, Richard O. Faulk & John S. Gray, *A Lawyer's Look at the Science of Global Climate Change*, 44 WORLD CLIMATE CHANGE REPORT 2 (BNA, Mar. 10, 2009) (providing scientific references regarding the climate change phenomenon)

natural forces, such as volcanism, be calculated reliably. Moreover, no method exists to account for the myriad of confounding forces that impact the relative degree of liability attributable to these or any potential defendants – such third-parties that have effected changes to forests and seas which absorb emissions.[24] Given climate change's extraordinary causal chain,[25] it is difficult to see how *ad hoc* common law decisions will lead to "judicially discoverable and manageable standards" that will guide courts to decisions that are "principled, rational, and based upon reasoned distinctions."[26]

Both "political question" considerations and the substantive law of public nuisance wisely preclude courts from resolving controversies when fair standards cannot be devised to resolve amorphous claims. For example, the law of public nuisance requires more than an "injury in fact" to justify recovery. To be a nuisance, a defendant's interference with the public right must be "substantial." It cannot be a "mere annoyance," a "petty annoyance," a "trifle," or a "disturbance of everyday life."[27] The defendant's

---

[24] *See generally, id* at 12-14 (providing discussion and references regarding absorption roles of forests and oceans)

[25] *See Kivalina*, 663 F.Supp. 2d at 876 (describing the climate change's causal chain).

[26] *Vieth*, 541 U.S. at 278; *Kivalina*, 663 F.Supp. 2d at 876 (noting the lack of guidance "that would enable the court to reach a resolution of this case in any 'reasoned' manner").

[27] *See generally,* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 71, at 557-58 (1941); *see also* Denise E. Antolini,

(Continued on following page)

interference must also be objectionable to the ordinary reasonable person, and one that materially interferes with the ordinary physical comfort of human existence according to plain, sober, and simple notions.[28] In a global context, where countless untraceable and unquantifiable natural, biological, and anthropogenic emissions allegedly act cumulatively over centuries to produce harm, determining whether any particular emissions constitute a "substantial interference" is objectively impossible.

Simply stated, the immeasurable scope of the controversy matters. Using public nuisance to redress global climate change far exceeds the tort's common law boundaries – and while venturing beyond those fences may be intellectually adventurous, there are no standards or rules that guarantee that such explorations will result in justice.[29] Such a standardless exercise is not jurisprudential. The proceeding

---

Modernizing Public Nuisance. Solving the Paradox of the Special Injury Rule, 28 ECOLOGY L. Q 755, 772 (2001).

[28] William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV 997, 1002-03 (1966); *see also* Antolini, *supra* note 27, at 772 n.57 (citing FRANCIS HILLIARD, THE LAW OF TORTS FOR PRIVATE WRONGS 631 (2d ed 1861)).

[29] *See Vieth*, 541 U.S. at 278. ("'The judicial Power' created by Article III, § 1, of the Constitution is not whatever judges choose to do . "). Indeed, the Supreme Court has already warned that it has "neither the expertise nor the authority" to evaluate the many policy judgments involved in climate change issues *Massachusetts v. EPA*, 549 U.S. 497, 533-34 (2007)

requested by Plaintiffs may be "called a trial, but it is not."[30]

C. Using Public Nuisance as an Aggregative Tort Creates "Standardless" Liability and Is Barred by the Political Question Doctrine

Despite the Second Circuit's reasoning that their rulings were consistent with the Restatement (Second) of Torts, *Connecticut v. Am. Elec. Power Co.*, 582 F.3d at 328, it failed to heed Dean Prosser's stern warning in his comments to § 821B: "[I]f a defendant's conduct . . . does not come within one of the traditional categories of the common law crime of public nuisance or is not prohibited by a legislative act, *the court is acting without an established and recognized standard.*"[31]

Dean Prosser's concerns were recently reinforced by one of the reporters for the Third Restatement, Professor James A. Henderson, who warned about the

---

[30] *See In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990) ("The Judicial Branch can offer the trial of lawsuits It has no power or competence to do more. We are persuaded on reflection that the procedures here called for comprise something other than a trial within our authority. It is called a trial, but it is not").

[31] RESTATEMENT (SECOND) OF TORTS § 821B cmt e. (1979) (emphasis added); J R. Spencer, *Public Nuisance: A Critical Examination*, 48(1) CAMBRIDGE L J 55, 56 (1989).

"lawlessness" of expansive tort liability.[32] According to Professor Henderson, these new tort theories are not lawless simply because they are non-traditional, or court-made, or because the financial stakes are high. Instead, "the lawlessness of these aggregative torts inheres in the extent to which they combine sweeping, social-engineering perspectives with vague, open-ended legal standards for determining liability and measuring recovery."[33] Such paths lead inevitably to limitless and universal liability. If the Court allows this controversy to proceed, it will be "empower[ing] judges and juries to exercise regulatory power at the macro-economic level that even the most aggressive administrative agencies could never hope to possess. In exercising these extraordinary regulatory powers via tort litigation, courts (including juries) exceed the legitimate limits of both their authority and their competence."[34]

Dean Prosser's wise advice, as well as Professor Henderson's concerns about "lawlessness," are substantiated by the history of public nuisance – a history where courts have refused to expand liability

---

[32] *See* James A Henderson, Jr., *The Lawlessness of Aggregative Torts*, 34 HOFSTRA L. REV. 329, 330 (2005).

[33] *Id.* at 338

[34] *Id.* Although the Second Circuit stressed that tort cases rarely involve political questions, *Connecticut v. Am Elec. Power Co.*, 582 F.3d at 326-29, aggregative torts, such as public nuisance, raise unique "lawlessness" concerns that transcend routine tort cases and cross the political question threshold. *See* Henderson, *supra* note 32, at 338.

because of concerns over "standardless" liability. In the early 20th century, litigants argued that public nuisance should be expanded to address activities that were not criminal and which did not implicate property rights or enjoyment.[35] Proponents of this expansion argued that the "end justified the means" by highlighting the tort's remarkable effectiveness and claiming "that [otherwise] there is no adequate remedy provided at law."[36]

Legal commentators and authorities, however, objected when public authorities sought to use public nuisance to address broad societal problems such as over-reaching monopolies, restraint of trade activities, prevention of criminal acts, and labor controversies such as strikes.[37] They warned that this "solution" was planting the seeds of abuse that would ultimately weaken the judicial system.[38] Finally, when public nuisance was used as a precursor to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") to address

---

[35] *People v. Lim*, 118 P2d 472, 475 (Cal 1941).

[36] *See* Edwin S. Mack, *Revival of Criminal Equity* 16 HARV L. REV 389, 400-03 (1903). These same arguments are resurfacing as governmental authorities employ public nuisance litigation to address complex societal problems *See* Faulk & Gray, *supra* note 22, at 974-75.

[37] Mack noted that the expanding boundaries of public nuisance law made courts of equity of that time period careless of their traditional jurisdictional limits. Mack *supra* note 49, at 397.

[38] *Id.* at 400-03.

environmental contamination in the Love Canal controversy, a decade of nuisance litigation failed to produce a solution.[39] Thereafter, arguments urging expansion were increasingly rejected, most notably in California, where the state's Supreme Court ultimately deferred to the legislature's "statutory supremacy" to define and set standards for determining liability.[40] Significantly, the court did so because judicial creativity would otherwise result in "standardless" liability.[41]

There is plainly an overlap between this jurisprudential principle and the "political question" doctrine. Although these concepts are inextricably linked, their conjunction has been inexplicably overlooked. Just as courts have traditionally resisted invitations to expand public nuisance liability in the absence of clear boundaries and guiding principles,

---

[39] *See* Eckardt C. Beck, *The Love Canal Tragedy,* EPA Journal (Jan. 1979) ("no secure mechanisms [were] in effect for determining such liability") *See generally,* Charles H. Mollenberg, Jr, *No Gap Left: Getting Public Nuisance Out of Environmental Regulation and Public Policy,* 7 EXPERT EVIDENCE REPORT 474, 475-76 (Sept. 24, 2007).

[40] *See People ex rel. Gallo v Acuna*, 929 P.2d 596, 606 (Cal.), *cert. denied*, 521 U.S. 1120 (1997) (stating that "[t]his lawmaking supremacy serves as a brake on any tendency in the courts to enjoin conduct and punish it with the contempt power under a standardless notion of what constitutes a 'public nuisance' ").

[41] *Id. See also People v. Lim*, 118 P2d 472, 475 (Cal. 1941) ("In a field where the meaning of terms is so vague and uncertain it is a proper function of the legislature to define those breaches of public policy which are to be considered public nuisances within the control of equity").

courts also must resist deciding political question controversies where they cannot devise definitive standards and rules for their adjudication. Each principle informs courts when advocates invite creative excursions, and in both contexts, respect for the legislative and executive spheres, and the constitutional limits on judicial power is critical. History's experience with public nuisance as a tort traditionally circumscribed by geographic limits and caused by identifiable actors, coupled with the pronounced concerns of wise legal scholars and courts regarding the dangers of entertaining controversies without guiding adjudicative principles, demonstrates the present impossibility of rendering judgments in climate change cases that are "principled, rational, and based upon reasoned distinctions."

D. Lack of Action by the Political Branches Does Not Empower Common Law Creativity

Contrary to the Second Circuit's claims, legislative and regulatory silence are not dispositive of whether courts are competent to decide climate change controversies. Indeed, there has been "a longstanding resistance, as a matter of law, to the idea that legislative inaction or silence, filtered through a judicial stethoscope, can be made to sound out changes in the law's lyrics – altering the prevailing patterns of rights, powers, or privileges that

collectively constitute the message of our laws."[42] Moreover, this Court has condemned reliance on congressional silence as "a poor beacon to follow."[43] More pointed – and remarkably similar to the concerns of Dean Prosser and Professor Henderson – is Justice Frankfurter's warning that "*we walk on quicksand* when we try to find in the absence of . . . legislation a controlling legal principle."[44]

The absence of action by the political branches does not empower common law adventures. This is especially true in public nuisance cases based upon global climate change, where there are no "controlling legal principles" to frame the controversy, fully investigate the issues, adjudicate liability or allocate responsibility. In such cases, courts must decide whether they have the resources to investigate and devise a proper remedy, and whether they are capable of creating definitive standards and rules to resolve the controversies fairly. This question goes to the very

---

[42] Laurence H. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J 515, 516, 522 (1982) (quoting Thomas Reed Powell, *The Still Small Voice of the Commerce Clause*, in 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW 931, 932 (Ass'n of American Law Schools, 1938))

[43] *Zuber v. Allen*, 396 U.S. 168, 185 (1969). *See also Cleveland v United States*, 329 U S. 14, 22 (1946) (Rutledge, J , concurring) (noting that "[t]here [are] vast differences between legislating by doing nothing and legislating by positive enactment . ").

[44] *Helvering v. Hallock*, 309 U.S. 106, 121 (1940) (emphasis added).

heart of the political question doctrine.[45] Unless this inquiry is answered correctly, the judiciary, the parties, and the public interest will be sacrificed to the shifting sands of "standardless" liability.

III. The Second Circuit's Standing Analysis Conflicts With The Substantive Law Of Public Nuisance And Equitable Maxims

Conflicts with the substantive law of public nuisance also plague the Second Circuit's standing analysis. According to the court, the injuries produced by the nuisance need only be an "identifiable trifle" involving "recreational" or "esthetic interests."[46] In so holding, the court apparently grafted the standing requirements for statutory citizen suits[47] onto the common law tort of public nuisance. Contrary to the Second Circuit's holding, however, common law public nuisance has never justified the abatement of

---

[45] This Court clearly recognizes that such scenarios exist *See Vieth*, 541 U S at 277 ("Sometimes, however, the law is that the judicial department has no business entertaining the claim of unlawfulness – because the question is entrusted to one of the political branches *or involves no judicially enforceable rights*") (emphasis added)

[46] *Connecticut v. Am Elec Power Co.*, 582 F 3d at 341.

[47] *See, e g., Friends of the Earth, Inc. v Laidlaw Envtl. Serv., Inc.*, 528 U S. 167, 183 (2000). To establish standing, plaintiffs must show a "concrete and particularized" injury that is "fairly traceable" to the action of a particular defendant *Id* at 180-81

"trifling" or insignificant conditions that do not, standing alone, disrupt, interfere, impede or impair rights held collectively by citizens.[48] To be a nuisance, a defendant's interference with the public right must be "substantial" and "unreasonable."[49] Surely standing to pursue a claim cannot be justified by allegations that fail to conform to the elements of the underlying tort. Under the Second Circuit's reasoning, it is difficult to imagine anyone who lacks standing to file nuisance claims regarding greenhouse gas emissions.

The same problems – merging tort standards with standing requirements for litigation challenging or enforcing environmental statutes and regulations – infects the Second Circuit's "redressability" discussion. For example, the court relies on this Court's holding in *Massachusetts v. EPA* that parties need not allege that their requested relief will "by itself reverse global warming" but instead, it is sufficient to show that the remedy will "slow or reduce" it.[50] Again, this is a standard that applies in *regulatory* litigation – not tort cases. To show standing in public nuisance cases, claimants must, at a minimum, plead the elements of the tort, including allegations of a substantial interference that can be *meaningfully* abated,

---

[48] *See* RESTATEMENT (SECOND) OF TORTS § 821B (defining public nuisance as "an unreasonable interference with a right common to the general public")

[49] *See* Faulk & Gray, *supra* note 22, at 964.

[50] *Massachusetts v EPA*, 549 U.S at 525

not nominally "reduced."[51] There must be specific allegations regarding particular conduct traceable to each particular defendant – allegations that plausibly show both the necessity and efficacy of abatement. In the absence of such a showing, any "redress" ordered by the court will be a hollow remedy. Moreover, massive amounts of time, effort and resources will be wasted in litigation where the ultimate "relief" is merely symbolic, not efficacious. Since the maxims of equity preclude the rendition of vain or useless orders,[52] Respondents surely lack standing to pursue equitable relief that amounts to no more than an idle gesture.

---

[51] *Cf. Ashcroft v. Iqbal*, ___ U.S. ___, 129 S Ct 1938, 1950 (2009) (citing *Bell Atl. Corp v Twombly*, 550 U.S. 544, 555-56 (2007)).

[52] *See, e g., New York Times Co. v United States*, 403 U.S 713, 744 (1971) ("It is a traditional axiom of equity that a court of equity will not do a useless thing just as it is a traditional axiom that equity will not enjoin the commission of a crime"); *Foster v. Mansfield*, 146 U.S. 88, 101-02 (1892) ("A court of equity is not called upon to do a vain thing. It will not entertain a bill simply to vindicate an abstract principle of justice, or to compel the defendants to buy their peace")

CONCLUSION

If, as Justice Holmes counsels, the development of the common law should be "molar and molecular,"[53] the transmutation of "public nuisance" concepts to address global climate change requires more rumination and digestion than the judiciary alone can prudently provide. Advocates who tout public nuisance litigation as a universal panacea should pay careful attention to the "rumination" analogy. Despite the tort's ravenous reputation as a potential "monster" capable of devouring time-honored legal precedents in a single gulp,[54] that appetite is constrained by the common law's tendencies to move in a "molar and molecular" fashion – to chew thoroughly – and then to swallow, if at all, only small bits at a time.

Under such circumstances, the limits of judicial competency suggest that forbearance, rather than adventure, is the most principled response. Particularly while Congress and the Executive Branch are in the midst of addressing climate change issues, it is

---

[53] *See Southern Pacific Co. v Jensen*, 244 U.S 205, 221 (1917) (Holmes, J.) ("I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions") *See also* BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113 (1921) (stating that courts make law only within the "gaps" and "open spaces of the law")

[54] *See In re Lead Paint Litig.*, 924 A 2d 484, 505 (N.J. 2007); *see also Troga Pub Sch Dist. No. 15 v. U.S. Gypsum Co.*, 984 F 2d 915, 921 (8th Cir. 1993) (originating the quote above)

inappropriate for courts to entertain standardless aggregative controversies.

Accordingly, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

RICHARD O. FAULK*
JOHN S. GRAY
GARDERE WYNNE SEWELL LLP
1000 Louisiana, Suite 3400
Houston, TX 77002-5007
(713) 276-5500
rfaulk@gardere.com
Counsel for Amici Curiae American Chemistry Council, American Coatings Association, National Association of Manufacturers, National Petrochemical and Refiners Association, Property Casualty Insurers Association of America, and Public Nuisance Fairness Coalition

September 2, 2010

*Counsel of Record

AMICUS CURIAE BRIEF

170

10-174

Supreme Court, U.S.
FILED
SEP 01 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY INC., *et al.*,
Petitioners,

v.

STATE OF CONNECTICUT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF UNIONS FOR JOBS AND THE ENVIRONMENT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

LAURENCE J. COHEN*
SHERMAN, DUNN, COHEN,
LEIFER & YELLIG, P.C.
900 SEVENTH STREET, N.W.,
SUITE 1000
WASHINGTON, D.C. 20001
TELEPHONE: (202) 785-9300
FAX. (202) 775-1950

*COUNSEL OF RECORD

EUGENE M. TRISKO
ATTORNEY AT LAW
P.O. BOX 47
GLENWOOD, MD 21738-0047
TELEPHONE: (301) 639-5238
FAX (410) 489-9483

OF COUNSEL

Peake DeLancey Printers, LLC - (301) 341-4600 - Cheverly MD

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	5
I. THE SECOND CIRCUIT DECISION FAILS TO SHOW DUE RESPECT FOR CLIMATE CHANGE POLICY DEVELOPMENT BY THE LEGISLATIVE AND EXECUTIVE BRANCHES	5
A. Executive Branch Actions Are Accelerating	5
B. Legislative Actions Reflect the Improproety of Ad Hoc, Piecemeal Remedies for Climate Change	9
C. International Actions Should Be Considered	11
II. COURTS LACK JUDICIALLY DISCOVERABLE AND MANAGEABLE STANDARDS FOR FASHIONING EFFECTIVE REMEDIES TO CLIMATE CHANGE	15
A. Courts Can Order Relief But Cannot Fashion Effective Remedies For Injuries Alleged In Climate Change Nuisance Actions.	15
B. Courts Lack The Ability To Develop Discoverable and Manageable Standards Because Only a Comprehensive Climate Policy Can Remedy Alleged Impacts of Climate Change	17
III. U.S. EPA REGULATION OF GREENHOUSE GAS EMISSIONS REFLECTS THE DISPLACEMENT BY FEDERAL STATUTORY LAW OF COMMON LAW NUISANCE CLAIMS	18
IV. CONCLUSION	21

TABLE OF AUTHORITIES

Page

Cases

Baker v. Carr,
369 U.S. 186 (1962) 5, 16

Barclay's Bank PLC v. Franchise Tax Bd.,
512 U.S. 298 (1994) 13

Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103 (1948) 16

City of Milwaukee v. Illinois,
451 U.S. 304 (1981) 20, 21

Comer v. Murphy Oil USA,
585 F.3d 855 (5th Cir. 2009) 14

Comer v. Murphy Oil USA,
No. 05-436, 2007 WL 6942285
(S.D. Miss. Aug. 30, 2007) 13

Connecticut v. Am. Elec. Power Co.,
406 F. Supp. 2d 265 (S D.N.Y. 2005) 16

Connecticut v. Am. Elec. Power Co.,
582 F.3d 309 (2d Cir. N.Y. 2009) 15, 20, 22

Container Corp. of America v. Franchise Tax Bd.,
463 U.S. 159 (1983) 13

Crosby v. National Foreign Trade Council,
530 U.S. 363 (2000) 13

Marbury v. Madison,
5 U.S. (1 Cranch) 137, 170 (1803) 4

Massachusetts v. EPA,
549 U.S. 497 (2007) 2, 6, 21

Native Village of Kivalina v. Exxon Mobil Corp.,
663 F.Supp. 2d 863 (N.D. Cal. 2009) 14

Nixon v. United States,
506 U.S. 224 (1993) 16

TABLE OF AUTHORITIES—Continued

Page

North Carolina v. TVA,
No. 09-1623, 2010 WL 2891572
(4th Cir. July 26, 2010) 3, 14

Constitutional Provisions

U S. Const. art. I § 8, cls. 1,3,11-14 12

U.S. Const. art. II, § 2, cl. 2 12

Statutes, Legislation and Treaties

American Power Act, http://kerry.senate.gov/imo/media/doc/APAbill3.pdf 11

Clean Air Act,
42 U.S.C. §f7401. ..... 3, 6, 20, 21

H.R. 2454, 111th Cong. (2009) 10

H.R. Rep. No. 11-137, 111th Cong. (2009) 10

United Nations Framework Convention on Climate Change, S. Treaty Doc No. 102-38; ILM 849 (1992) 1, 3, 11, 12, 19

Regulations and Executive Orders

EPA, ENDANGERMENT AND CAUSE OR CONTRIBUTE FINDINGS FOR GREENHOUSE GASES, 74 Fed. Reg. 66,496 (December 15, 2009). 7

EPA, FINAL RULE: PREVENTION OF SIGNIFICANT DETERIORATION AND TITLE V GREENHOUSE GAS TAILORING RULE, 76 Fed. Reg. 31,514 (June 3, 2010) 7

EPA, LIGHT-DUTY VEHICLE GREENHOUSE GAS EMISSION STANDARDS AND CORPORATE AVERAGE FUEL ECONOMY STANDARDS, 76 Fed. Reg. 25,324 (May 7, 2010) 7

EPA, MANDATORY REPORTING OF GREENHOUSE GASES, 74 Fed. Reg. 56,260 (October 30, 2009) 6

TABLE OF AUTHORITIES—Continued

Page

EPA, REGULATING GREENHOUSE GAS EMISSIONS UNDER THE CLEAN AIR ACT, 73 Fed. Reg. 44,354 (July 20, 2008) 6

Exec. Order No. 13,514, 74 Fed. Reg. 52,117 (October 8, 2009) 5

Other Authorities

COPENHAGEN ACCORD, http://unfccc.int/resource/ docs/2009/cop15/eng/l07.pdf 12

EPA, DRAFT FY 2011-2015 EPA STRATEGIC PLAN, 75 Fed. Reg. 74,736 (June 18, 2010) 6

EPA, REGULATORY IMPACT ANALYSIS FOR THE FINAL GREENHOUSE GAS TAILORING RULE, FINAL REPORT (EPA 452/R-10-003, MAY 2010).... 8, 9

DOE, STRATEGIC PLAN, U.S. CLIMATE CHANGE TECHNOLOGY PROGRAM (SEPTEMBER 2006)... 9

DOE, STRATEGIES FOR THE COMMERCIALIZATION AND DEPLOYMENT OF GREENHOUSE GAS INTENSITY-REDUCING TECHNOLOGIES AND PRACTICES (JANUARY 2009) 9

DOI, SECRETARIAL ORDER NO. 3289, ADDRESSING THE IMPACTS OF CLIMATE CHANGE ON AMERICA'S WATER, LAND, AND OTHER NATURAL AND CULTURAL RESOURCES (SEPTEMBER. 14, 2009) 9

MEMORANDUM FROM NANCY H. SUTLEY, CHAIR, COUNCIL ON ENVIRONMENTAL QUALITY TO HEADS OF FEDERAL DEPARTMENTS AND AGENCIES, DRAFT NEPA GUIDANCE ON CONSIDERATION OF THE EFFECTS OF CLIMATE CHANGE AND GREENHOUSE GAS EMISSIONS, (FEBRUARY 18, 2010) 18

TABLE OF AUTHORITIES—Continued

Page

OECD, TACKLING CLIMATE CHANGE AND GROWING THE ECONOMY, http://www.oecd.org/dataoecd/28/18/44287948.pdf. 19

UN FCCC, STATUS OF RATIFICATION OF THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, U.N. Doc. FCCC/1996/INF.1, U.N. FCCC, March 1, 1996, http://unfccc.int/resource/docs/ 1996/sbsta/inf01.pdf. 11

UN FCCC, WORKING GROUP ON LONG-TERM COOPERATIVE ACTION, NEGOTIATING TEXT, FCCC/AWGLCA/2010/6, May 17, 2010, http://unfccc.int/resource/docs/2010/awglca10/eng/06.pdf 12

INTEREST OF AMICUS CURIAE[1]

Unions for Jobs and the Environment, Inc. ("UJAE") is an association of ten national and international unions whose 3.2 million members seek to have a voice for union and worker concerns regarding U.S. global climate change policy and other environmental issues.[2] UJAE member unions are engaged in various aspects of U.S. energy supply, production, utilization and transportation. UJAE actively represents its members' concerns before all branches of the government where proposed actions would impact jobs or unduly burden the well-being of workers.

UJAE is accredited and participates as a non-governmental organization ("NGO") with formal observer status at the United Nations' Framework Convention on Climate Change, S. Treaty Doc. No. 102-38; U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 ILM 849 (1992) ("FCCC"). UJAE and its members have been involved for the past decade in both domestic and international climate change policy debates,

---

[1] Pursuant to Rule 37 6 of the Rules of this Court, counsel hereby certifies that the brief submitted on behalf of *amicus curiae* UJAE was not authored in whole or in part by counsel for a party, and no person or entity other than *amicus* and its staff have made a monetary contribution to the preparation of this brief All parties and the Solicitor General have granted blanket consents for the filing of *amicus curiae* briefs Counsel timely served notice of intent to file this brief with the Solicitor General and with all parties

[2] Formed in 2000, UJAE is a non-profit § 501(c)(4) organization incorporated in Maryland formed of the Brotherhood of Locomotive Engineers, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, International Brotherhood of Electrical Workers, International Brotherhood of Teamsters, Marine Engineers Beneficial Association; Transportation Communications International Union, United Food and Commercial Workers, United Mine Workers of America, United Transportation Union, and Utility Workers Union of America For more information, see the UJAE website at http //www ujae org

including the development of regulations by the U.S. Environmental Protection Agency ("EPA") implementing this Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007) ("*Massachusetts*"). The jobs and economic well-being of UJAE members will be critically impacted by decisions regarding climate change. UJAE seeks to ensure that any remedies for global climate change take workers' interests into account, incorporate appropriate mechanisms for transitioning to a lower-carbon economy, including strong technological incentives and labor protections such as "border adjustment" mechanisms to address international disparities in greenhouse gas ("GHG") controls, and avoid piecemeal emissions control actions having little impact on future global concentrations of greenhouse gases, or their related environmental effects. UJAE has sought to play a constructive role in helping to define domestic and international approaches to controlling GHG emissions, and has invested substantial resources in participating in the climate change policy process.

UJAE previously filed *amicus curiae* briefs before the U.S. District Court for the Southern District of New York and the U.S. Court of Appeals for the Second Circuit in the related climate change nuisance cases, *Connecticut et al. v. American Electric Power et al.* and *Open Space Institute v. American Electric Power et al.* ("*American Electric Power*"). UJAE believes that substantial arguments support the Petition for Writ of Certiorari filed in these cases. The Second Circuit's decision in *American Electric Power* merits review because the Second Circuit has decided an important question of federal law that has not been settled by this Court,[3] namely, whether under the U.S. Constitution plaintiffs can maintain common law nuisance claims against specific defendants for emitting greenhouse gases. Moreover, conflicts are increasing

---

[3] *See* SUP CT R 10(c)

among the federal circuit courts regarding the appropriate role of common law nuisance claims in cases involving the Clean Air Act, as evidenced by the Second Circuit's decision in this case and the Fourth Circuit's recent decision in *North Carolina* v. *TVA*, No. 09-1623, 2010 WL 2891572 (4th Cir. July 26, 2010), discussed *infra*.

SUMMARY OF THE ARGUMENT

This Court should grant the Petition for Writ of Certiorari on the basis that, contrary to the conclusions reached by the Second Circuit, the federal and state common-law nuisance claims at issue here would require a court to resolve political questions properly reserved for legislative and executive action. The damages alleged by Respondents can be remedied only by comprehensive national and multilateral emissions reductions strategies that Congress, EPA, the Department of State, and other executive agencies are now pursuing through legislation, a variety of regulations under the Clean Air Act addressing domestic GHG emissions from mobile and stationary sources, and multilateral negotiations involving industrial and developing nations under the UN FCCC. The competence for decision-making on the complex design of climate change mitigation strategies resides with the executive and legislative branches, not the judiciary.

Actions by Congress and the Obama Administration underscore the separation of powers arguments applicable to these and similar cases. President Obama, the Congress, and federal executive agencies are engaged in a series of complex policy-making, diplomatic, and cooperative efforts to craft comprehensive climate change remedies. EPA has begun to fashion a broad framework for regulating GHG emissions from both mobile and stationary sources under the Clean Air Act, 42 U.S.C. §7401, *et seq*. If the petition in this case were granted, UJAE would argue that the Clean Air Act clearly displaces any

federal common law claim that otherwise may have been available to litigants seeking to apply nuisance remedies against GHG emitters.

Judicial interference with policymaking on climate change issues in this and similar cases would be an improper intervention into a political question, as it would fail to show proper deference to the legislative and executive braches. Moreover, there are no sufficient judicially discoverable and manageable standards for effectively resolving the impacts of climate change alleged in such nuisance cases.

Because the judicial branch lacks the ability to craft a comprehensive approach to climate change that addresses the intersecting economic, environmental, technological, and diplomatic issues in this inherently global environmental phenomenon, a judicial role in establishing policy through nuisance lawsuits is improper and unwise. Nuisance litigation cannot be used as a tool to craft climate change policy. The risk of disturbing the complex economic, political, social and diplomatic considerations being carefully weighed and balanced by policymaking efforts among the representative branches of government makes the issue here an important matter of federal law that should be settled by this Court.

Judicial deference in political matters is a cornerstone of our constitutional system. As this Court explained in *Marbury v. Madison*, "The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have discretion. Questions, in their nature political...can never be made in this court." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). This Court has further held that the determining issue for whether a matter is a political question "is the relationship between the judiciary and the coordinate branches of the Federal

Government" and that the question of whether a matter is a nonjusticiable political question will turn on "the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination" of the matter at hand. *Baker v. Carr*, 369 U.S. 186, 210 (1962). Disputes that a court cannot resolve without "expressing a lack of respect due coordinate branches of government" or for which there is a "lack of judicially discoverable and manageable standards" for resolution of a matter are properly considered nonjusticiable political questions. *Id.* at 217.

ARGUMENT

I. THE SECOND CIRCUIT DECISION FAILS TO SHOW DUE RESPECT FOR CLIMATE CHANGE POLICY DEVELOPMENT BY THE LEGISLATIVE AND EXECUTIVE BRANCHES.

In this and similar cases, courts cannot fashion climate change remedies without showing a lack of due respect to the coordinate political branches. Climate change policy has been the subject of intense, complicated, and evolving efforts involving both houses of Congress, the President and executive agencies, and international diplomacy.

A. Executive Branch Actions Are Accelerating.

In 2009, President Obama ordered every executive agency to undertake efforts to address climate change and to develop policies that are consistent with "developing the domestic and international dimensions of a U.S. strategy for adaptation to climate change " Exec. Order No. 13,514, 74 Fed. Reg 52,117, 52,124 (Oct. 8, 2009).

Regulatory actions to address climate change are being pursued on a fast track by EPA. In the wake of this

Court's decision in *Massachusetts*, requiring that EPA consider a petition to regulate GHG emissions from motor vehicles, EPA has initiated multiple interrelated rulemakings to address GHG emissions under the Clean Air Act. These regulations are designed to put in place, under the Clean Air Act, a nationally applicable program to control GHG emissions from a wide range of industrial source sectors, going well beyond the automotive tailpipe emissions at issue in *Massachusetts*, and independent of potential national climate change legislation. *See* DRAFT FY 2011-2015 EPA STRATEGIC PLAN, 75 Fed. Reg. 74,736 (June 18, 2010, notice of availability.) In EPA's strategic plan, "taking action on climate change and improving air quality" is the first among the agency's five strategic goals. *Id.* at 74,737.

EPA's plans for advancing the regulation of GHGs under the Clean Air Act were developed soon after this Court's decision in *Massachusetts*. In July 2008, EPA published an advance notice of proposed rulemaking that described the complexities of regulating GHG emissions under the CAA, and sought comment from the public. *See* EPA, REGULATING GREENHOUSE GAS EMISSIONS UNDER THE CLEAN AIR ACT, 73 Fed. Reg. 44,354 (July 20, 2008).

In 2009, EPA took action to establish a regulatory program to address GHG emissions from domestic sources. In October 2009, EPA published a final rule implementing a congressional directive to establish a national inventory of emitting sources, requiring sources from nearly all significant sectors to report their GHG emissions annually. EPA, MANDATORY REPORTING OF GREENHOUSE GASES, 74 Fed. Reg. 56,260 (October 30, 2009). The rule also is intended to help inform "legislative efforts to address GHG emissions" because "accurate and timely information on GHG emissions is essential for informing many future climate decisions." *Id.* at 56,265.

In December 2009, EPA published formal findings that atmospheric concentrations of GHGs pose a threat to public health and welfare within the meaning of the Clean Air Act. EPA, ENDANGERMENT AND CAUSE OR CONTRIBUTE FINDINGS FOR GREENHOUSE GASES, 74 Fed. Reg. 66,496 (December 15, 2009). Based on those findings, in May 2010, EPA published final rules jointly with the Department of Transportation ("DOT"), creating new national efficiency and emissions standards for motor vehicles. EPA AND DOT, LIGHT-DUTY VEHICLE GREENHOUSE GAS EMISSION STANDARDS AND CORPORATE AVERAGE FUEL ECONOMY STANDARDS, 76 Fed. Reg. 25,324, 25,326 (May 7, 2010).

In EPA's view, the regulation of emissions from motor vehicles will trigger the regulation of other GHG emission sources under the Clean Air Act, including large electricity producers and manufacturing entities. *Id* Because of the complexity of the statutory requirements relating to other emission sources, EPA has announced modifications to its implementation of the GHG regulations. EPA, FINAL RULE: PREVENTION OF SIGNIFICANT DETERIORATION AND TITLE V GREENHOUSE GAS TAILORING RULE ("Tailoring Rule"), 76 Fed. Reg. 31,514 (June 3, 2010). This rule is intended to "tailor" new GHG permitting requirements to avoid immediate application of Best Available Control Technology ("BACT") requirements to smaller emitting sources. The rule will be phased in over a period of several years, and will apply to a wide variety of stationary source GHG emitters. *Id.* EPA has assembled a BACT Working Group to provide advice on the design of guidance for BACT determinations, and intends to issue BACT Guidance to the states later this year to facilitate state regulation of GHG emissions from new and modified sources subject to the Tailoring Rule. *See* http://www.epa.gov/oar/caaac/climatechangewg.html. As EPA explains, the Tailoring Rule is the first step in a wide-

ranging program to address GHG emissions from stationary sources:

> For the first step of this Tailoring Rule, which will begin on January 2, 2011, PSD or title V requirements will apply to sources' GHG emissions only if the sources are subject to PSD or title V anyway due to their non-GHG conventional pollutants. ... Specifically, for PSD, Step 1 requires that as of January 2, 2011, the applicable requirements of PSD, most notably, the best available control technology (BACT) requirement, will apply to projects that increase net GHG emissions by at least 75,000 tons per year (tpy) carbon dioxide equivalent (CO2e), but only if the project also significantly increases emissions of at least one non-GHG pollutant. For the title V program, only existing sources with, or new sources obtaining, title V permits for non-GHG pollutants will be required to address GHGs during this first step. ...
>
> The second step of the tailoring rule, that begins on July 1, 2011, will phase-in additional large sources of GHG emissions. New sources as well as existing sources not already subject to title V that emit, or have the potential to emit, at least 100,000 tpy CO2e will become subject to the PSD and title V requirements. ...
>
> (W)e also intend to issue a supplemental notice of proposed rulemaking (SNPR) in 2011, in which we will propose or solicit comment on a third step of the phase-in that would include more sources, beginning by July 1, 2013. .. We are establishing an enforceable commitment that we will complete this rulemaking by July 1, 2012, which will allow for 1 year's notice before step 3 would take effect. ...

EPA, REGULATORY IMPACT ANALYSIS FOR THE FINAL

GREENHOUSE GAS TAILORING RULE, FINAL REPORT (EPA 452/R-10-003, May 2010) at 5-7.

Other regulatory climate change initiatives are underway at the Departments of Interior, Energy, and other executive departments and agencies. In September 2009, the Department of the Interior ("DOI") launched a "coordinated Department-wide strategy to increase scientific understanding of and development of effective adaptive management tools to address the impact of climate change on our natural and cultural resources." DOI, SECRETARIAL ORDER NO. 3289, ADDRESSING THE IMPACTS OF CLIMATE CHANGE ON AMERICA'S WATER, LAND, AND OTHER NATURAL AND CULTURAL RESOURCES (Sept. 14, 2009), http://www.doi.gov/archive/climatechange/SecOrder3289.pdf.

The Department of Energy ("DOE") is funding and directing research and development of new energy technologies that may be able to reduce GHG emissions through its U.S. Climate Change Technology Program. *See* DOE, STRATEGIC PLAN, U.S. CLIMATE CHANGE TECHNOLOGY PROGRAM (September 2006). DOE also is involved in policy efforts to increase the pace of commercialization and deployment of technologies that reduce GHG emissions through carbon capture and sequestration demonstration projects and various energy efficiency initiatives. DOE, STRATEGIES FOR THE COMMER-CIALIZATION AND DEPLOYMENT OF GREENHOUSE GAS INTENSITY-REDUCING TECHNOLOGIES AND PRACTICES (January 2009).

B. LEGISLATIVE ACTIONS REFLECT THE IMPROPRIETY OF AD HOC, PIECEMEAL REMEDIES FOR CLIMATE CHANGE.

Climate change policy in Congress has evolved rapidly over the past two decades. The legislation that Congress

has developed reflects the representative branches' recognition of the profound economic, trade and social impacts associated with restrictions on GHG emissions. These policy proposals have uniformly included, at a minimum, emission reductions, support for alternative technologies such as carbon capture and sequestration, coordination with international efforts, and policies designed to mitigate and compensate for increased energy costs that are likely to cause economic damage and job displacement in trade-sensitive and energy-intensive industries.

On June 26, 2009, the House of Representatives passed H.R. 2454, *The American Clean Energy and Security Act*. H.R. 2454 (111th Cong., 1st Sess.) This legislation typifies Congress's efforts to carefully balance the economic, technological, social and environmental variables essential to a national climate change policy. H.R. 2454 was the result of multiple hearings before House committees, consultations with the international community, and testimony from dozens of expert witnesses before the House Committee on Energy and Commerce. *See* H.R. Rep. No. 11-137, pt. 1, at 318-20 (111th Cong., 1st Sess.) Ultimately, the bill passed by the House embraced comprehensive emission reduction mandates with broad-based technological incentives, protection for energy-intensive and trade-sensitive industries, mechanisms to control the impact of higher energy prices on consumers, and programs to build strong international emission "offset" markets to reduce adverse impacts on the domestic economy. The legislation also provided extensive program support for worker retraining and provisions to ensure comparable wages for workers at projects funded under the bill's various energy technology provisions.

The U.S. Senate also has developed comprehensive climate change legislation, which remains under considera-

tion. *See* American Power Act (available at: http://kerry.senate.gov/imo/media/doc/APAbill3.pdf). Although differing in a range of specific features, the Senate legislative language mirrors the approach taken by H.R. 2454 with a market-based cap-and-trade system for GHG emissions reductions, incentives to spur technology development, and provisions to mitigate increases in energy costs. While the Senate may defer action on climate legislation this year, new bills are sure to be introduced in the 112th Congress.

Taken together, recent legislative proposals in the House and Senate underscore the fact that courts cannot craft *ad hoc* remedies to climate change without showing a lack of respect to the legislative branch. Both houses of Congress have engaged in complex and detailed fact-findings and hearings, and the legislation being pursued reflects the comprehensive and international nature of the emission mitigation strategies that must be considered in any effort to address climate change.

C. International Actions Should Be Considered.

The global nature of greenhouse gas emissions and atmospheric concentrations of GHGs catalyzed the 1992 negotiation and ratification of the United Nations Framework Convention on Climate Change. The U.S. is among the 154 signatory nations to the Convention. *See* STATUS OF RATIFICATION OF THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, U.N. Doc. FCCC/1996/INF.1, U.N. FCCC, March 1, 1996, http://unfccc.int/resource/docs/1996/sbsta/inf01.pdf. The Convention's long-term objective is the "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." FCCC Art. 2.

International negotiations on climate change have been

progressing steadily and climate change decisions by the executive and legislative branches are being made with an effort to coordinate domestic policy with international endeavors. In December 2009, at the 15th Conference of the Parties to the UN FCCC, President Obama helped to negotiate the "Copenhagen Accord" with India, China, Brazil and South Africa. *See* http://unfccc.int/resource/docs/2009/cop15/eng/107.pdf.

The Copenhagen Accord sets an international goal of limiting the increase in global temperature to two degrees Celsius, provides for financing climate change adaptation measures, and includes a provision for industrial and developing country parties to submit climate change mitigation pledges. *Id.* The Accord marked a breakthrough in the willingness of major developing nations to agree to GHG emissions reductions, and more than 50 nations subsequently transmitted emission reduction pledges to the United Nations. *See* http://unfccc.int/meetings/items/5276.php. Key provisions of the Copenhagen Accord are now reflected in the negotiating text before the FCCC Working Group on Long-Term Cooperative Actions ("LCA"). The LCA is charged with negotiating a long-term "shared vision" to control global GHG emissions among both industrial and developing nations. *See* FCCC/AWGLCA/2010/6, May 17, 2010, http://unfccc.int/resource/docs/2010/awglca10/eng/06.pdf. Significantly, UJAE and other labor groups were successful in including language within the draft text of the LCA agreement on the need for a "just transition" of the workforce. *Id.*

The Second Circuit's decision in this matter threatens to interfere with these international efforts. The President is vested with inherent executive power to "make Treaties." U.S. Const. art. II, § 2, cl. 2. The U.S. legislative branch shares foreign powers related to, *inter alia*, commerce with foreign nations and ratifying

treaties. U.S. Const. art. I § 8, cls. 1,3,11-14, U.S. Const. art. II, § 2, cl. 2. This Court has "acknowledged that the 'nuances' of 'the foreign policy of the United States . . . are much more the province of the Executive Branch and Congress than of this Court." *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 386 (2000) (citing *Container Corp. of America v Franchise Tax Bd.*, 463 U.S. 159, 194 (1983), and *Barclay's Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 327 (1994)).

In this case, providing judicial venues for Respondents to achieve mandatory reductions in GHG emissions would constitute improper interference in our nation's foreign policy. Success by Respondents in obtaining court-ordered reductions of GHG emissions would set the stage for similar suits in every state and federal court in the nation, for every possible plaintiff, and for any combination of defendants. Indeed, the volume of the possible lawsuits - if every U.S. emitter of GHGs were potentially answerable in any court to any person who claims to be affected by GHG emissions - is nearly infinite.

The potential for a groundswell of other nuisance lawsuits resulting in inconsistent climate change outcomes is significant. Several recent lawsuits in the federal courts make this concern concrete. The first, *Comer v. Murphy Oil USA*, is a lawsuit brought by residents of Mississippi against more than two dozen oil and coal companies and other defendants, alleging that GHG emissions from those companies were responsible for an increase in the magnitude of property losses associated with Hurricane Katrina. The Southern District of Mississippi dismissed the action on standing and political question grounds. *Comer* v. *Murphy Oil USA*, No. 05-436, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007). A panel of the Fifth Circuit initially reversed, but the full court vacated the panel's opinion when it granted rehearing *en banc*. The Fifth Circuit subsequently dis-

missed the appeal due to an intervening loss of a quorum, leaving in place the district court's decision dismissing the action. *Comer* v. *Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *reh'g granted*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010).

A second case, *Native Village of Kivalina v. Exxon Mobil Corp.*, is a nuisance lawsuit brought against twenty-four oil, energy, and utility companies alleging that their contributions to climate change have resulted in the loss of Arctic sea ice. Similar to the lower court decision in *Comer*, the district court dismissed the case on political question grounds. *Native Village of Kivalina v. Exxon Mobil Corp.*, 663 F.Supp. 2d 863 (N.D. Cal. 2009), *appeal pending*, No. 09-17490 (9th Cir., Nov. 5, 2009).

More recently, the Fourth Circuit reversed a district court decision that had granted relief on state nuisance law grounds against TVA and other defendants, for damages allegedly caused by emissions regulated under the Clean Air Act. *North Carolina* v. *TVA*, No. 09-1623, 2010 WL 2891572 (4th Cir. July 26, 2010). The Fourth Circuit reversed and remanded with instructions to dismiss the action, in part because it was "unwilling to sanction the least predictable and the most problematic method for resolving interstate emissions disputes..." *Id.* at 16.

The Second Circuit's open invitation for courts to entertain climate-related claims would destroy any semblance of the federal government's national policy for addressing global climate change. By establishing their own *ad hoc* climate change policies, courts would fail to show due respect to the comprehensive and economy-wide obligations that consistently have been the goal of the representative branches. National climate change policy would be replaced by judicial remedies targeted at specific companies or industry sectors selected by plaintiffs.

Ongoing U.S. climate change efforts are "political" in every sense. They reflect the opinions, interests, and needs of individuals, business entities, labor groups and governments around the globe. Balancing the interests of all parties is, in all large-scale policymaking, an arduous process. Resolution of such matters by the political branches ensures that all interested parties' concerns are adequately considered, thus requiring the judicial branch to exercise restraint.

II. COURTS LACK JUDICIALLY DISCOVERABLE AND MANAGEABLE STANDARDS FOR FASHIONING EFFECTIVE REMEDIES TO CLIMATE CHANGE.

The Second Circuit reasoned that the nuisance allegations raised by plaintiffs do not require courts to "decide overarching policy questions...or determine how across-the-board emissions reductions would affect the economy..." *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 329 (2d Cir. 2009). However, the Second Circuit failed to distinguish the court's ability to grant the *relief* sought from its ability to fashion an effective *remedy*, and thereby failed to fully discern that a court is unable to discover and manage standards to achieve that remedy.

A. Courts Can Order Relief But Cannot Fashion Effective Remedies For Injuries Alleged in Climate Change Nuisance Actions.

The Second Circuit's conclusion that it can fashion an effective remedy in this case turns on the view that this matter is like other "complex public nuisance issues" such as cases involving the discharge of pollutants into waterways, and tort actions asserting damages resulting from interstate air pollution. *Id.* at 326-29. The only functional similarities between the examples used by the Second Circuit and the current climate change allegations

are that all the actions have been brought as nuisance or other tort claims and that they are, in a broad sense, "complex." However, courts are compelled to perform a much more discriminating analysis before reaching conclusions, and should focus on the overall "difficulty of fashioning relief." *Nixon v. United States*, 506 U.S. 224, 236 (1993). This analysis requires an evaluation of whether the issues at hand are "delicate [and] complex, and involve large elements of prophecy...and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil." *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

Here, the relief sought by the Respondents appears on its face simple enough: "an order (i) holding each of the Defendants jointly and severally liable for contributing to an ongoing public nuisance, global warming, and (ii) enjoining each of the Defendants to abate its contribution to the nuisance by capping its emissions of carbon dioxide and then reducing those emissions by a specified percentage each year for at least a decade." *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 270 (S.D.N.Y. 2005). Yet the Court cannot limit its inquiry regarding its abilities to whether it can grant the specific relief sought Rather, *Baker* requires the Court to consider whether it can fashion an effective remedy for the underlying injury in the case. *Baker*, 369 U.S. at 232.

In the present case, remedying the alleged injury requires authorities that differ greatly from those vested in the courts by the Constitution. An effective remedy would require the court to gather information on and to develop answers to difficult scientific, technological, and political issues, many of which involve speculation about the actions or inactions of third parties not before the court, such as: 1) how should the quantity of Petitioners'

GHG emissions and the relative impact of those emissions on climate change be measured?; 2) how should the impacts of future GHG emissions from developing nations that are not yet part of any formal international climate mitigation agreement be measured, and how does uncertainty about the rate of increase of these emissions affect the benefits of any court-ordered reductions of Petitioners' emissions?; 3) is technology commercially available that would permit Petitioners to reduce their GHG emissions, without jeopardizing jobs and the reliability of the nation's electricity supply?; and 4) would a reduction in GHG emissions by the Petitioners result in a reduction in global temperatures or sea level rise sufficient to remedy alleged damages, or would it result in "leakage" of carbon dioxide emissions to other regions or countries? These are the types of questions being considered by the political branches in their efforts to fashion effective remedies to global climate change. Courts lack the ability to conduct this sort of undertaking and the authority to resolve claims based on the speculative, *ad hoc* determinations required.

B. Courts Lack the Ability to Develop Discoverable and Manageable Standards Because Only a Comprehensive Climate Policy Can Remedy Alleged Impacts of Climate Change.

The representative branches recognize that crafting climate change solutions is uniquely challenging and must be done comprehensively. Neither the causes of, nor the solutions to, global climate change can be identified or implemented by litigation that focuses on individual emissions or emitters. As the Chairman of the President's Council on Environmental Quality ("CEQ") recently noted,

> Because climate change is a global problem that results from global GHG emissions, there are more

> sources and actions emitting GHG (in terms of both absolute numbers and types) than are typically encountered when evaluating the emissions of other pollutants. From a quantitative perspective, there are no dominating sources and fewer sources that would even be close to dominating total GHG emissions. The global climate change problem is much more the result of numerous and varied sources, each of which might seem to make a relatively small addition to global atmospheric GHG concentrations.

Memorandum from Nancy H. Sutley, Chair, Council on Environmental Quality to Heads of Federal Departments and Agencies, *Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions*, (Feb. 18, 2010) at 2.

Respondents here ask courts to substitute judicial doctrines for years of data collection and the analyses of experts working to understand what, if any, link exists between emissions from a particular source or group of sources and climate change impacts. This is a task that the coordinate branches have considered and rejected because it is impractical, unnecessary, and inefficient. As CEQ points out, "it is not currently useful...to attempt to link specific climatological changes, or the environmental impacts thereof, to the particular project or emissions, as such direct linkage is difficult to isolate and to understand." *Id.* at 3.

Put simply, even if Plaintiffs could prove that specific GHG emissions contribute to climate change to some degree, that proof is insufficient to support a claim that limiting those emissions would result in a concomitant reduction in global temperatures, sea level changes, or other environmental effects. As the Organization for Economic Cooperation and Development ("OECD") has explained:

> We need to move towards a global carbon market, involving as many countries, industries and emission sources as possible, to reach even a moderately ambitious GHG-concentration target at a manageable cost. Reducing global GHG emissions is a shared goal for both developed and developing countries. Even if developed countries brought their emissions to zero, their efforts alone would not be sufficient to meet this goal due to expected emissions growth in the major emerging economies by 2050.

OECD, TACKLING CLIMATE CHANGE AND GROWING THE ECONOMY, http://www.oecd.org/dataoecd/28/18/44287948.pdf.

A process of case-by-case court-ordered reductions in emissions cannot fashion an effective strategy for remedying either the causes or effects of climate change. Courts would be faced with complex and inherently political policy decisions if they attempted to draft standards directed at mitigating climate change. Fundamental issues would arise such as the availability of technology, primary and secondary economic impacts, and likely shifts of industries and emissions to other locations in the U.S, or to locations abroad where they would not be subject to the jurisdiction of U.S. courts.

III. U.S. EPA REGULATION OF GREENHOUSE GAS EMISSIONS REFLECTS THE DISPLACEMENT BY FEDERAL STATUTORY LAW OF COMMON LAW NUISANCE CLAIMS.

While Congress continues to debate prospective climate change legislation, and the UN FCCC process considers new global approaches for reducing GHG emissions by industrial and developing nations, the broad framework of GHG regulations for mobile and stationary sources being established by U.S. EPA under the authori-

ty of the Clean Air Act reflects Congress's displacement of federal common law nuisance cases. EPA's greenhouse gas control regulations will constitute, by definition, a nationally applicable program for addressing GHG emissions from new and existing stationary and mobile sources.

The Second Circuit's speculation about EPA's response to this Court's decision in *Massachusetts* is indicative of the flawed reasoning underlying the court of appeals' decision in this case:

> A proposed finding has no effect in law that would affect any rights at issue here. After reviewing public comments EPA might legitimately determine—subject to the requirements of administrative law—that its proposed finding is unwarranted or that regulation of greenhouse gases is otherwise inappropriate under the terms of the Act.. ...
>
> In sum, at least until EPA makes the requisite findings, for the purposes of our displacement analysis the CAA does not (1) regulate greenhouse gas emissions or (2) regulate such emissions from stationary sources. Accordingly, the problem of which Plaintiffs complain certainly has not "been thoroughly addressed" by the CAA. *Milwaukee II*, 451 U.S. at 320. We express no opinion at this time as to whether the actual regulation of greenhouse gas emissions under the CAA by EPA, if and when such regulation should come to pass, would displace Plaintiffs' cause of action under the federal common law.

Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 379, 381 (2d Cir. 2009)

Amicus respectfully submits that the Second Circuit's "if and when" speculation is not relevant; that the regulation of greenhouse gas emissions has been committed to

U.S. EPA by the Clean Air Act, as recognized by this Court's decision in *Massachusetts*; that EPA is acting aggressively to regulate such emissions under the Clean Air Act; and that Congress's commitment of greenhouse gas regulatory decision-making to EPA displaced any common law nuisance claims such as those urged by Respondents. As this Court emphasized in its seminal decision in *Milwaukee II*, "The question is whether the field has been occupied, not whether it has been occupied in a particular manner." *City of Milwaukee v. Illinois*, 451 U.S. 304, 324 (1981). To hold otherwise in this or similar cases would enable plaintiffs to use federal common law nuisance claims to seek climate change remedies that depart from the regulatory approaches developed by EPA based on its interpretation of federal statutory law. This result would vitiate the displacement doctrine articulated in *Milwaukee II* by requiring that EPA's greenhouse gas regulations embrace every conceivable remedy arguably available under common law.

IV. CONCLUSION

Courts lack the competence to do what the representative branches are grappling with: fashioning effective remedies to climate change while accounting for economic trade-offs, the costs of technologies to reduce GHG emissions, job and consumer impacts, and international obligations. By deciding individual nuisance cases, courts would intervene in climate policy decision-making and interfere with existing legislative, regulatory, and diplomatic efforts to remedy any alleged damages.

The federal government's decisions on climate policy will affect labor, consumer and business interests through higher energy costs and economic impacts on energy- and trade-sensitive industries. The loss of employment would be exacerbated if emissions reductions are not made as part of an economy-wide and inter-

national program to mitigate greenhouse gas emissions. Fashioning comprehensive solutions to global climate change resulting from hundreds of years' of GHG emissions from widely dispersed sources in industrial and developing nations is not the province of the judiciary, and certainly would not provide "[a]nother example of the federal courts' masterful handling of complex public nuisance issues..." *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 327 (2d Cir. 2009).

Respectfully submitted,

LAURENCE J. COHEN*
SHERMAN, DUNN, COHEN,
LEIFER & YELLIG, P.C
900 SEVENTH STREET, N W ,
SUITE 1000
WASHINGTON, D.C. 20001
TELEPHONE. (202) 785-9300
FAX: (202) 775-1950

*COUNSEL OF RECORD

EUGENE M. TRISKO
ATTORNEY AT LAW
P.O. BOX 47
GLENWOOD, MD 21738-0047
TELEPHONE (301) 639-5238
FAX (410) 489-9483

OF COUNSEL

AMICUS CURIAE BRIEF

170

(7)

Supreme Court, U.S.
FILED
SEP 02 2010
OFFICE OF THE CLERK

No. 10-174

IN THE

Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY, INC., ET AL.,
Petitioners,

v.

STATE OF CONNECTICUT, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF OF THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, THE ALLIANCE OF AUTOMOBILE MANUFACTURERS AND THE NATIONAL AUTOMOBILE DEALERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

RAYMOND B. LUDWISZEWSKI
Counsel of Record
CHARLES H. HAAKE
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
rludwiszewski@gibsondunn.com

Counsel for Amici Curiae

QUESTIONS PRESENTED

Whether States and private parties may bring a cause of action under the federal common law of nuisance to limit greenhouse gas emissions from certain sources where no statute creates such a cause of action, and where the lawsuit does not present any "uniquely federal interest." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981).

Whether a nuisance claim addressing global climate change, which would require a court to determine whether Defendants' greenhouse gas producing activities were reasonable under the circumstances relative to untold millions of other sources of greenhouse gas emissions throughout the world, is nonjusticiable under the political question doctrine on the grounds that there is a "lack of judicially discoverable and manageable standards for resolving" the dispute, and that the action presents the "impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

STATEMENT 3

SUMMARY OF ARGUMENT 9

ARGUMENT 10

I. THE CIRCUIT COURT'S OPINION AMOUNTS TO AN UNPRECEDENTED EXPANSION OF THE FEDERAL COMMON LAW OF NUISANCE AND CONFLICTS WITH OTHER CIRCUITS CONCERNING THE PARTIES THAT MAY INVOKE IT. 10

II. DETERMINING WHICH PARTIES MUST BEAR THE BURDEN OF REDUCING GREENHOUSE GAS EMISSIONS AND THE REASONABLENESS OF GREENHOUSE GAS EMITTING ACTIVITIES PRESENT NONJUSTICIABLE POLITICAL QUESTIONS. 17

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES

Baker v. Carr,
369 U.S. 186 (1962) 9, 17, 20, 21

Cal. Tahoe Reg'l Planning Agency v. Jennings,
594 F.2d 181 (9th Cir. 1979) 15

California v. Gen. Motors Corp.,
No. C06-05755 MJJ, 2007 WL 2726871
(N.D. Cal. Sept. 17, 2007) ..... passim

City of Milwaukee v. Illinois,
451 U.S. 304 (1981) 10, 11, 17

Comer v. Murphy Oil USA,
No. 05-436, 2007 WL 6942285 (S.D.
Miss. Aug. 30, 2007) 8

Comm. for the Consideration of the Jones Falls Sewage Sys. v. Train,
539 F.2d 1006 (4th Cir. 1976) 15

Erie Railroad Co. v. Tompkins,
304 U.S. 64 (1938) 10, 11

Georgia v. Tenn. Copper Co.,
206 U.S. 230 (1907) 12, 14, 15

Illinois v. City of Milwaukee,
406 U.S. 91 (1972) ..... passim

Lucas v. S.C. Coastal Council,
505 U.S. 1003 (1992) 19

Massachusetts v. EPA,
549 U.S. 497 (2007) 6

Massachusetts v. U.S. Veterans Admin.,
541 F.2d 119 (1st Cir. 1976) 12

Missouri v. Illinois,
200 U.S. 496 (1906) 13, 15

Nat'l Audubon Soc'y v. Dept. of Water & Power of Los Angeles,
869 F.2d 1196 (9th Cir. 1988) 12, 15

Nat'l Sea Clammers Ass'n v. City of New York,
616 F.2d 1222 (3d Cir.1980) 15

Native Vill. of Kivalina v. ExxonMobil Corp.,
663 F. Supp. 2d 863 (N.D. Cal. 2009).. 8, 19, 20, 21

New York v. New Jersey,
256 U.S. 296 (1921) 13

North Dakota v. Minnesota,
263 U.S. 365 (1923) 12

Oregon Waste Sys., Inc. v. Dept. of Envtl. Quality of Ore.,
511 U.S. 93 (1994) 13

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004) 11

Tex. Indus., Inc. v. Radcliff Materials, Inc.,
451 U.S. 630 (1981) 9, 11

Vieth v. Jubelirer,
541 U.S. 267 (2004) 19

OTHER AUTHORITIES

Daniel Hays, *Climate Claims Are The 'New Asbestos,' Swiss Re Suggests*, Nat'l Underwriter Prop. & Cas., May 29, 2009 8

EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2008*, Rep. No. EPA 430-R-10-006 (2002) 5

Restatement (Second) of Torts § 821B cmt. e (1979) 20

Restatement (Second) of Torts § 840E 19

Vanessa Houlder, *Climate Change Could Be the Next Legal Battlefield*, Fin. Times (London), July 14, 2003 8

RULES

Rule 37.2(a) 1

REGULATIONS

Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010) 6, 7

Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) 7

Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010) 7

BRIEF OF THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, THE ALLIANCE OF AUTOMOBILE MANUFACTURERS AND THE NATIONAL AUTOMOBILE DEALERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Amici curiae the Association of International Automobile Manufacturers ("AIAM"), the Alliance of Automobile Manufacturers (the "Alliance") and the National Automobile Dealers Association ("NADA") respectfully submit that the petition for a writ of certiorari should be granted.[1]

INTEREST OF *AMICUS CURIAE*

The question presented in this case is whether States and private parties may invoke the federal common law of nuisance to require that some sectors of the economy, but not others, bear the burden of addressing global climate change. This question has arisen in a number of recent cases, some seeking to require those defendants singled-out in the lawsuit to abate their greenhouse gas emissions, and others seeking monetary damages for injuries allegedly caused by climate change. *Amici* have a significant interest in the correct resolution of this question because certain AIAM and Alliance members were

---

[1] Pursuant to this Court's Rule 37.2(a), counsel of record received timely notice of the intent to file this brief, and letters of consent from all parties to the filing of this brief have been submitted to the Clerk Pursuant to this Court's Rule 37.6, this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amici* or their counsel made a monetary contribution for the preparation or submission of this brief.

the targets of such a lawsuit, *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) (*General Motors*), in which the State of California sought billions of dollars in damages the State claimed were caused by climate change. The *General Motors* court correctly dismissed that action on the ground that the issue presented a nonjusticiable political question, and the State of California ultimately dismissed its appeal.

Amici are trade associations collectively representing almost the entire automobile industry in the United States. The Alliance is a trade association of car and light truck manufacturers, whose members include BMW Group, Chrysler Group LLC, Ford Motor Company, General Motors Company, Jaguar, Land Rover, Mazda North America, Mercedes-Benz USA, Mitsubishi Motors, Porsche Cars North America, Toyota Motor North America, Inc., and Volkswagen Group of America. AIAM's members include 15 foreign-based automobile manufacturers, such as American Honda Motor Company, Inc., Hyundai Motor America, Isuzu Motors America, LLC, Kia Motors America, Inc., Mitsubishi Motors North America, Inc., Nissan North America, Inc., Subaru of America, Inc., and Toyota Motor North America, Inc. NADA is a trade association that represents franchised automobile and truck dealers who sell new and used motor vehicles and engage in service, repair, and parts sales. These trade associations represent their members' interests in matters impacting the automobile industry, such as motor vehicle safety, emissions, and fuel economy, and they regularly represent their interests in litigation.

Amici seek to participate in this matter because if the Second Circuit's holding is left undisturbed, it

would have wide-ranging consequences for not just the automobile industry, but across the economy. Virtually every element of industry either emits greenhouse gasses as part of its operation or manufactures, markets or sells greenhouse gas emitting products. The result would be that any party that is responsible for any amount of greenhouse gas emissions could be subject to a federal lawsuit seeking either monetary compensation for alleged climate-related injuries, or injunctive relief to abate its emissions. *Amici* believe that because addressing global climate change is an issue of broad national and international concern, this Court's precedents dictate that it is committed to the political branches and not to *ad hoc* adjudication in the Article III courts.

STATEMENT

This lawsuit raises core issues that lie at the intersection between the nation's energy policy and concerns for environmental protection. Plaintiffs allege that Defendants' emissions of greenhouse gasses—principally carbon dioxide—contribute to global climate change and thereby cause a public nuisance under the federal common law. Plaintiffs seek an injunction forcing Defendants to cap and then reduce their carbon dioxide emissions.

1. Controlling carbon dioxide emissions presents unique challenges that do not arise in traditional environmental public nuisance actions. First, the emission of carbon dioxide is ubiquitous. Not only is it exhaled by humans and animals when converting food into energy and living tissue, but carbon dioxide is also released whenever a carbon-containing fuel—such as oil, natural gas, and coal—is burned. These

fossil fuels provide the energy source for nearly all modes of transportation, every piece of equipment employing an internal combustion engine, every combustion-generated source of heat, and approximately 70% of all electricity generated in the United States. The sources of carbon dioxide emissions in the United States are inestimable.

Second, a source of carbon dioxide has the same impact on climate change no matter where it is located. Carbon dioxide does not remain close to the earth's surface and localized near its source. Rather, it disperses swiftly and evenly throughout the atmosphere and mixes indistinguishably with carbon dioxide from distant biological and man-made sources. Consequently, emissions of carbon dioxide from a source in Connecticut have no greater impact in Connecticut than they do elsewhere in the United States or indeed the world. Similarly, whatever climate change impacts Connecticut may be experiencing are equally caused by carbon dioxide sources within the state as they are by such sources in the other forty-nine states and throughout the globe. In essence, therefore, every person and entity in the world is responsible for some amount of the carbon dioxide emissions that is believed to influence climate change across the globe.

Third, carbon dioxide is inert and extremely stable. Unlike other substances that are emitted from combustion sources, such as oxides of nitrogen and carbon monoxide, there are no aftertreatment devices that can capture and reduce carbon dioxide to some other chemical form. Rather, the amount of carbon dioxide emitted from a combustion source depends entirely on the quantity and type of fuel burned. For example, burning a gallon of gasoline results in the emission of roughly twenty pounds of

carbon dioxide, regardless of the characteristics of the vehicle that burned the fuel. Consequently, the only means currently available to lower the amount of carbon dioxide emitted from man-made sources is to reduce the amount of carbon that is oxidized in combustion to create energy.

2. Any policies adopted to address global climate change would therefore entail reducing the carbon-intensity of the American economy. This can be accomplished in three ways, which can be exemplified by developments in the automobile industry. One, we can simply produce fewer emissions by using less energy through doing less, for example by driving our existing cars and trucks less.[2] Two, we can produce fewer emissions without decreasing activity levels by being more fuel efficient, for example by utilizing gasoline-powered cars that achieve better fuel economy. Three, we can also generate lower emissions while maintaining activity levels by switching to fuels that are less carbon intensive, for example by producing cars that run on ethanol, natural gas or electricity.

Determining how much this nation should reduce its greenhouse gas emissions and selecting the appropriate means for achieving those reductions entails complex policy choices of the highest order.

---

2 Indeed, the increase in the price of gasoline coupled with the recent economic downturn has led to a significant decline in petroleum consumption and greenhouse gas emissions by the transportation sector simply by virtue of the fact that people are driving their cars less. EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2008*, Rep. No. EPA 430-R-10-006, at 2-1 (2002), available at http://epa.gov/climatechange/emissions/downloads10/US-GHG-Inventory-2010_Report pdf.

The elected branches of government are currently addressing these questions. For example, as a result of this Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), the U.S. Environmental Protection Agency has recently worked with the National Highway Traffic Safety Administration (NHTSA) to finalize a joint national program governing both motor vehicle greenhouse gas emissions and fuel economy. *See* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010).[3] Beginning with the 2012 model year (which starts in January of 2011), each automaker's combined fleet of cars and light duty trucks must meet increasingly stringent fuel economy and corresponding greenhouse gas emissions standards. By the 2016 model year, the standards impose a maximum emission rate of 250 grams of carbon dioxide equivalent and a commensurate fuel economy of 35.5 miles per gallon. The regulations include credits to encourage the commercialization of vehicles that run on fuels other than gasoline, such as electric vehicles, plug-in hybrid electric vehicles, and fuel cell vehicles.

These standards were adopted by EPA and NHTSA after a public notice-and-comment process. Each agency weighed and balanced a number of competing policy concerns, consistent with their enabling statutes. For instance, EPA explained in the preamble to the rulemaking that it "is called

---

[3] This coordination was "both needed and possible because the relationship between improving fuel economy and reducing CO2 tailpipe emissions is a very direct and close one." Light-Duty Vehicle Greenhouse Gas Emission Standards, 75 Fed. Reg. at 25,327.

upon to weigh and balance various factors, and to exercise judgment in setting standards that are a reasonable balance of the relevant factors." Light-Duty Vehicle Greenhouse Gas Emission Standards, 75 Fed. Reg. at 25,404. In setting its standards, the agency therefore "considered many factors, such as cost, impacts on emissions (both GHG and non-GHG), impacts on oil conservation, impacts on noise, energy, safety, and other factors, and has, where practicable, quantified the costs and benefits of the rule." *Id.*

EPA takes the position that the regulation of tailpipe greenhouse gas emissions under Title II of the Clean Air Act triggers the agency's obligation to regulate greenhouse gas emissions from stationary sources. EPA has finalized the first set of such regulations, which will go into effect for large stationary sources on January 2, 2011. *See* Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010). The rule adopted by EPA regulates greenhouse gas emissions from stationary sources under the Prevention of Significant Deterioration (PSD) program and the Title V operating permit program. *See* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010). Under EPA's rule, the burden of reducing these emissions will fall initially on stationary sources that emit at least 75,000 tons of carbon dioxide equivalent per year and would otherwise require a preconstruction permit for a non-greenhouse gas pollutant.

3. At the same time the elected branches are struggling with these far-reaching policy questions, courts have also been invited to tackle the issue of

greenhouse gas emissions and global climate change. Every district court to have considered the issue has dismissed the case on political question grounds.

In addition to the current action, residents of the Gulf Coast sued a collection of oil, chemical and power companies for money damages alleging that the defendants' emissions of greenhouse gasses contributed to global warming that in turn added to the ferocity of Hurricane Katrina. *Comer v. Murphy Oil USA*, No. 05-436, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007). A similar climate-related action was brought by the State of California against six automobile companies seeking to recover billions of dollars in damages the State claimed were caused by climate change. *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007). Finally, a city and the governing body of an Eskimo village sued a collection of oil, energy and utility companies for the cost of relocating the city and tribe, alleging that as a result of global warming, the Arctic sea ice protecting the Kivalina coast from winter storms has diminished and resulted in erosion and the destruction of their land. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009). As pointed out in the Petition for Writ of Certiorari, legal observers anticipate an explosion of climate-related lawsuits, and predict that these actions could inundate courts in the same fashion asbestos and tobacco lawsuits have in the past. Vanessa Houlder, *Climate Change Could Be the Next Legal Battlefield*, Fin. Times (London), July 14, 2003, at 10; Daniel Hays, *Climate Claims Are The 'New Asbestos,' Swiss Re Suggests*, Nat'l Underwriter Prop. & Cas., May 29, 2009.

SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be granted so that this Court may put back in its bottle the genie that has become an ever-expanding federal common law of nuisance. Ignoring this Court's pronouncements that federal courts may create common law in only a "few and restricted" instances, *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981), the Second Circuit has held that the federal common law of nuisance is as broad as the Restatement of Torts will allow. This ruling will have the practical effect of giving every person and entity in the world claiming an impact from global climate change a federal cause of action for both money damages and injunctive relief against every greenhouse gas emitting person or entity in the country.

This Court has never recognized such a sweeping application of the federal common law of nuisance. Instead, that doctrine has long been reserved for those very limited instances where a State is suing sources outside of its borders for interstate pollution having a direct and immediate effect on the health and welfare of its citizens. The Second Circuit's decision unleashes the federal common law of nuisance from these moorings, and casts aside all of this Court's careful limitations on the scope of this judicially-created federal cause of action.

By expanding the scope of the federal common law of nuisance in this novel manner, the Second Circuit's decision runs headlong into the political question doctrine articulated in *Baker v. Carr*, 369 U.S. 186 (1962). Adjudicating this action will necessarily require a court to make fundamental policy decisions concerning how this nation should

have met, and should continue to meet, its growing need for energy. A court would have to decide, for example, which of the innumerable sources of greenhouse gas emissions in the nation are legally responsible for addressing the impacts of global climate change, and what level of historical greenhouse gas emissions are to be retroactively adjudged unreasonable under the circumstances. Aside from invoking "vague and indeterminate nuisance concepts," *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) ("*Milwaukee II*"), the Second Circuit articulated no judicially discoverable standards to make these key determinations, nor did it recognize the inherently policy-laden nature of these questions.

The Second Circuit's legally untenable holding has vastly expanded the federal common law of nuisance beyond its previously-recognized limits, and would enmesh the Article III courts in political questions of profound importance with wide-ranging implications. This Court should grant the petition for a writ of certiorari to both reaffirm the limited nature of the federal common law and to avoid the very evils for which the political question doctrine was created.

ARGUMENT

I. THE CIRCUIT COURT'S OPINION AMOUNTS TO AN UNPRECEDENTED EXPANSION OF THE FEDERAL COMMON LAW OF NUISANCE AND CONFLICTS WITH OTHER CIRCUITS CONCERNING THE PARTIES THAT MAY INVOKE IT.

1. It is a fundamental tenet of federal jurisprudence that the power of federal courts to

create common law is extremely narrow. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). "Federal courts, unlike state courts, are not general common law courts and do not possess a general power to develop and apply their own rules of decision." *Milwaukee II*, 451 U.S. at 312. "*Erie* recognized as much in ruling that a federal court could not generally apply a federal rule of decision, despite the existence of jurisdiction, in the absence of an applicable Act of Congress." *Id.* at 313. Accordingly, this Court must "start with the assumption that it is for Congress, not federal courts, to articulate appropriate standards to be applied as a matter of federal law." *Id.* at 317. This limitation on the power to create common law reflects the overarching principle that "a decision to create a private right of action is one better left to the legislative judgment in the great majority of cases." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004).

Consistent with these principles, this Court has held that federal courts may create common law in only a "few and restricted" instances that "fall into essentially two categories": first, where "Congress has given the courts the power to develop substantive law"; and second, where "a federal rule of decision is necessary to protect uniquely federal interests." *Tex. Indus.*, 451 U.S. at 640 (citations and internal quotation marks omitted). A "uniquely federal interest" exists "only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of states or our relations with foreign nations, and admiralty cases." *Id.* at 641. It is therefore not surprising that in the 70 years since *Erie* was decided, this Court has recognized a federal common law cause of action for

an interstate nuisance only once, when in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee I*"), it authorized one State to seek injunctive relief against a source in another State to enjoin water pollution when such pollution produced a "simple type" of nuisance. *Id.* at 106 n.8 (quoting *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923)).

2. Global climate change is far from the "simple type" of nuisance this Court has previously recognized, which has invariably entailed a State seeking to abate pollution originating from discrete sources outside of its borders and causing traceable and identifiable harm to its own citizens. *See, Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 236 (1907) (Georgia sought to abate emissions of noxious gas that emanated from factories located in Tennessee and wafted over the Tennessee border and into Georgia); *Milwaukee I*, 406 U.S. at 107 n.9 (holding that injunctive relief might be proper to protect Illinois from "improper impairment by sources outside its domain"). This limitation results from the fact that "federal common law was originally recognized to fill a void in the law applicable to suits seeking abatement of pollution originating within the domain of one state sovereign and exerting adverse effects in the domain of another." *Massachusetts v. U.S. Veterans Admin.*, 541 F.2d 119, 123 (1st Cir. 1976). The federal common law of nuisance therefore encompasses "only those interstate controversies which involve a state suing sources outside of its own territory because they are causing pollution within the state to be inappropriate for state law to control..." *Nat'l Audubon Soc'y v. Dept. of Water & Power of Los Angeles*, 869 F.2d 1196, 1205 (9th Cir. 1988).

Greenhouse gas emissions are fundamentally different because there are millions of sources of the alleged nuisance and they can be found both within and outside the complaining State. Every state tolerates—or indeed encourages through economic development subsidies—the emission of greenhouse gasses from within its own borders, and directly contributes to those emissions through its ownership of energy-consuming public facilities. Consequently, the carbon dioxide present in Connecticut is equally traceable to sources located within that State as it is to sources outside the State. A State, however, may not invoke federal common law to enjoin out-of-state activities where it allows the very same activities within its own borders. *See, e.g., Missouri v. Illinois*, 200 U.S. 496, 522 (1906) (denying injunction where "the plaintiff has sovereign powers and deliberately permits discharges similar to those of which it complains"); *New York v. New Jersey*, 256 U.S. 296, 310-11 (1921) (denying request by New York for injunction barring New Jersey from discharging sewage into harbor "when it is considered that for many years all of the sewage from the great population of New York City and its environs . . . has been discharged into the harbor").

Moreover, allowing States to apply the federal common law of nuisance in the context of greenhouse gas emissions would invite each state to try to export the costs of greenhouse gas regulation to businesses in other States. Empowering a State to use federal common law nuisance claims to impose carbon dioxide emission limits exclusively on out-of-state businesses would give in-state businesses—that emit the exact same carbon dioxide and contribute equally to any resulting climate change impacts—an unfair competitive advantage. States may not mandate

"differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Ore. Waste Sys., Inc. v. Dep't of Envtl. Quality of Ore.*, 511 U.S. 93, 99 (1994).

This concern is particularly acute where the State seeking to impose carbon dioxide emission limits on a particular business sector does not internalize the costs of those limits because it is neither the producer nor the sole consumer of the product generating the emissions. Motor vehicles, for example, are manufactured predominantly in the Midwest and the South, but are purchased throughout the nation. A single State or group of States should not be able to use a common law nuisance claim to impose carbon dioxide emission limits on motor vehicles, or exact tribute for lawful, historical emissions, where the costs of those actions will be borne primarily by other States. As discussed below, because reducing greenhouse gas emissions results in costs and benefits felt throughout the entire nation, the policy choice of setting appropriate emission limits properly rests with the elected branches of our government, and is not a matter of federal common law.

3. The Second Circuit's opinion is further flawed because it casts aside two previously-recognized and important restrictions on the federal common law of nuisance, namely that it (1) may only be invoked by a State that is (2) seeking injunctive relief, and not monetary damages. This Court has never allowed non-State parties to invoke the federal common law of nuisance, nor has it recognized an action for money damages.

While acknowledging a limited federal common law of nuisance that allows a State sovereign to sue

another State sovereign or its citizens to abate interstate pollution, this Court was motivated—and constrained—by fundamental questions of federalism. *See Illinois v. City of Milwaukee*, 406 U.S. 91 (1972); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907); *Missouri v. Illinois*, 200 U.S. 496 (1906). Until the instant case, the courts of appeals have largely recognized these limits. The Ninth Circuit, for instance, has noted that the federal common law of nuisance applies "only [to] those interstate controversies which involve a state suing sources outside of its own territory because they are causing pollution within the state to be inappropriate for state law to control." *Nat'l Audubon Soc'y v. Dept. of Water & Power of Los Angeles*, 869 F.2d 1196, 1205 (9th Cir. 1988);[4] *see also Cal. Tahoe Reg'l Planning Agency v. Jennings*, 594 F.2d 181, 193-194 (9th Cir. 1979) (emphasizing the limited scope of "the federal common law of nuisance," which at most "permits one state to enjoin damaging activities carried on in another" and "bestows upon us no power to root out that which happens to offend . . . a vigorous plaintiff"). The Fourth Circuit has also noted that the federal common law of nuisance "has not been extended beyond the abatement of public nuisances in interstate controversies where the complainant is a state and the offenders are creating extra-territorial harm." *Comm. for the Consideration of the Jones Falls Sewage Sys. v. Train*, 539 F.2d 1006,

---

[4] In support of its conclusion, the *National Audubon* court noted that in *Georgia v. Tennessee Copper Co.*, this "Court focused on the facts that the plaintiff was a state and the injury was interstate," and that in *Milwaukee I*, "the case [again] centered on an interstate controversy which involved a state suing sources outside its domain which were causing pollution within the state." *Nat'l Audubon Soc'y*, 869 F.2d at 1204-05

1009 (4th Cir. 1976); *but see National Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222, 1233 (3d Cir. 1980) (holding that "that the common law nuisance remedy recognized in *Illinois v. City of Milwaukee* is available in suits by private parties.").

The Second Circuit's decision allowing municipal and private entities to assert a claim under the federal common law of nuisance represents a marked departure from this Court's precedent, and highlights a split in the circuits on this question. If left standing, the decision would significantly expand the parties that may invoke the doctrine, and would likely result in a flood of federal common law nuisance claims brought in federal court. Moreover, although the Plaintiffs in this particular action have sought only injunctive relief, the Second Circuit's reliance on the Restatement of Torts to delineate the outer bounds of the federal common law of nuisance could be read as opening the door to damages actions.

By applying the federal common law of nuisance to the complex question of global climate change (and not just nuisances of a simple type), by holding that a federal common law nuisance claim may be pursued by any party (and not just by States), and by adopting a broad view of the doctrine that would allow the recovery of monetary damages (and not just injunctive relief), the Second Circuit has fundamentally rewritten the federal common law. Given that countless people and businesses may claim that they have been harmed by global climate change, recognizing such an expansive cause of action could lead to a torrent of new litigation in the federal courts. This Court should step in and restore the federal common law of nuisance back to its original and much more limited scope.

II. DETERMINING WHICH PARTIES MUST BEAR THE BURDEN OF REDUCING GREENHOUSE GAS EMISSIONS AND THE REASONABLENESS OF GREENHOUSE GAS EMITTING ACTIVITIES PRESENT NONJUSTICIABLE POLITICAL QUESTIONS.

Review by this Court is also warranted because adjudicating Plaintiffs' claims would necessarily require a court to employ the "vague and indeterminate" nuisance standard, *Milwaukee II*, 451 U.S. at 317, to make broad policy pronouncements concerning the nation's past, current and future energy policy. A court presiding over a climate-related nuisance claim would have to determine which among the millions of greenhouse gas emitters in the nation, if any, may be held legally responsible, and which greenhouse gas producing activities are unreasonable under the circumstances, if any. A court cannot draw these inherently policy-laden lines without running afoul of the political question doctrine. That doctrine is implicated where there is "a lack of judicially discoverable and manageable standards for resolving" the dispute before the court, or where the action presents the "impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217.

1. Because the basic actions creating greenhouse gas emissions (the burning of carbon-based fuels) are commonplace and ubiquitous, every participant in the world economy shares some responsibility for the concentration of greenhouse gasses in the atmosphere. Consequently, a court adjudicating a climate-related nuisance action will be required to

determine which emitters of greenhouse gasses should be held legally liable, if any, and must therefore reduce their emissions or compensate those who claim damages from global climate change. The Second Circuit did not articulate any standard for drawing this line and failed to recognize that its placement entails an exercise in policy making constitutionally vested in the elected branches of government.

The Second Circuit attempted to brush this issue aside, claiming that "[t]he possibility that mandatory emissions reductions may be imposed upon these defendants is quite different from mandatory emissions reduction requirements on American industry." Pet. App. 26a n.4 (quotations omitted).[5] But the impact of a decision in this case will likely reach much further than just the six defendants whom Plaintiffs have chosen to sue. For one thing, any decision by a federal court assessing legal liability for greenhouse gas emissions will, as a practical matter, impact the actions of other similar

---

5 Notably, the Circuit Court's conclusion that a decision in this action will have no broader impact than to address the emissions of the defendants before it is contradicted by its reasoning for allowing private parties to assert the federal common law of nuisance In support of that conclusion, the court pointed to an "'overriding federal interest in the need for a uniform rule of decision.'" Pet. App. 97a (quoting *Milwaukee I*, 406 U.S. at 105 n.6). But if this action has been properly asserted by non-State plaintiffs because of an "overriding federal interest in the need for a uniform rule of decision" concerning industrial emissions of greenhouse gasses, then, contrary to the Second Circuit's assertion otherwise, a decision by a court adjudicating Plaintiffs' claims would have to articulate a broadly-applicable standard for determining what levels of greenhouse gas emissions create a nuisance.

greenhouse gas emitters. For another, the Second Circuit did not consider the possibility that other greenhouse gas sources may be brought into the action as defendants, which is very likely given that Plaintiffs are seeking to hold just these six defendants "jointly and severally liable for creating, contributing to, or maintaining [the] public nuisance" of global climate change. Pet. App. 11a. Even where a nuisance action seeks injunctive relief, a defendant may implead other joint-tort feasors and seek an order requiring them to bear a share of the emission reductions required to abate the nuisance. Restatement (Second) of Torts § 840E. The list of joint tortfeasors that have contributed to greenhouse gas emissions is endless. The Second Circuit's decision does not offer any standard that is "principled, rational, and based upon reasoned distinctions" for determining where the line should be drawn between those who may properly be held responsible for abating the emissions believed to cause global climate change and those who may not. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004). Indeed, "one searches in vain . . . for anything resembling a principle in the common law of nuisance." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting).

For this reason, district courts forced to address this issue have uniformly and correctly concluded that drawing the line between those greenhouse gas emitters that are legally liable for climate change and those that are not "requires the judiciary to make a policy decision about who should bear the cost of global warming." *Kivalina*, 663 F. Supp. 2d at 876-77. However, "[t]he Court is left without guidance in determining what is an unreasonable contribution to the sum of carbon dioxide in the

Earth's atmosphere, or in determining who should bear the costs associated with the global climate change that admittedly result[s] from multiple sources around the globe." *General Motors*, 2007 WL 2726871, at *15. Simply put, "the allocation of fault—and cost—of global warming is a matter appropriately left for determination by the executive or legislative branch in the first instance." *Kivalina*, 663 F. Supp. 2d at 877.

2. Deciding Plaintiffs' nuisance claim would also require a court to determine which greenhouse gas emitting activities are reasonable under the circumstances and which are not. The Second Circuit did not articulate any standard a district court could follow in making that distinction, and, indeed, it is impossible to draw that line "without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

The Restatement defines a public nuisance as "an unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B(1) (1979). Whether a particular interference is unreasonable under the circumstances turns on weighing "the gravity of the harm against the utility of the conduct." *Id.* § 821B cmt. e. In each category of public nuisance—whether intentional, negligent or reckless—"some aspect of the concept of unreasonableness is found." *Id.* "[I]n determining whether the gravity of the interference with the public right outweighs the utility of the actor's conduct, it is necessary to consider the social value that the law attaches to the primary purpose of the conduct, the suitability of the conduct to the character of the locality and the impracticability of preventing or avoiding the invasion." *Id.* § 828 cmt. a.

Addressing this question in the context of a climate-related nuisance action clearly entails a non-justiciable political question. By what standard is a court to determine "the social value that the law attaches to" the burning of fossil fuels to produce electricity or the manufacture of motor vehicles that run on gasoline? Similarly, because greenhouse gasses mix evenly in the atmosphere and the location of a source therefore has no impact on the concentration of greenhouse gasses at any particular location, how could a court determine "the suitability" of the greenhouse gas emitting conduct "to the character of the locality" where the source is situated? Finally, given the undeniable need for this country to burn fossil fuels for energy, how can a court determine "the impracticability of preventing or avoiding the invasion?" These questions can only be answered by formulating national policy concerning energy and greenhouse gas emissions. A court adjudicating a climate-related nuisance claim would be required to "balance the competing interests of reducing global warming emissions and the interests of advancing and preserving economic and industrial development," *General Motors*, 2007 WL 2726871, at *8, and that is plainly "an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217 (1962).

Moreover, an action seeking injunctive relief to abate a source's greenhouse gas emissions necessarily entails a determination of what would be an "acceptable limit on the level of greenhouse gases emitted by Defendants." *Kivalina*, 663 F. Supp. 2d at 876. Plaintiffs do not claim that Defendants' activities should have resulted in zero emissions of carbon dioxide, but rather contend that the levels of carbon dioxide emitted from Defendants' activities

were unreasonably high under the circumstances. Deciding the optimum level of carbon dioxide emissions from a particular activity requires a far-ranging analysis of the relative social and economic costs and benefits of more stringent standards. A standard-setting authority—whether it be an expert agency or Congress—has the constitutional competence to set the appropriate level of emissions at the point where the benefits of enhanced stringency are outweighed by the additional costs to society.[6] The Courts do not possess those institutional tools.[7]

Clearly, climate-related nuisance actions present quintessential political questions. Adjudicating such claims will require a court to decide which segments of society—along the broad spectrum of contributors to worldwide greenhouse gas emissions—should be held legally liable and which should be excused. A

---

6 Indeed, as discussed above, this is precisely the sort of policy-laden question that EPA is considering in determining which sectors of the economy should bear the burden of reducing greenhouse gas emissions and what the appropriate level of emissions from specific sources should be. Whether one agrees or disagrees with the decisions made by EPA and other regulatory agencies in this regard is beside the point. The point is that there are processes by which the public can participate in agency rulemaking as well as the legislative process, and the political branches must consider this input in addressing the complex problem of how best to reduce greenhouse gas emissions.

7 Furthermore, given the fact the greenhouse gas emissions disperse evenly across the nation (and indeed the world), a source of emissions could find itself subject to lawsuits in multiple jurisdictions, and consequently face the possibility of inconsistent judicial determinations concerning what is a reasonable level of greenhouse gas emissions under the circumstances.

court also will be required to determine under what circumstances greenhouse gas emissions are reasonable and under what circumstances they are not. Resolving these questions will require a non-judicial policy determination, and courts lack any discernable standard for resolving this dispute. Certiorari should be granted to ensure that the formulation of national policy concerning greenhouse gas emissions will rest with the political branches of government where it properly belongs.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

RAYMOND B. LUDWISZEWSKI
Counsel of Record
CHARLES H. HAAKE
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Amici Curiae

September 2, 2010

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
SEP 03 2010
OFFICE OF THE CLERK

(14)

No. 10-174

IN THE

Supreme Court of the United States

AMERICAN ELECTRIC POWER CO., ET AL.,

Petitioners,

v.

CONNECTICUT, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Ave, NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

ANDREW G. MCBRIDE
MEGAN L. BROWN*
BRENDAN T. CARR
EMILY F. SCHLEICHER
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-7000
mbrown@wileyrein.com

*Counsel of Record

232139

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the Second Circuit decision undermines the separation of powers by opening federal courts to suits against any entity that allegedly "contributes" to global warming, and by approving the judicial creation of national environmental and economic policy through the development and imposition of caps on carbon dioxide emissions.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	ii
TABLE OF CITED AUTHORITIES	iv
INTEREST OF AMICUS CURIAE	1
SUMMARY OF REASONS TO GRANT THE PETITION	1
REASONS FOR GRANTING THE PETITION	4
I. THE RESULT BELOW ENCOURAGES THE ARTICLE I AND II BRANCHES TO ABDICATE RESPONSIBILITY AND UNDERMINES THE SEPARATION OF POWERS.	4
II. THIS DISPUTE OVER GLOBAL WARMING IS NOT A "CASE OR CONTROVERSY" WITHIN THE MEANING OF ARTICLE III.	9
A. The "Case or Controversy" Limitation on Judicial Action Is Indispensible to the Separation of Powers.	9
B. The Decision Below Misapplies The "Causation" Aspect Of Standing, A Crucial Limitation On Article III Power.	10

Contents

Page

III. A REQUEST FOR JUDICIALLY-CREATED EMISSIONS CAPS PRESENTS A NONJUSTICIABLE POLITICAL QUESTION. 16

A. This Case Demands Judicial Action Unguided By Any Standard or Rule. 17

B. The Panel Trivializes The Significant, Intended Consequences Of This Case. 20

IV. THIS IS THE APPROPRIATE TIME AND VEHICLE FOR THE COURT TO ADDRESS THESE QUESTIONS. 23

CONCLUSION 25

TABLE OF CITED AUTHORITIES

Page

CASES

Allen v. Wright,
468 U.S. 737 (1984) 9, 11, 12

Baker v. Carr,
369 U.S. 186 (1962) 6, 16, 20

California v. General Motors Corp., No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) 5

Cannon v. University of Chicago,
441 U.S. 677 (1979) 7

Carmichael v. Kellogg, Brown & Root Services, Inc.,
572 F.3d 1271 (11th Cir. 2009) 6, 20

Chicago & Southern Air Lines v. Waterman S. S. Corp.,
333 U.S. 103 (1948) 5

Cipollone v. Liggett Group, Inc.,
505 U.S. 504 (1992) 19

Comer v. Murphy Oil USA et al., No. 05-436 (S.D. Miss. Aug. 30, 2007), rev'd, 585 F.3d 855 (5th Cir. 2009), vacated on grant of reh'g en banc, 598 F.3d 208 (5th Cir. 2010), appeal dismissed, No. 07-60756, 2010 WL 2136658 (5th Cir. May 28, 2010) 4, 22

Cited Authorities

	Page
Conn v. City of Reno, 591 F.3d 1081 (9th Cir. 2010)	13
Davis v. Federal Election Commission, 128 S. Ct. 2759 (2008)	10
Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978)	11-12
Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980)	22
Goldwater v. Carter, 444 U.S. 996 (1979)	17
Habecker v. Town of Estes Park, Colo., 518 F.3d 1217 (10th Cir. 2008)	15
Haitian Refugee Ctr. v. Gracey, 809 F.2d 794 (D.C. Cir. 1987)	11
Hancock v. Commissioner of Education, 443 Mass. 428 (Ma. 2005)	7
Japan Whaling Association v. America Cetacean Society, 478 U.S. 221 (1986)	16
Lane v. Halliburton, 529 F.3d 548 (5th Cir. 2008)	16

Cited Authorities

Page

Lewis v. Casey,
518 U.S. 343 (1996) 10

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 10, 11

Massachusetts v. EPA,
549 U.S. 497 (2007) 5

Mistretta v. United States,
488 U.S. 361 (1989) 9

Native Village of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009), appeal docketed, No. 09-17490 (9th Cir. 2010) 4-5, 23

North Carolina v. Tennessee Valley Authority,
No. 09-1623, 2010 WL 2891572 (4th Cir. July 26, 2010) 19, 20

Pegram v. Herdrich,
530 U.S. 211 (2000) 19

Public Citizen v. U.S. Department of Justice,
491 U.S. 440 (1989) 9

Simon v. E. Ky. Welfare Rights Organization,
426 U.S. 26 (1976) 12, 15

Cited Authorities

Page

Summers v. Earth Island Institute,
129 S. Ct. 1142 (2009) 10, 11

Turner Broadcasting Systems, Inc. v. FCC,
512 U.S. 622 (1994) 19

United States v. Richardson,
418 U.S. 166 (1974) 8

Vieth v. Jubelirer,
541 U.S. 267 (2004) 19

Warth v. Seldin,
422 U.S. 490 (1975) 5, 12, 14

Williams v. North Carolina,
317 U.S. 287 (1942) 9

CONSTITUTION AND REGULATIONS

Control of Emissions from New Highway
Vehicles, 68 Fed. Reg. 52,922 (Sept. 3, 2003) ... 5-6

U.S. Const. art. III, § 2 9

Page

MISCELLANEOUS

Kristen H. Engel, *Harmonizing Regulatory and Litigation Approaches to Climate Change Mitigation: Incorporating Tradable Emissions Offsets into Common Law Remedies*, 155 U. Penn. L. Rev. 1563 (2007) 8

Randall S. Abate, *Automobile Emissions and Climate Change Impacts: Employing Public Nuisance Doctrine as Part of a "Global Warming Solution" in California*, 40 Conn. L. Rev. 591, 626-27 (2008) 21

INTEREST OF AMICUS CURIAE[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, publishes the annual Cato Supreme Court Review, and files amicus briefs. This case presents an opportunity to clarify the distinction between law and policy, a concept vital to the separation of powers. Cato is concerned that allowing courts to determine policy issues—instead of legal ones—would dramatically expand the role of the federal courts, thereby relieving the legislative and executive branches of political accountability for sweeping changes to national economic and social policy.

SUMMARY OF REASONS TO GRANT THE PETITION

Respondents ask a federal judge to order six national energy companies with operations in 20 states to "abate" their "contribution[s]" to global warming "by

---

1 Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief. Letters of consent have been lodged with the Clerk, and counsel for Cato transmitted letters of intent to file this brief to counsel for all parties in this case on August 18, 2010.

requiring [them] to cap [their] carbon dioxide emissions and then reduce them by a specific percentage each year for at least a decade." Compl. ¶ 186.[2] Respondents seek this relief not to compel compliance with any binding emissions standard—no rules exist. Rather, they seek judicial intervention because, in their view, no satisfactory rule has been provided by the Article I and II Branches, which presently are debating emissions caps, perhaps the most controversial element of the many policy disputes about global warming.

In finding jurisdiction, the panel opinion conflicts with necessary limitations on federal courts' power. As every district court confronting these cases has concluded, they have neither the policy-making authority, the technical expertise, nor the constitutional responsibility to address the fundamental policy concerns implicated by this case. Permitting Respondents to obtain regulation in court will encourage the political branches—unable to reach consensus or unwilling to take unpopular action—to dodge difficult policy questions by letting the courts do their dirty work. Respondents' requested relief, and their novel and highly attenuated theory of liability thus present a fundamental challenge to the separation of powers that requires this Court's attention.

In its effort to legitimize the delegation of raw policy-making power, the panel trivializes the economic and political consequences of this case and ignores the

2 As used herein, "Compl." refers to the Complaint filed by State Plaintiffs-Respondents, *Connecticut, et al. v. Am. Elec. Power Co., et al.*, No. 04-05669 (S.D.N.Y. July 21, 2004).

dangers this enterprise poses to the separation of powers. Like an ostrich with its head in the proverbial sand, the panel asserts that Respondents "do not ask the district court to decide overarching policy questions" or "balanc[e] . . . broad interests" because the court would *only* be required to adjudicate the liability of the named defendants. Pet.App. 34a. This conclusion does not withstand scrutiny. While this case names only six defendants, a court cannot determine their liability without deciding overarching policy questions and engaging in the type of balancing that even the panel acknowledges would be beyond an Article III court's jurisdiction. As the United States explains, this case and others like it "are quintessentially fit for political or regulatory—not judicial—resolution, because they simultaneously implicate many competing interests of almost unimaginably broad categories of both plaintiffs and defendants." Brief for the Tennessee Valley Authority in Support of Petitioners at 13, *Am. Elec. Power. Co., et al. v. Connecticut, et al.*, No. 10-174 (Aug. 21 2010) ("United States' Br.").

In finding jurisdiction, the panel makes several errors. Of those, Cato focuses on two: the panel's analysis of standing and the political question doctrine. First, the panel virtually eliminates Article III's causation requirement by permitting any entity affected by climate change to sue any alleged carbon-emitter—nearly every individual and business on the globe—that could "contribute to" the alleged and speculative consequences of hundreds of years of greenhouse gas emissions. Second, the panel eviscerates the political question doctrine by directing the district court to make complex policy judgments of far-reaching impact,

unguided by any standard from the politically accountable branches.

This Court should grant certiorari to correct these errors and provide guidance on the judiciary's proper role in this increasingly litigated area of national policy. It should act now to ensure prompt resolution of these questions of national importance, which are sure to recur.

REASONS FOR GRANTING THE PETITION

I. THE RESULT BELOW ENCOURAGES THE ARTICLE I AND II BRANCHES TO ABDICATE RESPONSIBILITY AND UNDERMINES THE SEPARATION OF POWERS.

This case is one of several seeking to impose liability for and achieve judicial abatement of the activities allegedly responsible for the warming of Earth's climate.[3] Out of the billions of individuals and businesses

---

3 Including this case, three major "global warming" suits against the energy industry are proceeding. In *Comer v. Murphy Oil*, Mississippi residents sued dozens of oil and gas companies for damages from Hurricane Katrina, which allegedly was intensified by global warming. The district court dismissed the case based on the political question doctrine and a lack of standing. *See Comer v. Murphy Oil USA et al.*, No. 05-436 (S.D. Miss. Aug. 30, 2007), rev'd, 585 F.3d 855 (5th Cir. 2009), vacated on grant of reh'g en banc, 598 F.3d 208 (5th Cir. 2010), appeal dismissed, No. 07-60756, 2010 WL 2136658 (5th Cir. May 28, 2010). In *Kivalina*, an Alaskan village sued two dozen oil, energy, and utility companies for $400 million for Alaskan coastal erosion allegedly caused by global warming. The district court dismissed the claims under the political question doctrine and for lack of standing. *See Native Vill. of Kivalina v.* (Con't)

worldwide that emit carbon dioxide and other greenhouse gases, Respondents have sued six companies, asking the Southern District of New York to "permanently enjoin[] each Defendant to abate its contribution" to global warming by capping and reducing its carbon dioxide emissions over at least a decade. Compl. ¶ 186. Because the novel theory of liability and the sweeping relief requested will require "decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility," *Chicago & Southern Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 111 (1948), this case promises to drag the federal courts far beyond "the proper—and properly limited—role of the courts in a democratic society," *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

As this Court has observed, "Congresses have eschewed enacting binding emissions limitations to combat global warming." *Massachusetts v. EPA*, 549 U.S. 497, 530 (2007). And pursuant to *Massachusetts v. EPA*, the EPA itself is currently addressing these issues, having previously observed that "[i]t is hard to imagine any issue . . . having greater 'economic and political significance' than regulation of activities that might lead to global climate change." *Control of Emissions From New Highway Vehicles and Engines*, Notice of Denial of Pet. for Rulemaking, 68 Fed. Reg. 52,922, 52,928

(Con't)
ExxonMobil Corp., 663 F. Supp 2d 863 (N.D. Cal. 2009), appeal docketed, No. 09-17490 (9th Cir. 2010). A fourth case, in which automakers were sued under nuisance theories, in 2007 met the same fate—dismissal under the political question doctrine. *See California v. Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept 17, 2007). The appeal was voluntarily dismissed.

(Sept. 3, 2003). It is into this breach that this case calls the judiciary. If allowed to proceed, this case and others like it will require federal judges to assume the role of environmental, industrial, and economic policy czars, forcing them to act as Article III administrators over some of the most hotly-contested and momentous issues of our time.

Certiorari is manifestly appropriate. The panel's conclusions, which conflict with decisions reached by district courts confronting similar cases,[4] will have far-reaching impact. Not only are other suits pending, more litigation will follow if this Court does not withdraw the invitation to bring complex policy disputes to the courts. Under the panel's approach—which dramatically relaxes Article III's standing requirement and ignores the political question doctrine—virtually any policy dispute is within the judiciary's domain. The decision permits, and may require, a judge to set "reasonable" standards of care for greenhouse gas emissions, despite the fact that the political branches have not established any duty. Such "regulation by litigation" will pretermit administrative decisionmaking, remove fundamental policy disputes from the democratic process, and embroil the judiciary in political controversies.

---

4 These district courts' conclusions on justiciability are noteworthy, because the "discriminating inquiry" demanded by *Baker v. Carr*, 369 U.S. 186, 217 (1962), requires a court to "analyze [an] appellant's claim as it would be tried, to determine whether a political question will emerge," *Carmichael v. Kellogg, Brown & Root Services, Inc.*, 572 F.3d 1271, 1281 (11th Cir. 2009) (citation omitted). The district courts are uniquely suited to this inquiry; they would bear the burden of finding facts about global warming, determining liability under plaintiffs' novel theories, apportioning responsibility, and, here, setting and enforcing emissions caps.

Fidelity to the separation of powers here is not mere formalism. Judicial vigilance is particularly necessary where the coordinate branches of government might not simply acquiesce to, but may welcome judicial action that relieves them of the need to make—or be held accountable for—decisions resolving difficult questions of national policy. Indeed, "[t]he more this court interferes in policymaking . . . the more we allow the Legislature to avoid difficult questions, and the more our citizens get accustomed to turning to the courts for solutions rather than to their elected officials." *Hancock v. Comm'r of Educ.*, 443 Mass. 428, 472-73 (Ma. 2005) (Corwin, J., concurring). When the judiciary "assume[s] policymaking authority . . . [r]ather than confronting the hard political choices involved, Congress is encouraged to shirk its constitutional obligation and leave the issue to the courts to decide. When this happens, the legislative process with its public scrutiny and participation has been bypassed, with attendant prejudice to everyone concerned." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 743 (1979) (Powell, J., dissenting).

The Article I and II Branches of government are presently wrestling with whether and how to address climate change; their debates center on the very emissions caps sought here. *See, e.g., With a Whimper*, N.Y. Times, Editorial, July 23, 2010, *available at* http://www.nytimes.com/2010/07/23/opinion/23fri1.html (lamenting failure of a "stripped-down version [of climate legislation] that caps only emissions from power plants."). There is even disagreement over which of those two branches is the appropriate source of any caps. *See, e.g.*, Juliet Eilperin, *Effort to block EPA from regulating greenhouse gases fails in Senate*, Wash. Post

June 10, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/06/10/AR2010061004088.html (in Senate vote, "central question was whether Congress or the administration would set the rules for curbing carbon dioxide."). While accountable officials may prefer to have controversial carbon caps imposed by the branch that does not face the ballot box, this Court should not permit the judicial function to be improperly expanded as a means of relieving the coordinate branches of their responsibilities.[5]

Time and again, this Court has rejected "efforts to convert the Judiciary into an open forum for the resolution of political or ideological disputes about the performance of government." *United States v. Richardson*, 418 U.S. 166, 192-93 (1974) (Powell, J., concurring). This Court should grant certiorari to reaffirm the judiciary's limited role relative to the other branches—a role that does not include crafting major economic and environmental policies out of whole cloth. "[A] court is likely to lose its way if it strays outside the modest bounds of its own special competence and turns the duty of adjudicating only the legal phases of a broad

---

5 Activists and litigants appear to be using the courts to extort concessions they perceive as politically unattainable. *See, e.g.*, Kristen H. Engel, *Harmonizing Regulatory and Litigation Approaches to Climate Change Mitigation: Incorporating Tradable Emissions Offsets into Common Law Remedies*, 155 U. Penn. L. Rev. 1563, 1564 and 1573 n. 29 (2007) ("climate change litigation fills a niche created by the . . . absence of federal action" and "opens up the possibility of a quid pro quo: industry accepts federal mandatory emissions limits in exchange for immunity from liability").

social problem into an opportunity for formulating judgments of social policy." *Williams v. North Carolina*, 317 U.S. 287, 307 (1942) (Frankfurter, J., concurring).

II. THIS DISPUTE OVER GLOBAL WARMING IS NOT A "CASE OR CONTROVERSY" WITHIN THE MEANING OF ARTICLE III.

A. The "Case or Controversy" Limitation on Judicial Action Is Indispensible to the Separation of Powers.

Our government is premised on the division of the legislative, executive, and judicial functions into coordinate branches. "The Framers . . . knew that the most precious of liberties could remain secure only if they created a structure of Government based on a permanent separation of powers." *Pub. Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 468 (1989).

Article III vindicates this vision by confining judicial review to "Cases" and "Controversies." U.S. Const. art. III, § 2; *Allen v. Wright*, 468 U.S. 737, 750 (1984) ("[T]he 'case or controversy' requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded."). This limitation "prevent[s] the Judiciary from encroaching into areas reserved for the other Branches by extending judicial power to matters beyond those disputes traditionally thought to be capable of resolution through the judicial process." *Mistretta v. United States*, 488 U.S. 361, 385 (1989) (citations and quotations omitted).

Standing "'is an essential and unchanging part of the case-or-controversy requirement of Article III.'" *Davis v. Fed. Election Comm'n*, 128 S. Ct. 2759, 2768 (2008) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). It "prevents courts of law from undertaking tasks assigned to the political branches." *Lewis v. Casey*, 518 U.S. 343, 350 (1996); *see also Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009) (explaining that where standing "does not exist, allowing courts to oversee legislative or executive action would significantly alter the allocation of power . . . away from a democratic form of government") (citations and quotations omitted). The standing requirement thus prevents the judiciary from invading the province of the political branches or being forced to decide issues properly left to the democratic process.

B. The Decision Below Misapplies The "Causation" Aspect Of Standing, A Crucial Limitation On Article III Power.

The panel concludes that Respondents establish causation for standing purposes by alleging that Petitioners' conduct "contributes" to global climate change. Pet.App. 72a. This analysis misapplies the causation element of standing, is inconsistent with Article III, and warrants correction by this Court.

"[T]he irreducible constitutional minimum of standing contains three elements." *Lujan*, 504 U.S. at 560. First, "[t]o seek injunctive relief, a plaintiff must show that he is under threat of suffering 'injury in fact'"—an invasion of a legally protected interest which is (a) "concrete and particularized," and (b) "actual or

imminent, not conjectural or hypothetical." *Summers*, 129 S. Ct. at 1149. Second, there must be a "causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant," and not the product of the independent action of some third party not before the court. *Lujan*, 504 U.S. at 560. Third, it must be "likely," not merely "speculative," that injury can be "redressed by a favorable decision." *Id.* at 561. This inquiry "requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen*, 468 U.S. at 752.

Although the injury-in-fact requirement has garnered more judicial attention, the "causation aspect" of standing—traceability and redressability—is equally vital. This "causation aspect" is "properly understood as designed to confine federal courts to their 'properly limited' function." *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 805 (D.C. Cir. 1987). Because standing prevents the virtually limitless spread of judicial authority, "'causation' in this context is something of a term of art, taking into account not merely an estimate of effects but also considerations related to the constitutional separation of powers as that concept defines the proper role of courts in the American governmental structure." *Id.* at 801.

A plaintiff must make at least two related showings to satisfy the causation requirement. First, he must show that there is a "substantial likelihood" that the defendant's conduct caused his injury-in-fact. *Duke*

Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 75 (1978). "[I]f the line of causation between the illegal conduct and the injury is too attenuated," the traceability requirement will not be met. *Allen*, 468 U.S. at 752. Second, his asserted injury must not "result[] from the independent action of some third party not before the court." *Simon*, 426 U.S. at 41-42; *see also Lujan*, 504 U.S. at 561 (incorporating *Simon*'s third party requirement into the traceability prong of standing). Respondents, therefore, "must allege facts from which it reasonably could be inferred that, absent the [challenged conduct] . . . there is a *substantial probability* that they would" not have suffered their alleged injury-in-fact. *Warth*, 422 U.S. at 504 (emphasis added).

Respondents' chain of causation is fatally flawed because it fails to meet either requirement: it is too speculative and the harms alleged are inextricably tied to the actions and inactions of third parties and diverse natural phenomena.

The alleged chain of "causation" here involves at least the following links: (1) Carbon dioxide has existed in the Earth's atmosphere for 20 million years, and the levels have been rising since at least the 18th century, Compl. ¶ 88; (2) Petitioners allegedly emit 10% of "anthropogenic carbon dioxide emissions in the United States," *id.* at ¶ 98;[6] (3) In the Earth's atmosphere, Petitioners' carbon dioxide emissions mix with the other

---

6 No allegation is made as to what percentage of *global* emissions this constitutes, which would seem critical to understanding contributions to *global* warming.

90% of U.S. carbon dioxide emissions, the emissions of the rest of the world, carbon dioxide that has been in the atmosphere for "several centuries," *id.* at ¶ 87, and other global greenhouse gases, *id.* at ¶ 85; (4) Increased gases raise atmospheric temperature which, among other things, allegedly makes oceans "less efficient at removing carbon dioxide from the atmosphere, thus causing even more carbon dioxide to accumulate" in turn accelerating further the concentration of gases and atmospheric warming, *id.* at ¶ 90; (5) The gases thus accumulated are predicted to warm the Earth's atmosphere by some unspecified temperature at some unspecified time, *id.* at ¶ 91; (6) The predicted warmer atmosphere may cause various ecological effects, including sea level rise, *id.* at ¶ 113, on the one hand, and at the same time may "lower the water levels of the Great Lakes" *id.* at ¶ 122; (7) These effects may (in the case of sea level rise) cause flooding, which may erode beaches and harm tourism, *id.* at ¶ 117, or may (in the case of lake levels falling) adversely affect boat docks, requiring the extension of municipal water intakes, damaging wetlands, *id.* at ¶ 125.

Such an attenuated and speculative chain of causation is inadequate for purposes of Article III and calls to mind the "[t]he Butterfly Effect" which, in this case, "becomes an engine for judicial intervention." *Conn v. City of Reno*, 591 F.3d 1081, 1090 (9th Cir. 2010) (Kozinksi, C.J., dissenting from denial of rehearing en banc) ("if judges can draw attenuated causal connections of the sort at issue in this case, they can expand their authority to encompass a much larger sphere of activity").

Respondents' chain of causation simply is too attenuated and too dependent on natural phenomena and third parties to satisfy the "substantial likelihood" standard. Because carbon dioxide mixes in an admittedly undifferentiated manner in the atmosphere with other gases, *id.* at ¶ 85, is emitted by virtually every individual and business worldwide, Pet.App. 72a., and has been accumulating for at least centuries, Compl. ¶ 87, there simply cannot be a "substantial likelihood" that these defendants have caused or will cause Respondents' asserted injuries. Indeed, by Respondents' own allegations, Petitioners emit only 10% of U.S. carbon dioxide emissions, which is an even smaller fraction of global greenhouse gas emissions, and a vanishingly small percentage of the gases accumulating in the atmosphere for hundreds, even millions, of years. Respondents simply cannot say that, absent these companies' emissions, there is a "substantial probability" that they would *not* suffer their alleged global warming-created injuries. *Warth*, 422 U.S. at 504.

Under the panel's quite different approach, however, any person or business on the planet that allegedly "contributes" to global warming can be potentially liable—and any person allegedly harmed thereby can sue—for damages or abatement. Though the panel concluded that evaluation under the tort standard for causation was improper at this stage, Pet.App. 69a-70a, it does not follow that the panel's "contributes" standard is appropriate. Indeed, such a standard cannot be squared with the "case or controversy" requirement's causation aspect. Article III requires more. The "substantial likelihood" standard ensures that Respondents have presented a "case or controversy"

susceptible to judicial review, rather than some abstract and attenuated theory of potential harm. "Although the 'traceability' of a plaintiff's harm to the defendant's actions need not rise to the level of proximate causation, Article III does require proof of a substantial likelihood that the defendant's conduct caused plaintiff's injury in fact." *Habecker v. Town of Estes Park, Colo.*, 518 F.3d 1217, 1225 (10th Cir. 2008) (internal citations and quotations omitted)). Without such a requirement, the federal courts would become venues for adjudication of all manner of generalized grievances and speculative theories, so long as the alleged activity arguably "contributes to" some lengthy chain of causation. But the case or controversy requirement exists to ensure that "a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant," *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976), not the actions and inactions of billions of third parties and independent natural phenomena over millennia. *See* United States' Br. 15 ("The medium that transmits injury to potential plaintiffs is literally the Earth's entire atmosphere.").

At bottom, Respondents have failed to satisfy Article III and cannot establish standing. Only by deviating from the "substantial likelihood" test could the panel find a "case or controversy" based on the facts alleged. This is error and, if left unchecked, will cause lasting harm to the separation of powers.

III. A REQUEST FOR JUDICIALLY-CREATED EMISSIONS CAPS PRESENTS A NONJUSTICIABLE POLITICAL QUESTION.

Even if Respondents could establish standing, their lawsuit nevertheless is nonjusticiable. The political question doctrine

> excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly ill suited to make such decisions, as courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature.

Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986) (internal quotation marks omitted).

Courts have traditionally declined to resolve cases that "lack . . . judicially discoverable and manageable standards for resol[ution]," or are brought "without an initial policy determination of a kind clearly for nonjudicial discretion," *Baker*, 369 U.S. at 217. "[U]nder our Constitution, there are some questions that cannot be answered by the judicial branch. Out of due respect for our coordinate branches and recognizing that a court is incompetent to make final resolution of certain matters, these political questions are deemed 'nonjusticiable.'" *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008). While judges should not hide behind the

political question doctrine to avoid deciding legal questions that happen to be politically sensitive, this case asks courts to venture far beyond constitutional and prudential limitations on their power. Put simply, this Court must ask, "[w]ould resolution of the question demand that a court move beyond areas of judicial expertise?" *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring). Here the answer is undoubtedly "yes."

A. This Case Demands Judicial Action Unguided By Any Standard or Rule.

In concluding that the trial court erred when it dismissed these cases under the political question doctrine, the panel observed that "[f]ederal courts have long been up to the task of assessing complex scientific evidence in cases where the cause of action was based either upon the federal common law or upon a statute. They are adept in balancing the equities and in rendering judgment." Pet.App. 35a. The panel's restatement of the judiciary's general competence is no response to the uniquely global, complex, and political nature of the regulatory decisions and oversight demanded here. *Accord* United States' Br. 15. The panel has vastly oversimplified the undertaking that would be required to decide this case and erred in concluding that the issues presented are within the ken of the judiciary. The trial court correctly determined that this case turns on questions that must be addressed, if at all, by the other branches. And those branches are in fact responding to global warming concerns and considering the same issues and remedies being championed here. *See id.* at 15-17.

While Respondents attempt to frame their case as governed by run-of-the-mill nuisance principles, at their core the Complaints seek to use common law doctrines in unprecedented ways to achieve fundamental changes to national environmental, industrial, and economic policies. This is what makes this case unlike the many complex tort cases over which the judiciary has exercised jurisdiction in the past. *See id.* at 13-15.

Though the Complaints do not expressly ask these particular questions, this case demands answers to these, or variants thereof: should Petitioners' greenhouse gas emissions be regulated out of concern for their impact on Earth's climate? Given the utility of emitting activities, what emissions levels are appropriate? How should limits be phased-in and/or subsidized? What oversight is necessary? How would judicial emissions caps operate if the EPA or Congress set their own restrictions?

Respondents do not simply seek a determination that Petitioners' greenhouse gas emissions are unlawful, though that would take the courts well beyond their constitutional role. Respondents seek far more. They ask that a court, based on a record created within the confines of the judicial process, evaluate evidence of global phenomena dating back millions of years, determine complex facts about climate change, and balance a virtually endless array of competing interests to develop and impose emissions limits to reduce Petitioners' contributions by "a specifi[c] percentage," over "at least a decade." Compl. ¶ 6. This "is a broad call on judicial power to assume continuing regulatory jurisdiction . . . This far-reaching demand for relief

presents important questions of justiciability." *Gilligan*, 413 U.S. at 5; *cf. North Carolina v. Tennessee Valley Auth.*, No. 09-1623, 2010 WL 2891572, at *1 (4th Cir. July 26, 2010) (reversing injunction setting emissions caps because "[i]f allowed to stand, the injunction would encourage courts to use vague public nuisance standards to scuttle the nation's carefully created system for accommodating the need for energy production and the need for clean air").[7] As this Court has observed in other contexts, "complicated factfinding" and "debatable social judgment[s] are not wisely required of courts unless for some reason resort cannot be had to the legislative process" which is a "preferable forum for comprehensive investigations and judgments of social value." *Pegram v. Herdrich*, 530 U.S. 211, 221 (2000). "Congress is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon an issue as complex and dynamic as that presented here." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665-66 (1994) (plurality opinion).

These lawsuits seek to embroil federal courts in momentous policy choices well before the political branches have decided upon any standard of care arising from greenhouse gas emissions. But "[o]ne of the most obvious limitations imposed by [Article III] is that judicial action must be governed by *standard*, by *rule*." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion). The political question doctrine applies with full

---

7 Although abatement acutely presents justiciability issues, damages are also problematic. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) ("The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.").

force where, as here, a court is asked to adjudicate tort claims "without any manageable standards for making reasoned determinations regarding the[] fundamental elements of [the] claims." *Carmichael*, 572 F.3d at 1288; *see Baker*, 369 U.S. at 216; *cf. North Carolina v. Tennessee Valley Auth.*, 2010 WL 2891572, at *9 (explaining use of nuisance suit to set emissions caps "would reorder the respective functions of courts and agencies"). Respondents seek to have the Southern District of New York make up emissions rules under the rubric of common law nuisance, and then mandate and oversee compliance. And they seek this precisely because the political branches have not provided what they deem adequate standards. This case thus presents the quintessential political question.

B. The Panel Trivializes The Significant, Intended Consequences Of This Case.

The panel takes comfort that it is only dealing with the routine nuisance liability of six named defendants, and dismisses the notion that it would be regulating "emission sources not before the court." Pet.App. 34a. But the conclusion that this case does not require a court to "determine how across-the-board emissions reductions would affect the economy and national security" is willful blindness. *Id.* If successful, Respondents will achieve—as they seek—dramatic changes to the production and sale of energy nationwide, and the panel decision will have substantial impacts on pending and future cases.

The panel's treatment of this case as involving the routine application of the common law to a narrow set of defendants overlooks the dramatic, intended effect that emissions caps will have on the national economy. For these six large energy corporations, a single judge may create, impose, and enforce years of restrictions requiring fundamental changes to operations in at least 20 states. Compl. ¶ 166-186. This will directly and irrevocably affect how energy is produced and sold, which is Respondents' stated goal. *See id.* at ¶ 5 (explaining desirability of Defendants' implementation of "practical" options such as "changing fuels" and "increasing generation from . . . wind, solar" and other sources that will "reduc[e] carbon dioxide emissions without *significantly* increasing the cost of electricity" to consumers (emphasis added)). Nor does the panel satisfactorily account for the dozens of companies presently facing similar suits, or the untold other "contributors" to global warming that will be sued under the panel's relaxed requirements. *Accord* United States' Br. 14-15.

At bottom, the panel fails to confront the enterprise in which these litigants are engaged. This case answers the call of commentators and activists for "heroic litigation to go beyond the bounds of traditional doctrine and try to promote public good through creative use of common law theories like public nuisance" to address "the climate change crisis." Randall S. Abate, *Automobile Emissions and Climate Change Impacts: Employing Public Nuisance Doctrine as Part of a "Global Warming Solution" in California*, 40 Conn. L. Rev. 591, 626-27 (2008).

Global warming litigants in similar cases have been remarkably candid in their motives—dissatisfied with the other branches' responses to these inherently political questions, they have turned to the courts. They seek judicial action because "State and Federal Governments . . . [have] refused to regulate greenhouse gas emissions." Third Amended Complaint ¶ 39, *Comer v. Murphy Oil*, No. 05-436 (S.D. Miss. April 19, 2006). They assert that "Article III resolution is the only viable choice here as the branches of government authorized by the Articles I and II of the U.S. Constitution have refused to act." *Id.* at ¶ 18 n. 13. But alleged legislative or regulatory inaction does not change the fact that, under our system of government, "judges are not accredited to supersede Congress or the appropriate agency by embellishing upon the regulatory scheme. Accordingly, caution must temper judicial creativity in the face of legislative or regulatory silence." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980). Indeed, inaction by the political branches is itself a political fact for which they are properly held accountable. By ordering the lower courts to fill a void they are institutionally and constitutionally ill-suited to enter, the panel has thrown the "caution" inherent in the political question doctrine to the wind. The panel has invited a wave of litigation that promises to shift responsibility for fundamental policy decisions away from the democratic branches and into the hands of private litigants and judges. This course trivializes the political question doctrine, violates the separation of powers, and will inflict long term damage on our system of government.

IV. THIS IS THE APPROPRIATE TIME AND VEHICLE FOR THE COURT TO ADDRESS THESE QUESTIONS.

In light of the conflict of authorities, the important and recurring nature of the issues, and the procedural posture of other "global warming" cases, this is the right time and vehicle to reaffirm the core justiciability principles that give meaning to the separation of powers.

This Court should not wait for or link this case to other "global warming" cases, which might needlessly delay and complicate adjudication of the justiciability issues here. *Comer*, the next case to reach this Court, suffers from several flaws. It was correctly decided by the district court, but presents complex procedural questions. Due to the way the case was pled, the Fifth Circuit panel decision reversing the district court was vacated by a diminished *en banc* court that subsequently lost its quorum due to a remarkable *ninth* recusal before briefing concluded. Plaintiffs there have taken the extraordinary step of seeking a writ of mandamus from this Court "directing the United States Court of Appeals for the Fifth Circuit to reinstate Petitioners' appeal and return it to the panel for final adjudication." Pet. for Writ of Mandamus 6, *In re Comer et al.*, No 10-294 (Aug. 30, 2010). These procedural complexities render *Comer* a poor vehicle in comparison to this case.

Nor should this Court await the Ninth Circuit's resolution of similar justiciability issues in *Kivalina*. Plaintiffs there do not seek emissions caps, and in any event, a reviewable decision there is years away, as the

case has not been fully briefed. As the United States explains, *see* United States' Br. 9-10, much mischief can be accomplished in the Second Circuit, in litigation and adjudication of this case and filing of others like it, while this Court awaits a reviewable Ninth Circuit decision. Given that the issues are jurisdictional, allowing these cases to proceed is inconsistent with judiciary's responsibility to police its own jurisdiction.

Cato urges swift and certain action here. The Court must protect the Article III power and must act now to prevent federal judges from being forced to settle disputed and complex questions of national environmental, industrial, and economic policy that are properly the province of their coordinate branches of government.

CONCLUSION

For the reasons set forth herein and in the Petition, the Court should grant the writ of certiorari.

Respectfully submitted,

ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Ave, NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

ANDREW G. MCBRIDE
MEGAN L. BROWN*
BRENDAN T. CARR
EMILY F. SCHLEICHER
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-7000
mbrown@wileyrein.com

Counsel of Record

AMICUS CURIAE BRIEF

170

(10)

No. 10-174

Supreme Court, U S
FILED
SEP 3 - 2010
OFFICE OF THE CLERK

In the

Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY INC., et al.,

Petitioners,

v.

CONNECTICUT, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

EDWIN MEESE III
214 Massachusetts Ave. N.E.
Washington D.C. 20002

JOHN EASTMAN
ANTHONY T. CASO
Counsel of Record
KAREN J. LUGO
Center for Constitutional Jurisprudence
c/o Chapman Univ. Sch. of Law
One University Drive
Orange, California 92886
Telephone: (714) 628-2530
E-Mail: caso@chapman edu

Counsel for Amicus Curiae
Center for Constitutional Jurisprudence

QUESTION PRESENTED

Amicus addresses the following question:

1. Do federal courts have jurisdiction to create remedies for claims based on the theory of the "federal common law tort of public nuisance" for contributing to global warming when this Court has already ruled that Congress has given the Environmental Protection Agency the power to regulate "greenhouse gas emissions" as part of a comprehensive scheme to regulate air pollution?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF AMICUS CURIAE 1

REASONS FOR GRANTING THE PETITION 2

CONCLUSION 8

TABLE OF AUTHORITIES

Cases

Boy Scouts of America v. Dale,
530 U.S. 640 (2000) 1

Chevron U.S.A. Inc. v. Nat'l Res. Def. Council,
467 U.S. 837 (1984) 5

City of Milwaukee v. Illinois,
451 U.S. 304 (1981) (*Milwaukee II*) 4-5, 8

Connecticut v. Am. Elec. Power Co. Inc.,
582 F.3d 309 (2nd Cir. 2009) 5

Elk Grove Unified Sch. Dist. v. Newdow,
542 U.S. 1 (2004) 1

Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) 2

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) 1

Illinois v. City of Milwaukee,
406 U.S. 91 (1972) (*Milwaukee I*) 3

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 3

Massachusetts v. EPA, 549 U.S. 497 (2007) 4-5

Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs,
531 U.S. 159 (2001) 1

United States v. Morrison, 529 U.S. 598 (2000) 1

Zelman v. Simmons-Harris, 536 U.S. 639 (2002) 1

Rules of Court

Sup. Ct. R. 37.2(a) 1

37.6 1

Miscellaneous

75 Fed. Reg. 25,324 (May 7, 2010) 6

75 Fed. Reg. 31,514 (June 3, 2010) 6

The Federalist No. 78 (Alexander Hamilton) (Clinton Rossiter ed., 1961) 3

IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, Center for Constitutional Jurisprudence[1] is dedicated to upholding the principles of the American Founding, including separation of powers and due respect for the proper limit on those powers, including the judicial power. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); and *United States v. Morrison*, 529 U.S. 598 (2000).

The Center believes that the issue presented in the Petition for Writ of Certiorari in this case raises critical question regarding the scope of the judicial power. Where Congress has spoken to an issue and has provided a comprehensive regulatory structure, there is no longer any room for the courts to create

---

[1] Pursuant to this Court's Rule 37.2(a), all parties have filed consents to the filing of amicus briefs in this matters. Amicus has also given notice of intent to file this brief to all parties more than 10 days before this brief was filed.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission

remedies in response to claims based on "federal common law torts."

REASONS FOR GRANTING THE PETITION

The Second Circuit has authorized a suit to move forward based on a claim of a federal common law tort of public nuisance. State and private parties are claiming injury from global warming and assert that the Defendants in this action are responsible, at least in part, for that warming. The court below recognized that Congress has authorized the EPA to regulate greenhouse gasses in a comprehensive fashion. However, because EPA had yet to issue such comprehensive regulations the Second Circuit ruled that federal courts have the authority to create federal common law imposing emission limitations. As the brief of the United States points out, EPA is currently working on developing appropriate emission limitations that are consistent with the Clean Air Act. Intervention of federal courts at this point can lead to conflicting requirements and, more importantly, exceed the bounds of judicial authority. Review by this Court is necessary to preserve the proper role of the judiciary in the federal system.

This Court long ago rejected the notion that the federal judiciary could create a general federal common law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). *Erie* was based on the recognition that both Congress and the Judiciary are limited to their enumerated powers. Because no clause in the Constitution authorized the courts to create "substantive rules of Common Law applicable in a state," the courts had no authority to entertain claims based on a general federal common law. *Id.*

This lack of authority was not an oversight by the Framers. It was the design.

> The legislature not only commands the purse, but *prescribes the rules by which the duties and rights of every citizen are to be regulated.* The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. *It may truly be said to have neither FORCE nor WILL, but merely judgment*; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

The Federalist, No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added). This Court has long noted that: "[i]t is emphatically the province and duty of the judicial department to say what the law is" (*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)) but has not claimed the authority for the judiciary to say what the law *should be*.

The Court has allowed the creation of federal common law in limited areas where necessary to adjudicate disputes between states. *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972) (*Milwaukee I*). Even in those instances, the authority of federal courts to create remedies is displaced once Congress has acted. "When Congress has not spoken to a particular issue, however, and when there exists a 'significant conflict between some federal policy or interest and the use of state law,' the Court has found it necessary, in a 'few and restricted' instances

to develop federal common law." *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981) (*Milwaukee II*) (citations omitted). However, the judicial authority to create federal common law is "subject to the paramount authority of Congress." *Id.* (citation omitted). Where Congress has acted, the Court presumes "that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." *Id.* at 317. Thus, the Court ruled, regarding the federal common law public nuisance claims raised by the states for water pollution, that Congress had "not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." *Id.*

Whether the Clean Air Act similarly displaces any authority of the federal judiciary to set limits on emission of greenhouse gasses is one of the important issues raised in this case. In *Massachusetts v. EPA*, 549 U.S. 497 (2007), this Court noted that the scope of the definition of an "air pollutant" under the Clean Air Act is exceedingly broad. *Id.* at 528, 529. Contrary to EPA's conclusions, this Court found that this expansive definition reflected Congress's intent to imbue the Clean Air Act's regulatory scheme with the flexibility necessary to address future scientific research and developments. *Id.* at 532. Thus, this Court held that "[b]ecause greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant,'" "EPA

has the statutory authority to regulate the emission of such gases from new motor vehicles." *Id.*

Notwithstanding the authority given by Congress to the EPA to regulate on this issue, the Second Circuit was concerned that EPA had not fully exercised that regulatory authority. The court found EPA's proposed 2009 finding that greenhouse gases are a danger to public health and welfare to fall short of actual regulation, stating that "until EPA completes the rulemaking process, we cannot speculate as to whether the hypothetical regulation of greenhouse gases under the Clean Air Act would in fact speak directly to the particular issue raised" by the claimants. *Connecticut v. Am. Elec. Power Co. Inc.*, 582 F.3d 309, 380 (2nd Cir. 2009) (citations omitted).

This approach differs markedly from the approach taken by this Court in *Milwaukee II*. Instead of looking to whether Congress has spoken on the issue, the Second Circuit formulated the test as whether the administrative agency has fully exercised its authority to regulate. Such an approach, however, invites judicial interference in the administrative process not countenanced since *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837 (1984).

In any event, during the 11 months that have followed the ruling of the Second Circuit, actions taken by EPA have substantially altered the basis for that court's distinction between actual regulation and mere research. Two rules in particular erode the Second Circuit's finding of a lack of regulation by EPA. On May 7, 2010, EPA, in conjunction with the Department of Transportation's National Highway

Traffic Safety Administration, published a final rule that will dramatically reduce the amount of greenhouse gases emitted by light duty vehicles. 75 Fed. Reg. 25,324. On June 3, 2010, EPA published another final rule that tailors "the applicability criteria that determine which stationary sources and modification projects become subject to permitting requirements for greenhouse gas [] emissions under the Prevention of Significant Deterioration [] and title V programs of the Clean Air Act." 75 Fed. Reg. 31,514. By issuing these rules, EPA has clearly moved beyond mere research of greenhouse gas emissions and entered into the field of actual regulation.

In addition to settling this important question of judicial power under the Constitution, review by this Court is also necessary to ensure that there is one national standard for greenhouse gas emissions. The development of a patchwork of distinct public nuisance law among the federal circuit courts in the absence of a clear definition of the scope of federal regulation under the Clean Air Act will be chaotic.

Nuisance claims require courts to determine whether the harm suffered was unreasonable—that is whether the gravity of the harm outweighs the utility of the conduct. Where a nuisance claim is based on contributing to global warming through the emission of greenhouse gases, courts will be required to determine a level of acceptable greenhouse gas emissions. The factors that courts will consider in making this determination--geography, meteorology, and economic necessity, for example--are likely to differ greatly from one circuit to another.

Determinations of standards of reasonable greenhouse gas emissions made under such a system will therefore be inherently incongruous. Additionally, these unique doctrines will necessarily affect private interests across circuit boundaries, due to the inherently transient nature of greenhouse gas emissions, making any determination of fault or responsibility for global warming inherently suspect.

CONCLUSION

The Petition for Writ of Certiorari raises critical questions of judicial power. Do federal courts have the power to set environmental rules after Congress has formulated a policy and delegated regulation to an administrative agency? *Milwaukee II* seems to answer that question in the negative. However, the Second Circuit has ruled that there is still space for federal judicial regulation if the administrative agency has yet to exercise the full extent of its powers. This Court should grant the Petition for Writ of Certiorari to address this important question.

DATED: September, 2010.

Respectfully submitted,

EDWIN MEESE III
214 Mass. Ave. NE
Washington, DC 20002

JOHN EASTMAN
ANTHONY T. CASO
Counsel of Record
KAREN J. LUGO
Center for Constitutional Jurisprudence
c/o Chapman University School of Law
One University Drive
Orange, CA 92886
Telephone: (714) 628-2530
E-Mail: caso@chapman.edu

Counsel for Amicus Curiae
Center for Constitutional Jurisprudence

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
SEP 3 - 2010
OFFICE OF THE CLERK

(16)

No. 10-174

In the Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY INC., ET AL.
Petitioners,

v.

STATE OF CONNECTICUT, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

GREGORY GARRE
Counsel of Record
RICHARD P. BRESS
GABRIEL K. BELL
LATHAM & WATKINS LLP
555 11TH STREET, NW
SUITE 1000
WASHINGTON, DC 20004
(202) 637-2200
gregory.garre@lw.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTERESTS OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. REVIEW IS WARRANTED BECAUSE OF THE EXTRAORDINARY IMPORTANCE OF THE QUESTIONS PRESENTED 6

A. The Decision Below Has Staggering Economic Implications 6

B. The Decision Below Will Undermine the Ongoing Political Process 9

II. REVIEW IS WARRANTED TO DETERMINE WHETHER SEPARATION OF POWERS PRINCIPLES BAR PLAINTIFFS' GLOBAL WARMING SUIT 11

A. Plaintiffs Have Not Stated a Claim Under Federal Common Law 11

B. Plaintiffs' Suit Raises Non-Justiciable Political Questions 15

C. Plaintiffs Lack Standing 20

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

CASES

Alexander v. Sandoval,
532 U.S. 275 (2001) 11

ASARCO, Inc. v. Kadish,
490 U.S. 605 (1989) 22

Baker v. Carr,
369 U.S. 186 (1962) 15, 16

Boumediene v. Bush,
553 U.S. 723 (2008) 6

California v. General Motors Corp.,
No. C06-05755-MJJ, 2007 WL 2726871
(N.D. Cal. Sept. 17, 2007), *appeal dismissed*, No. 07-16908 (9th Cir. June 24, 2009) 7

Caperton v. A.T. Massey Coal Co.,
129 S. Ct. 2252 (2009) 6

City of Milwaukee v. Illinois,
451 U.S. 304 (1981) 14

Comer v. Murphy Oil USA,
585 F.3d 855 (5th Cir. 2009), *appeal dismissed*, 607 F.3d 1049, 1055 (5th Cir. 2010) (en banc) 19

TABLE OF AUTHORITIES—Continued

Page(s)

Comer v. Murphy Oil USA,
No. 1:05-CV-436-LG-RHW, 2007 WL
6942285 (S.D. Miss. Aug. 30, 2007), *rev'd*,
585 F.3d 855 (5th Cir. 2009), *appeal*
dismissed, 607 F.3d 1049 (5th Cir. 2010).....7

Corrie v. Caterpillar, Inc.,
503 F.3d 974 (9th Cir. 2007) 16

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006) 5, 20

El-Shifa Pharmaceutical Industries Co. v.
United States,
607 F.3d 836 (D.C. Cir. 2010) (en banc).....16

Friends of the Earth, Inc. v. Laidlaw
Environmental Services (TOC), Inc.,
528 U.S. 167 (2000) 23

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) 17

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 20, 21, 22, 23

Luther v. Borden,
48 U.S. (7 How.) 1 (1849) 16

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803).....15

TABLE OF AUTHORITIES—Continued

Page(s)

Massachusetts v. EPA,
549 U.S. 497 (2007) 3, 6, 9, 10, 16, 21

Medellin v. Texas,
552 U.S. 491 (2008) 6

Missouri v. Illinois,
200 U.S. 496 (1906) 12

Native Village of Kivalina v. ExxonMobil Corp.,
663 F. Supp. 2d 863 (N.D. Cal. 2009),
appeal pending, No. 09-17490 (9th Cir.) 7

North Carolina v. TVA, --- F.3d ----, 2010 WL 2891572 (4th Cir. July 26, 2010) 7

North Dakota v. Minnesota,
263 U.S. 365 (1923) 12

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004) 11

Texas Industries, Inc. v. Radcliff Materials, Inc.,
451 U.S. 630 (1981) 12, 13, 18

United States v. Hudson & Goodwin,
11 U.S. (7 Cranch) 32 (1812) 11

United States v. Standard Oil Co. of California,
332 U.S. 301 (1947) 11, 13, 14

TABLE OF AUTHORITIES—Continued

Page(s)

Vieth v. Jubelirer,
541 U.S. 267 (2004) 15

Wheeldin v. Wheeler,
373 U.S. 647 (1963) 11

Wilkie v. Robbins,
551 U.S. 537 (2007) 12

STATUTES, TREATIES AND REGULATIONS

42 U.S.C. §13381 9

U.N. Framework Convention on Climate Change (1992), *available at* http://unfccc.int/resource/docs/convkp/conveng.pdf 9

68 Fed. Reg. 52,922 (Sept. 8, 2003) 18

OTHER AUTHORITIES

Nicholas Bloom, *The Impact of Uncertainty Shocks*, 77 Econometrica 623 (2009) 8

EPA, *CO_2 Emissions from Fossil Fuel Combustion, 1990-2007, available at* http://www.epa.gov/climatechange/emissions/downloads/CO2FFC_2007.pdf 18

TABLE OF AUTHORITIES—Continued

Page(s)

Energy Information Administration, U.S. Department of Energy, *International Energy Outlook 2009* (May 2009) 22

Kenneth Green *et al.*, *Climate Change: Caps vs. Taxes*, American Enterprise Institute Environmental Policy Outlook, June 2007 8

Trevor Houser *et al.*, *Assessing the American Power Act: The Economic, Employment, Energy Security, and Environmental Impact of Senator Kerry and Senator Lieberman's Discussion Draft*, Peterson Institute for International Economics Policy Brief, May 2010 ..... 8, 9

I.P.C.C., *2007 Synthesis Report*, Energy Information Administration, U.S. Department of Energy, *International Energy Outlook 2009* (May 2009) 22

Darren Samuelsohn, *Rockefeller Finds It's Better to Negotiate on Climate Than Sit on Sidelines*, N.Y. Times, Sept. 14, 2009 8

San Francisco Chronicle, Editorial Board, *An interview with Sen.* Barack Obama (Jan. 17, 2008), *available at* http://www.sfgate.com/cgi-bin/blogs/opinionshop/detail?entry_id=23562 8

TABLE OF AUTHORITIES—Continued

Page(s)

Robert Stavins, *Addressing climate change with a comprehensive US cap-and-trade system*, 24 Oxford Review of Econ. Pol'y 298 (2008) 9

Laurence H. Tribe *et al.*, *Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* (Washington Legal Found. Critical Legal Issues Series, Working Paper No. 169, 2010) 13, 18, 19, 22, 23

Bernie Woodall, *U.S. carbon cap to raise power prices: Moody's*, Reuters.com, Mar. 25, 2009 8

INTERESTS OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (Chamber) is the nation's largest federation of businesses and associations.[1] The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million U.S. businesses and professional organizations. The Chamber advocates issues of vital concern to the nation's business community and has frequently participated as *amicus curiae* before this Court and the federal courts of appeals. And when misguided decisions of lower courts threaten the interests of the business community and the greater public, the Chamber has supported certiorari petitions for this Court's review. This is such a case.

The proper response to global climate change is an issue of profound concern to the Chamber's members. The Chamber works to discourage ill-conceived climate change policies and measures that could severely damage the security and economy of the United States, and instead encourages positive measures, such as long-term technological innovation and long-term clean technology deployment. The Chamber believes that nuisance suits such as this one, which seek to impose caps and reductions on carbon dioxide emissions in a piecemeal fashion on an arbitrary subset of U.S.

---

[1] The parties have filed blanket letters of consent for *amicus* briefs. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention to file this brief. No counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund its preparation or submission.

industry, are an especially ill-conceived and constitutionally illegitimate response. A meaningful and politically legitimate response to climate change must be national, indeed global, in nature, and must be fashioned by the politically accountable branches. The Chamber thus has a vital interest in ensuring that courts do not usurp the roles of the executive and legislative branches by entertaining this type of lawsuit.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs seek to hold six American utility companies jointly and severally liable for "contributing" to global climate change caused by innumerable sources under vague and far-reaching federal and state common law theories of "nuisance." Compl. 49, No. 04-5669 (S.D.N.Y. July 21, 2004). They asked a lone district court to immediately "cap" defendants' carbon dioxide emissions and then reduce them by an unspecified percentage "each year for at least a decade." *Id.* The district court sensibly rejected that request, recognizing that how best to address the complex issues implicated by global climate change is a question that can only be resolved by the political branches. Pet.App.171a-187a.

The Second Circuit reversed, however, and permitted this suit to proceed. Pet.App.1a-170a. Because that decision is based on a profoundly misguided conception of the role of the courts in our constitutional government and has potentially disastrous implications for the U.S. business community as well as this nation's efforts to address the phenomenon of global climate change, the Chamber

and its members have a strong interest in this Court granting review and reversing its judgment.

This Court's guidance is urgently needed. Since *Massachusetts v. EPA*, 549 U.S. 497 (2007), an "emerging category of litigation over greenhouse-gas emissions" has developed "implicat[ing] myriad plaintiffs and defendants." Tennessee Valley Authority (TVA) Br. 10. If the decision of the Second Circuit is not reversed, this suit and the others that inevitably follow will destabilize our economy and undermine our democratic process. The debate over the appropriate response to climate change affects every business concern and implicates virtually every facet of daily life. This complex political dialogue belongs in the political arena, not the courthouse. Only the elected branches are authorized and equipped to develop our nation's response to climate change and undertake any necessary reforms. With such important and pervasive national issues at stake, the country can ill afford to await further percolation in the lower courts.

The Acting Solicitor General—speaking through the TVA—agrees that this Court's intervention is warranted now, and that the decision below should be vacated. He suggests, however, that the Court should remand for consideration of the TVA's "prudential standing" argument and for further consideration of the displacement issue. TVA Br. 10-11. Such a remand is unnecessary. While it comes with a new heading, the "prudential standing" argument is based on largely the same considerations that already inform the standing and political question issues that were decided below. The TVA may advance that argument in this Court if it wishes to do so. But a remand is not necessary to

address it. Nor is there any particular reason to believe that the court of appeals would be receptive to the argument given what it has already said about the underlying concerns in its comprehensive, 139-page decision. The same goes for the displacement issue, which was already decided below. While the TVA's unusual GVR proposal is certainly preferable to a denial of certiorari, the fact that the Acting Solicitor General has even floated this request underscores the magnitude of the problems created by the decision below.

The Second Circuit's decision offends three fundamental limitations on judicial power. *First*, the court overstepped its authority by creating new federal common law to accommodate plaintiffs' claims. This Court has made clear that courts are not to create or extend judge-made causes of action, and, despite their appellation, plaintiffs' claims in this case do not look remotely like previously recognized traditional "nuisance" claims. Nuisance suits have been allowed to proceed under federal common law only as necessary to permit states to protect the land and air within *specific geographic regions* against harm directly caused by a *discrete set of defendants* who were discharging *obviously noxious substances* such as sewage, trash, and toxic fumes. Plaintiffs' suit asks the courts to assess fault for injuries caused by apparently harmless emissions from literally billions of sources worldwide over the last "several centuries." Compl. ¶87. The common law is ill-equipped to address such staggeringly complex—and "unprecedentedly broad," TVA Br. 11—nuisance claims.

Second, the court of appeals erred in failing to appreciate that the global nature of climate change and

the necessity in any bid for redress to balance an enormously vast array of interrelated interests are ill-suited to the *ad hoc* and piecemeal nature of litigation. The political question doctrine prohibits courts from acting where, as here, there are no judicially manageable standards and any adjudication would inevitably require initial policy decisions reserved to the political branches. What is the appropriate level of global emissions? Who should bear the costs of limiting emissions? Should developed nations act even if developing nations do not? These questions are not just complex or difficult—they have no "right" jurisprudential answers.

Third, the court of appeals erred in finding that plaintiffs have Article III standing. The likelihood of redressability in this suit against a finite and arbitrary set of carbon-emitting entities is so remote and so speculative that the ruling here would permit literally anyone alleging climate-change based damages to sue any entity or natural person in the world—an absurd result that highlights once again just how inapt the judicial forum is for addressing such inherently global concerns. Contrary to the lower court's opinion, the principles animating *Massachusetts*—which depended on the ability of *Congress* to relax the Article III inquiry in the context of a *statutory* provision for challenging agency action—are inapplicable here.

As this Court has observed, "[d]etermining that a matter before the federal courts is a proper case or controversy under Article III ... assumes particular importance in ensuring that the Federal Judiciary respects 'the proper—and properly limited—role of the courts in a democratic society.'" *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (citation

omitted). Certiorari is warranted to make clear that adjudication of the growing wave of common law nuisance claims directed against alleged culprits of global climate change exceeds the "the proper—and properly limited—role of the courts in a democratic society."

This Court should grant review and reverse the judgment of the court of appeals.

ARGUMENT

I. REVIEW IS WARRANTED BECAUSE OF THE EXTRAORDINARY IMPORTANCE OF THE QUESTIONS PRESENTED

This Court has not hesitated to intervene promptly to decide important issues of federal law when awaiting further percolation in the lower courts would jeopardize important national interests. *See, e.g.*, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009); *Boumediene v. Bush*, 553 U.S. 723 (2008); *Medellin v. Texas*, 552 U.S. 491 (2008); *Massachusetts*, 549 U.S. 497. In *Massachusetts*, this Court granted the writ because of the "unusual importance of the underlying issue." 549 U.S. at 506. Prompt review is even more critical in this case, given the staggering breadth of the potential economic, social, and political implications of the lower court's ruling. This Court should grant the petition and provide necessary guidance on the questions presented without delay.

A. The Decision Below Has Staggering Economic Implications

If not reversed, the decision below will impose punishing costs on businesses and consumers that will only be exacerbated as this "emerging category of litigation" (TVA Br. 10) sweeps the nation's courts.

First, allowing multiple district courts to act as mini-EPAs will lead to a host of new suits and, inevitably, inconsistent outcomes.[2] Indeed, there have already been at least three other public nuisance common law suits against arbitrarily-selected greenhouse gas emitters across several industries. Pet. 8-10.[3] In those cases, plaintiffs sought damages from various groupings of automobile, oil, coal, chemical, energy, and utility companies. Although none of those plaintiffs has (yet) been successful, *see id.*, the Second Circuit's decision, which permits suit against any emitter, will invite a continuing barrage and produce a patchwork of regulation.

The resulting conflicting standards and regulatory uncertainty will impose serious costs on our economy. Businesses large and small will face intractable challenges in assessing future capacity—not knowing when, whether, and to what degree a lone district court might impose emissions caps (or damages). *See North Carolina v. TVA*, --- F.3d ----, 2010 WL 2891572, at *1, *10 (4th Cir. July 26, 2010) (application of "vague public nuisance standards" to emissions leaves companies "unable to determine [their] obligations ex ante"). And, as a result, firms will "become more cautious in

---

[2] Under plaintiffs' theory of personal jurisdiction, *any* carbon emitters could be sued in *any* district court in the country. *See* Compl. ¶38; Mem. in Opp. to Mot. to Dismiss 13-14.

[3] *See Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal pending*, No. 09-17490 (9th Cir.); *Comer v. Murphy Oil USA*, No. 1:05-CV-436-LG-RHW, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007), *rev'd*, 585 F.3d 855 (5th Cir. 2009), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010) (en banc); *California v. Gen. Motors Corp.*, No. C06-05755-MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), *appeal dismissed*, No. 07-16908 (9th Cir. June 24, 2009).

responding to business conditions," resulting in decreased hiring, investment, and productivity. Nicholas Bloom, *The Impact of Uncertainty Shocks*, 77 Econometrica 623, 625 (2009).[4] This Court's guidance is immediately necessary to remove the cloud of uncertainty that will otherwise stunt economic growth and prevent businesses from efficiently ordering their affairs.

Second, the judicial imposition of emissions caps on these utility industry defendants (and, inevitably, on other emitters in other cases) will dramatically increase U.S. energy prices. As the President has previously acknowledged, "capping greenhouse gasses" means "electricity rates would necessarily skyrocket."[5] And the "vast majority" of the burden of increased energy costs will fall on residential consumers.[6]

---

[4] *See also* Darren Samuelsohn, *Rockefeller Finds It's Better to Negotiate on Climate Than Sit on Sidelines*, N.Y. Times, Sept. 14, 2009 (because there is "'no predictability,'" Wall Street "'lends no money to people trying to build power plants'" (quoting Sen. Rockefeller)); Kenneth Green *et al.*, *Climate Change: Caps vs. Taxes*, American Enterprise Institute Environmental Policy Outlook, June 2007, at 2-3 (uncertainty of energy costs and fuel availability can lead to spikes in fuel prices).

[5] *San Francisco Chronicle*, Editorial Board, *An interview with Sen.* Barack Obama *at* 40:39 (Jan. 17, 2008), *available at* http://www.sfgate.com/cgi-bin/blogs/opinionshop/detail?entry_id=23562. *See also, e.g.*, Trevor Houser *et al.*, *Assessing the American Power Act: The Economic, Employment, Energy Security, and Environmental Impact of Senator Kerry and Senator Lieberman's Discussion Draft*, Peterson Institute for International Economics Policy Brief, May 2010, at 13 (caps would increase household electricity, heating, and gasoline prices); Bernie Woodall, *U.S. carbon cap to raise power prices: Moody's*, Reuters.com, Mar. 25, 2009.

[6] Woodall, *supra*.

Third, those higher energy costs will drive up the cost of all manufactured goods and transportation.[7] As even emissions-capping advocates acknowledge, "most of the cost of the programme will be borne by consumers, facing higher prices of products, including electricity and gasoline."[8] And the compound effect is to threaten hundreds of thousands of jobs and depress wages, as companies downsize or relocate.[9] While legislators are able to consider the competing economic interests and tailor schemes to mitigate such hardships (e.g., through tax breaks or other incentives), courts cannot similarly ameliorate the unintended consequences of their mandates.

B. The Decision Below Will Undermine the Ongoing Political Process

For decades, the legislative and executive branches have struggled with global climate change. *See Massachusetts*, 549 U.S. at 507-09 (recounting prior legislation and treaties); Pet.App.145a-58a. They have long recognized that controlling greenhouse gas emissions involves a complex interrelation of environmental, economic and geo-political issues requiring a comprehensive, coordinated approach.[10] To

---

[7] *See, e.g.*, Houser, *supra* at 12; Robert Stavins, *Addressing climate change with a comprehensive US cap-and-trade system*, 24 Oxford Review of Econ. Pol'y 298, 312-14 (2008).

[8] Stavins, *supra*, at 313.

[9] *See* Houser, *supra*, at 12 (predicting 479,000 lost jobs from 2011-20).

[10] *See, e.g.*, 42 U.S.C. §13381 (directing study of the "economic, energy, social, environmental, and competitive implications, including implications for jobs"); U.N. Framework Convention on Climate Change, prmbl. at 1 (1992) ("[T]he global nature of climate

date, statutes and treaties have focused primarily on research and reporting requirements, and the U.S. has not adopted any sweeping international agreements to limit greenhouse gas emissions. *See Massachusetts*, 549 U.S. at 507-09; Pet.App.145a-58a.

In *Massachusetts*, this Court recognized that the politically accountable branches must take the lead on regulating global climate change because the courts have "neither the expertise nor the authority to evaluate" the myriad policy judgments. 549 U.S. at 533. And that decision has spurred the delicate political dialogue that is ongoing. This Court should rein in, sooner rather than later, lower courts that seek to hijack and preempt this active process by inventing new common law claims.

The business community has ordered its affairs on the reasonable assumption that it will continue to be an important stakeholder with a voice in the ongoing democratic process, as the elected branches seek equitable and effective solutions. The court of appeals' decision threatens to eliminate that opportunity for debate, subvert the democratic process, and impose piecemeal court-ordered mandates in lieu of balanced, comprehensive legislative solutions. American businesses will not be the only losers. The nation's effort to address global climate change will suffer too.

It may be that this Court would agree with the Second Circuit that this new breed of litigation is appropriate and consistent with the fundamental limits on the exercise of judicial power (although, as explained next, such a ruling would be unprecedented).

---

change calls for the widest possible cooperation by all countries ....").

But the last thing that should happen is for this Court to deny review in this case and allow this decision and the others that will inevitably follow to inflict untold damage on the U.S. economy and efforts of the political branches to fashion a comprehensive response to global climate change—only to grant review in another case years from now and hold that this litigation was constitutionally unfounded all along.

II. REVIEW IS WARRANTED TO DETERMINE WHETHER SEPARATION OF POWERS PRINCIPLES BAR PLAINTIFFS' GLOBAL WARMING SUIT

A. Plaintiffs Have Not Stated a Claim Under Federal Common Law

This Court has long understood that creating federal common law raises fundamental separation of powers concerns. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812) (refusing to fashion federal criminal common law). And, it is "needless to state that we are not in the free-wheeling days ante-dating *Erie R. Co. v. Tompkins*." *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963). In the modern era, this Court has "sworn off the habit of venturing beyond Congress's intent," *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001), and stressed that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases," *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004). Even in new situations that are arguably analogous to established common law actions, this Court has made clear that federal courts do not have unchecked "freedom to create new common-law liabilities." *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 313 (1947). It has cautioned the courts to be particularly hesitant

where judicial standards "would be endlessly knotty to work out" and liability is more properly addressed "through legislation," *Wilkie v. Robbins*, 551 U.S. 537, 562 (2007).

In limited instances, primarily early in the last century, this Court recognized that states can bring "simple type" public nuisance federal common law claims to enjoin interstate environmental harms. *See, e.g., North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923). Plaintiffs insist—and the Second Circuit agreed—that their nuisance suits fits comfortably within that paradigm. Compl. ¶¶152-64; Pet.App.78a-95a. But the "simple type" public nuisance actions previously recognized by this Court, which are among the "'few and restricted'" instances in which this Court has recognized any federal common law cause of action,[11] do not support the Second Circuit's decision.

Plaintiffs' suit bears no resemblance to those traditional nuisance actions—each of which involved allegations that a discrete set of defendants directly caused harm with obviously toxic or dangerous substances in a geographically definable area, *e.g., Missouri v. Illinois*, 200 U.S. 496 (1906) (Chicago sewage harmed cities along Mississippi river)—and permitting it to advance would extend the federal courts' common law-making power far beyond the limited authority this Court has previously recognized. Plaintiffs' claims implicate non-toxic substances emitted by billions of sources worldwide over "several centuries," Compl. ¶87, caused by everyone in every corner of the globe and—if plaintiffs' claims are to be

---

[11] *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (citation omitted).

believed—causing generalized harms worldwide. As Professor Tribe has explained, "[u]nlike traditional pollution cases, where discrete lines of causation can be drawn from individual polluters to their individual victims," climate change suits describe a "non-linear, collective impact of millions of fungible, climactically indistinguishable, and geographically dispersed emitters." *See* Laurence H. Tribe *et al.*, *Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* 15 (Washington Legal Found. Critical Legal Issues Series, Working Paper No. 169, 2010).

Far from the historically modest application of existing tort principles to a discrete nuisance, plaintiffs advance claims that are "unprecedentedly broad" (TVA Br. 11) and seek to have the courts dictate the substance and implementation of federal climate change policy—with profound and inevitable effects on American businesses, jobs, and individuals. Indeed, because everyone still breathing on the planet contributes to greenhouse gas emissions, if plaintiffs' claims are permitted to go forward, all businesses—and, indeed, all individuals—will, overnight, become subject to unpredictable and open-ended *joint-and-several* liability. Such an extraordinary broad assertion of common law liability is unheard of.

The "exercise of judicial power" to expand "traditionally established" causes of action to the novel and pervasive problem of global climate change would impermissibly "intrud[e] within a field properly within Congress' control." *See Standard Oil*, 332 U.S. at 311-17 (refusing government's request to impose federal common law tort liability on defendant for loss of a services of injured soldier); *Texas Indus.*, 451 U.S. at

638-47 (refusing to create federal common law cause of action for contribution from antitrust conspirators, where sheer "range of factors to be weighed" in deciding whether to create such an action "demonstrate[d] the inappropriateness of judicial resolution"). "Whatever the merits of the policy" advocated by the plaintiffs in this case, "its conversion into law is a proper subject for congressional action, not for any creative power of [the courts]." *Standard Oil*, 332 U.S. at 314.

As this Court has explained, "[t]he enactment of a federal rule in an area of national concern ... is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress." *City of Milwaukee v. Illinois*, 451 U.S. 304, 312-13 (1981) ("*Milwaukee II*"). That principle should doom this "nuisance" suit: If ever there were an area "better left to legislative judgment," this is it.[12]

---

[12] The Second Circuit also held that, notwithstanding *Massachusetts*, the CAA does not displace federal common law nuisance claims. Pet.App.137a-44a. The Chamber does not believe that *Massachusetts* permits EPA to "shoehorn greenhouse gas emissions controls into the existing [CAA]," for doing so would lead to "absurd" results, as EPA itself has elsewhere acknowledged. *See* Petition for Reconsideration, No. EPA-HQ-OAR-2009-0171, at 3, 10-19 (Mar. 15, 2010), *denied*, 75 Fed. Reg. 49,556 (Aug. 13, 2010), *pet. for review pending*, No. 10-1235 (D.C. Cir. Aug. 13, 2010). EPA's ill-considered decision, manifested in a series of interrelated rulemakings, to invoke the blunt instrument of the CAA to regulate the complex problem of climate change is subject to an ongoing array of litigation brought by states, industry and public interest organizations. In light of those substantial challenges, this Court should decide the antecedent question whether federal common law can even accommodate a public nuisance tort of the nature suggested by plaintiffs in this

B. Plaintiffs' Suit Raises Non-Justiciable Political Questions

Consistent with the Framers' tripartite scheme, courts have no authority to decide questions that are "in their nature political." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). Article III does not authorize "*whatever* judges choose to do" but, instead, the "law pronounced by the courts must be principled, rational, and based upon reasoned distinctions." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality). Under the familiar *Baker* framework, when a case presents no judicially manageable standards by which a court (or jury) can make a rational decision or requires an initial policy judgment (*Baker* factors 2 and 3), it must be left to the elected branches. *Baker v. Carr*, 369 U.S. 186, 210-11, 217 (1962). The political question doctrine also bars adjudication where there is a textual commitment to another branch, a danger of disrespect to other branches, a need to adhere to a political decision already made, or the potential for embarrassing other branches (*Baker* factors 1 and 4-6). *Id.*

In this case, the Second Circuit recognized a new and categorical exception to those established principles. According to the Second Circuit, "where a case 'appears to be an ordinary tort suit,'" there is no political question bar. Pet.App.38a (citation omitted); *see* Pet.App.27a-41a. That approach cannot be squared with the careful, "case-by-case inquiry" that this Court

---

case before considering whether displacement of such federal common law has in fact occurred. However, if the CAA did give EPA such authority, the Chamber agrees with petitioners and the TVA that the common law claims presented here would be displaced under *Milwaukee II* and its progeny. Pet. 20-24; TVA Br. 22-32.

requires (and that other lower courts have undertaken) to determine whether the question posed "lies beyond judicial cognizance." *Baker*, 369 U.S. at 211.

This Court and the lower courts have repeatedly refused to adjudicate political questions even when arising in the context of private litigants' common law and tort actions. *See, e.g., Luther v. Borden*, 48 U.S. (7 How.) 1, 39-40 (1849) (trespass); *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 844 (D.C. Cir. 2010) (en banc) (defamation); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982-84 (9th Cir. 2007) (public nuisance and wrongful death). This Court thus emphasized in *Baker* that the political question doctrine applies "even in private litigation which directly implicates no feature of separation of powers" and "though in form simply [a common law] action." 369 U.S. at 214, 218. Accordingly, a plaintiff cannot "clear the political question bar" simply by "'recasting'" a claim "'in tort terms.'" *El-Shifa Pharm. Indus. Co.*, 607 F.3d at 843 (citation omitted).

Here, plaintiffs' "nuisance" claims present no judicially manageable standards and their resolution requires myriad initial policy determinations reserved to the political branches. In *Massachusetts*, this Court found no political question in assessing "the proper construction of a congressional statute," 549 U.S. at 516, but there is no such legislative guidance here. And contrary to the Second Circuit's suggestion, this case cannot be adjudicated under the "well-settled tort rules" found in prior nuisance cases and the Restatement (Second) of Torts, Pet.App.27a-35a, because neither source provides the necessary judicially manageable standards or obviates the need for an initial policy determination.

As this Court has explained, public nuisance law "ordinarily entails" analysis of, among other things, the "degree of harm" posed by the activities, the "social value" of the activities, and their "suitability to the locality in question." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030-31 (1992) (addressing state law). In traditional tort cases, however, these are merely *incremental* determinations of policy, which courts appropriately make against a backdrop of well-established common law, without trespass on the political domain. But in this case the policy decisions necessary to resolve plaintiffs' claims are not incremental in nature. In the guise of a routine nuisance action, plaintiffs ask a single district court to balance the myriad environmental, economic, and geopolitical factors implicated by global climate change and make from whole cloth policy decisions that continue to be the subject of intense political debate within our political branches and with other nations through international diplomatic channels.

The Second Circuit characterized this as a "discrete domestic nuisance" case that does not require a court to fashion "across-the-board" domestic or international emissions limits or a "comprehensive and far-reaching solution to global climate change." Pet.App.25a-26a. But there is nothing remotely "discrete" about a nuisance action that tries to tackle the phenomenon of *global* climate change, and given the global nature of greenhouse gases, the imposition of caps on any given enterprise (or handful of enterprises) is necessarily arbitrary.

Such an inquiry must also balance all relevant interests—weighing potential benefits of reduced emissions (even as other developing countries increase

greenhouse gas emissions) against the profound impact on local economic growth and energy costs; ascertaining the availability of alternative fuel sources or new technologies to reduce emissions; and so on. "It is hard to imagine any issue in the environmental area having greater 'economic and political significance' than regulation of activities that might lead to global climate change." Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,928 (Sept. 8, 2003).

Because, as alleged, *every* enterprise—indeed *every person*—worldwide over the last several centuries is to some degree complicit in greenhouse gas emissions, this line-drawing is not just "difficult" for a court.[13] The initial policy judgment about who should bear the cost of the harm is so intimately entwined with every sector of the economy and every facet of daily life that it is unquestionably "'a matter of high policy'" that must be "'resol[ved] within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot.'" *Texas Indus.*, 451 U.S. at 647 (citation omitted). Crafting solutions to greenhouse gas emissions is "so plainly immune to coherent judicial management as to be implicitly entrusted to political processes." Tribe, *supra*, at 24. Courts are "institutionally ill-suited to entertain lawsuits concerning problems this irreducibly global and interconnected in scope." *Id.* at 21.

For precisely these reasons, every district court to consider common law claims seeking redress for global

---

[13] Plaintiffs collectively are complicit in more than the 650 million tons attributed to the defendants. *Compare* EPA, *CO_2 Emissions from Fossil Fuel Combustion, 1990-2007*, *with* Compl. ¶2.

warming has found them to raise political questions beyond judicial purview. *See supra* note 3. The unanimity of trial judges on this point is telling, as they are on the front lines and must deal first-hand with the limits of judicial competence to manage such actions. Although two appellate panels have now disagreed,[14] those courts, with their "quixotic and unyielding faith in nuisance doctrine, ... manifestly los[t] their way in the ... real thicket of political question doctrine." Tribe, *supra*, at 17, 24. This Court should grant review and guide the courts along the rightful path.

The brief filed by the Acting Solicitor General supports this conclusion. In arguing that the decision below should be vacated, the government specifically emphasizes the "lack of judicial manageability, and the unusually broad range of underlying policy judgments that would need to be made" to adjudicate plaintiffs' nuisance claims on the way to arguing that plaintiffs' claims "are quintessentially fit for political or regulatory—not judicial—resolution." TVA Br. 13, 17. The Acting Solicitor General makes those points in arguing lack of "prudential standing," but the same considerations compel the conclusion that this case should be dismissed under the political question doctrine. Changing the label does not change the result—or the need for this Court's review.[15]

---

[14] *See* Pet.App.1a; *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *appeal dismissed*, 607 F.3d 1049, 1055 (5th Cir. 2010) (en banc).

[15] The Chamber agrees with the TVA that "prudential standing" is lacking as well. But a remand for the court of appeals to consider that issue seems pointless. Because the "prudential standing" doctrine is motivated by the same considerations as the political question doctrine, it is difficult to see how the court of

C. Plaintiffs Lack Standing

Article III's limitation to cases and controversies "is crucial in maintaining the 'tripartite allocation of power' set forth in the Constitution" and ensures that the judiciary "respects 'the proper—and properly limited—role of the courts in a democratic society.'" *DaimlerChrysler Corp.*, 547 U.S. at 341 (citations omitted). Thus, this Court has long held that to establish standing plaintiffs must show they have suffered an injury-in-fact, caused by defendants' conduct and likely to be redressed by the relief sought. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

The Second Circuit fundamentally erred in finding standing because the nature of global climate change prevents plaintiffs from demonstrating either causation or redressability. As plaintiffs acknowledge, greenhouse gasses are undifferentiated, for they "rapidly mix in the atmosphere" and inevitably merge with emissions from the rest of the world. Compl. ¶155. Thus, plaintiffs' alleged injuries are neither fairly traceable to these particular defendants (as opposed to third parties not before the court) nor likely to be redressed by capping their emissions. Although the interrelated requirements of causation and redressability are both lacking, *amicus* focuses here on the latter.

The Second Circuit reached its errant conclusion based on *Massachusetts*. But *Massachusetts* is

---

appeals could come out differently on prudential standing given what it has already said in rejecting petitioners' political question argument. In any event, as the TVA acknowledges (Br. 22), this Court may address the prudential standing argument in reviewing the judgment below.

distinguishable in two critical respects. *First*, *Massachusetts* involved standing to enforce a *congressionally-conferred procedural* right. 549 U.S. at 516-20. This Court emphasized that Congress "'has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before'" and that "a litigant to whom Congress has 'accorded a procedural right to protect his concrete interests' ... 'can assert that right without meeting all the normal standards for redressability and immediacy.'" *Id.* at 516 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring)), 517-18. *Second*, Congress had "authorized [that] type of challenge *to EPA action*." *Id.* at 516 (emphasis added). The Court explained that agencies implement regulatory schemes incrementally, "whittl[ing] away" at the underlying problem over time, such that the procedural relief at issue (requiring EPA to reconsider its refusal to regulate) might well trigger systemic, nationwide regulation to address the asserted underlying injuries. *Id.* at 524.

Those considerations do not support standing here. Plaintiffs invoke no congressionally-conferred procedural right and the redress they seek is not connected to any future agency action. Instead, they ask the courts to fashion and enforce an abstract common law nuisance action, and then assume judicial responsibility for redressing the alleged nuisance without any involvement of the political branches.

Contrary to the Second Circuit's opinion, plaintiffs cannot establish that it is "'likely,' as opposed to merely 'speculative,'" that a favorable decision will redress their alleged injuries, *Lujan*, 504 U.S. at 561 (citation omitted), for at least two reasons.

First, any marginal relief plaintiffs hope to gain by an injunction is purely "speculative" because it is based on conjecture about energy markets and the decisions of innumerable third parties. In particular, capping the emissions of these particular defendants is "as likely to exacerbate as to ameliorate" the allegedly injurious effects of climate change as corporations shift operations elsewhere to avoid regulation and access more favorable fuel prices. Tribe, *supra*, at 17. Redressability has been found lacking in far less speculative scenarios. *See, e.g., ASARCO, Inc. v. Kadish*, 490 U.S. 605, 614 (1989) (plurality) (Kennedy, J.) (redress was "pure speculation" where taxpayers challenged law allegedly depriving State of educational funds because State might shift funds rather than pass savings along to constituents).

Second, even if capping these defendants' emissions would incrementally reduce global emissions, there is no reasonable possibility that the change would perceptibly diminish plaintiffs' alleged injuries. *See* Tribe, *supra*, at 19 ("[A] stringent injunction will have no statistically significant impact on global temperatures ...."). After all, defendants' carbon emissions only constitute roughly one percent of worldwide emissions—and *falling* due to the accelerating increases in the developing world.[16]

Plaintiffs' standing is based on the notion that *every* reduction in emissions (no matter how slight) marginally "reduces the risks of injury." Compl. ¶4. But Article III requires more than conjecture and statistically insignificant generalities. *See, e.g., Lujan*,

---

[16] *See* Compl. ¶2; I.P.C.C., *2007 Synthesis Report* 16; Energy Information Administration, U.S. Department of Energy, *International Energy Outlook 2009*, at 109–11 (May 2009).

504 U.S. at 571 (plurality) (redressability lacking where cutting 10% of funding for allegedly harm-producing development project would not necessarily "do less harm to [endangered] species"); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 186-87 (2000) (deterrent value of fines for excessive discharge of extremely toxic chemicals could at some point become so insignificant that they cease to provide "sufficient deterrence to support redressability"). Of course, on the margin, every molecule of CO_2 eliminated *theoretically* slows the centuries-long cumulative effects of CO_2, but if that were enough to establish redressability, plaintiffs could "wield the hammer of federal common law against any emitter of their choosing," regardless of how trivial its emissions. Tribe, *supra*, at 16. Taken to its logical conclusion, this would permit suit to remove a single car from the road or turn off a lone light bulb.

If the traditional redressability inquiry means anything, it cannot be satisfied simply by seeking *any* amount of reduction in defendants' emissions—no matter how small relative to worldwide emissions and regardless of offsets by predictable shifts to non-capped energy sources. As this Court has repeatedly stressed, "[s]tanding is not 'an ingenious academic exercise in the conceivable.'" *Lujan*, 504 U.S. at 566 (citation omitted). Plaintiffs here have not shown that relief is remotely "likely." And the absence of likely redressability—and thus Article III standing—underscores that the courts are an inappropriate forum to address the extraordinarily complex and manifestly global and political issues raised by climate change.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

GREGORY GARRE
Counsel of Record
RICHARD P. BRESS
GABRIEL K. BELL
LATHAM & WATKINS LLP
555 11TH STREET, NW
SUITE 1000
WASHINGTON, DC 20004
(202) 637-2200
gregory.garre@lw.com
Counsel for Amicus Curiae

September 3, 2010

AMICUS CURIAE BRIEF

170

(11)

Supreme Court, U.S.
FILED
SEP 3 - 2010
OFFICE OF THE CLERK

No. 10-174

IN THE
Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY INC., *et al.*,
Petitioners,

v.

STATE OF CONNECTICUT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE EDISON ELECTRIC INSTITUTE, AMERICAN PUBLIC POWER ASSOCIATION, AND NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

EDWARD H. COMER
Vice President and
General Counsel
WILLIAM L. FANG
EDISON ELECTRIC INSTITUTE
701 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 508-5615

CHRISTOPHER T. HANDMAN*
DOMINIC F. PERELLA
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5719
chris.handman@hoganlovells.com

*Counsel of Record

Counsel for Amici Curiae

(additional counsel listed on inside cover)

WILSON-EPES PRINTING CO., INC – (202) 789-0096 – WASHINGTON, D.C. 20002

Additional counsel:

SUSAN N. KELLY
Vice President of Policy Analysis and General Counsel
AMERICAN PUBLIC POWER ASSOCIATION
1875 Connecticut Avenue, N.W., Suite 1200
Washington, D.C. 20009-5715
(202) 467-2933

RAE E. CRONMILLER
Environmental Counsel
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION
4301 Wilson Boulevard
Arlington, VA 22203-1860
(703) 907-5500

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. THE POLITICAL BRANCHES ENGAGE IN COMPREHENSIVE GHG-EMISSIONS REGULATION 6

II. INJECTING "JUDICIAL REGULATION" INTO THIS MIX WOULD SUBSTANTIALLY UNDERMINE THE REGULATORY SCHEME 12

A. Judges Adjudicating Individual Nuisance Lawsuits Cannot Make Comprehensive Policy 13

B. Judges Cannot Tie Emissions Mandates To The Tools Needed To Achieve Them 14

C. Judicial Regulation Risks Economic Harm By Causing The Costs Of Cutting GHG Emissions To Rise Quickly And Substantially 18

D. Judicial Regulation Is Inappropriate From An Institutional Perspective 20

III. THE SECOND CIRCUIT'S APPROACH WOULD FORCE THE COURTS INTO A QUASI-PERMANENT OVERSIGHT ROLE 21

TABLE OF CONTENTS—Continued

Page

IV. CONGRESS HAS DISPLACED FEDERAL COMMON LAW IN THIS AREA 23

CONCLUSION 26

TABLE OF AUTHORITIES

Page

Cases:

Angela R. by Hesselbein v. *Clinton*, 999 F.2d 320 (8th Cir. 1993) 22

City of Milwaukee v. *Illinois*, 451 U.S. 304 (1981) 21, 23, 24

Entergy La., Inc. v. Louisiana Pub. Serv. Comm'n, 539 U.S. 39 (2003) 2

Illinois v. *City of Milwaukee*, 406 U.S. 91 (1972) 24

In re Gaston & Snow, 243 F.3d 599 (2d Cir. 2001) 25

Massachusetts v. *EPA*, 549 U.S. 497 (2007) 7, 8, 24

National Cable & Telecomms. Ass'n v. *Gulf Power Co.*, 534 U.S. 327 (2002) 2

New York v. *FERC*, 535 U.S. 1 (2002) 2

Sandin v. *Conner*, 515 U.S. 472 (1995) 22

Texas v. *Pankey*, 441 F.2d 236 (10th Cir. 1971) 24

Constitution:

U.S. Const. art. III, § 2 4

TABLE OF AUTHORITIES—Continued

Page

Statutes:

42 U.S.C. § 7408 6

42 U.S.C. § 7409 6

42 U.S.C. § 7410 6

42 U.S.C. § 7411(b)(1)(A) 6

42 U.S.C. § 7411(d) 6

42 U.S.C. § 7475(a)(4) 7

42 U.S.C. § 7602(g) 6

42 U.S.C. § 7661 7

Legislative Materials:

Legislative Proposals to Reduce Greenhouse Gas Emissions: An Overview: Hearing Before the Subcomm. on Energy and Air Quality of the H. Comm. on Energy & Commerce, 110th Cong. (June 19, 2008) (statement of Edison Electric Inst. President Thomas R. Kuhn) 14, 15, 20

Rule:

S. Ct. R. 37.6 1

TABLE OF AUTHORITIES—Continued

Page

Regulatory Materials:

Environmental Prot. Agency, *Prevention of Significant Deterioration & Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31514 (2010) 7, 8, 12

Final Order, *In re Application of Appalachian Power Co.*, No. PUE-2009-00030 (Va. S.C.C. July 15, 2010)..... 12

Order, *In re Application of Ky. Power Co. for Approval of Renewable Energy Purchase Agreement*, No. 2009-00545, 2010 WL 2640998 (Ky. P.S.C. June 28, 2010)..... 17

Other Authorities:

Carbon Control News, *FERC Faces Climate Challenge* (Oct. 28, 2008) 18

Congressional Budget Office, *Policy Options for Reducing CO_2 Emissions* (Feb. 2008) 17

Congressional Research Serv., *The Role of Offsets in a Greenhouse Gas Emissions Cap-and-Trade Program: Potential Benefits & Concerns* (Apr. 2008)..... 18

Department of Energy, Energy Info. Admin., *Voluntary Reporting of Greenhouse Gases 2005* (Dec. 2006)..... 3

TABLE OF AUTHORITIES—Continued

Page

Edison Elec. Inst., *Understanding EEI's Global Climate Change Points of Agreement* (Feb. 2009) 16

Electric Power Research Inst., *Modeling the Technology Mix* (2007) 19

Electric Power Research Inst., *The Power to Reduce CO_2 Emissions: The Full Portfolio* (2007) 16

Environmental Prot. Agency, *CAA National Enforcement Programs* (May 2010) 24

Environmental Prot. Agency, *DOT, EPA Set Aggressive National Standards for Fuel Economy & First Ever Greenhouse Gas Emission Levels for Passenger Cars & Light Trucks* (Apr. 1, 2010) 9

Environmental Prot. Agency, *EPA Sets Thresholds for Greenhouse Gas Permitting Requirements/Small Businesses & Farms Will Be Shielded* (May 13, 2010) 8

Environmental Prot. Agency, *Final Rule: Prevention of Significant Deterioration & Title V Greenhouse Gas Tailoring Rule, Fact Sheet* (May 13, 2010) 9

TABLE OF AUTHORITIES—Continued

Page

Environmental Prot. Agency, *Understanding the Clean Air Act* (2008) 10

Exec. Order No. S-21-09 (Cal. Sept. 15, 2009) 16

Federal Energy Regulatory Comm'n, *Renewable Portfolio Standards (RPS) & Goals* (updated Aug. 2010) 11

Institute for Elec. Efficiency, *State Electric Efficiency Regulatory Frameworks* (July 2010) 11

Pew Center on Global Climate Change, *Emissions Caps for Electricity* (updated June 2010) 11

Pew Center on Global Climate Change, *Greenhouse Gas Emissions Targets* (updated June 2010) 10

Pew Center on Global Climate Change, *North American Cap & Trade Initiatives* (2010) 17

Pew Center on Global Climate Change, *Regional Initiatives* (updated July 2010) 10

Restatement (Second) of Torts § 821B(1) (1979) 21

IN THE

Supreme Court of the United States

No. 10-174

AMERICAN ELECTRIC POWER COMPANY INC., *et al.*,
Petitioners,

v.

STATE OF CONNECTICUT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE EDISON ELECTRIC INSTITUTE, AMERICAN PUBLIC POWER ASSOCIATION, AND NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST[1]

Edison Electric Institute ("EEI") is the national association of U.S. shareholder-owned electric utili-

[1] Pursuant to Rule 37.6, counsel for *amici* certifies that no party, or counsel for a party, authored or paid for this brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amici*, their members, or their counsel made a monetary contribution to the brief. This brief is filed with the consent of all parties. Counsel gave notice to all parties at least 10 days before filing

ties and their affiliates and industry associates worldwide. Its members are located in 49 states and the District of Columbia. They generate approximately three-quarters of all electricity produced by the nation's electric companies and serve about 70 percent of all retail customers in the nation. Organized in 1933, EEI represents its members' interests and advocates equitable policies in legislative and regulatory arenas.

The American Public Power Association ("APPA") represents the nation's more than 2,000 not-for-profit, publicly owned electric utilities, doing business in every state except Hawaii and serving more than 45 million Americans. APPA's members are units of state or local government.

The National Rural Electric Cooperative Association ("NRECA") represents the nation's 930 not-for-profit, customer-owned rural electric cooperatives, which serve 42 million end users in 47 states.

Amici—whose member companies and utilities collectively serve 94 percent of the electric customers in the nation—appear regularly before this Court in cases presenting issues of great importance to the electric industry and the U.S. economy as a whole. *See, e.g.*, *Entergy La., Inc.* v. *Louisiana Pub. Serv. Comm'n*, 539 U.S. 39 (2003); *New York* v. *FERC*, 535 U.S. 1 (2002); *National Cable & Telecomms. Ass'n* v. *Gulf Power Co.*, 534 U.S. 327 (2002). This, without question, is such a case. *Amici*'s member companies recognize the growing concerns regarding the effects of climate change and are extensively engaged in efforts to reduce greenhouse gas ("GHG") emissions and to support federal legislation designed to coordinate further reductions. Indeed, the electric-utility industry leads all other sectors in reducing, avoiding,

or sequestering GHG emissions. *See* Department of Energy, Energy Info. Admin., *Voluntary Reporting of Greenhouse Gases 2005* at 9 (Dec. 2006).[2] Because the predicate for this lawsuit is *global* warming, it is vital that GHG regulation be a *comprehensive* regime, undertaken with an eye toward all sources of GHG emissions and the most efficient and practical ways to reduce those emissions. Only a comprehensive approach can allow for sensible choices regarding (i) how to allocate emissions-reduction responsibilities and emissions credits across economic sectors, (ii) how to foster the technology necessary to facilitate reductions, and (iii) how to ensure that reductions do not saddle consumers with astronomical prices and drive industries and jobs either from one region of the country to another, or overseas.

Federal and state legislators and regulators have been working for years to implement these sorts of multifaceted emissions policies. The *ad hoc* adjudicatory approach approved by the Second Circuit would undermine those efforts. It is the antithesis of the comprehensive strategy the nation needs. The Court should grant the writ.

SUMMARY OF ARGUMENT

1. Electric utilities are already subjected to comprehensive regulation by the political branches at both the federal and state level. These legislators and expert agencies consider the various ways to produce electricity and balance their costs—including environmental costs—against their benefits. First among these regulatory authorities is the

---

[2] *Available online at* http://www.eia.doe.gov/oiaf/1605/vrrpt/summary/pdf/0608(2005-s).pdf (last checked Aug. 20, 2010).

federal government, which has the authority to regulate GHGs under the Clean Air Act and is exercising that authority. States, too, have targeted GHGs through emissions-reduction initiatives and renewable-energy requirements that necessarily reduce reliance on GHG-emitting fuel sources. And under traditional utility regulation, state public-utility commissions rule on the relative economic, energy, and environmental considerations of fuel choices—including alternative energy sources and technologies—as part of the rate-review process.

2. The essential attributes that allow the political branches to craft effective and comprehensive GHG regulations are attributes that the federal judiciary lacks: subject-matter expertise, political accountability, and—most important—the ability to implement rules that apply to all sources within, and across, industries. After all, a federal district court does not enjoy a roving commission to police GHG emissions. Instead, the federal courts can resolve only those specific "cases" and "controversies" that parties initiate. U.S. Const. art. III, § 2. But nuisance suits of the type the Second Circuit upheld can be brought by just about any plaintiff against just about any emissions source, of which there are millions in the United States alone. The Second Circuit's decision therefore opens the door to extraordinarily fragmented judicial regulation of GHG emissions. This *ad hoc* approach would undercut ongoing efforts by federal and state legislators and regulators to develop GHG-emissions regimes that take into account the costs of emissions reduction and the technological tools available to reach emissions goals.

The Second Circuit's approach would also be expensive—far more costly than a comprehensive national regime. Without new technologies enabling emissions reductions, GHG sources would have to take drastic steps to make quick cuts. Those steps could cause electricity prices to rise quickly and substantially. And of course, allowing GHG-regulation-by-nuisance-suit opens the door to large monetary judgments against the electric industry and other industries—costs that ultimately would be paid by electricity customers.

3. The approach endorsed by the Second Circuit is flawed for yet another reason: It likely would embroil the federal district courts in long-term oversight of standing emissions decrees. This sort of decades-long oversight is not the highest and best use of the federal judiciary.

The bottom line is that GHG regulation is too consequential, and too complex, to address on a piecemeal basis. That, no doubt, is why Congress has already stepped in and displaced federal common law in this area. Congress and the U.S. Environmental Protection Agency ("EPA") have taken actions—including significant steps since the decision below issued—that speak directly to the concerns plaintiffs seek to address through litigation. In the face of those actions, it is not the courts' place to fashion *ad hoc* rules through the largely standardless mechanism of public nuisance law. This Court should grant the petition to ensure that the intricate policy questions surrounding GHG continue to be resolved by the political branches in the first instance.

ARGUMENT

I. THE POLITICAL BRANCHES ENGAGE IN COMPREHENSIVE GHG-EMISSIONS REGULATION.

The political branches already do what no single judge can when it comes to regulating GHG emissions: comprehensively balance the costs of those emissions and alternative energy sources against their benefits. Permitting the judicial branch to recalibrate that balance—guided not by statutory language and expert agency determinations but amorphous common-law adjudication—would be both unworkable and improper.

1. Congress crafted the Clean Air Act as a comprehensive regime for regulating air pollutants. The Act broadly defines "air pollutants," *see* 42 U.S.C. § 7602(g), authorizes EPA to list certain pollutants that "endanger public health or welfare," *id.* § 7408, and requires States to regulate emissions of listed pollutants to prevent pollution from exceeding EPA standards. *Id.* §§ 7409-7410. But that is only the beginning of the wide-ranging regulatory regime the Act creates. It also authorizes EPA to list categories of "stationary sources"—*i.e.*, non-mobile emissions sources, such as power plants—that "cause[ ], or contribute[ ] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare," and to establish federal performance standards for new or modified sources that fall within the listed category. *Id.* § 7411(b)(1)(A). It requires states to issue performance standards for existing stationary sources in some circumstances. *Id.* § 7411(d). It requires that any major new or modified "emitting facility" obtain a permit to ensure

prevention of significant deterioration ("PSD") of air quality and to certify that the facility will use "the best available control technology for each pollutant subject to regulation" under the Act. *Id.* § 7475(a)(4). And it requires operators of large stationary sources to apply for "Title V" operating permits that aggregate all of the Act's requirements. *Id.* § 7661.

In *Massachusetts* v. *EPA*, 549 U.S. 497, 532 (2007), this Court confirmed that carbon dioxide (CO_2), the principal greenhouse gas, is among the many air pollutants that the Clean Air Act authorizes EPA to regulate. Since the *Massachusetts* decision—and particularly since the Second Circuit's decision below—EPA has taken multiple steps to do just that.

In June 2010, EPA adopted final "tailoring" rules providing that large GHG sources subject to the PSD and Title V programs must address GHG emissions in their permits starting next year, and setting a schedule for regulation of smaller sources. *See* EPA, *Prevention of Significant Deterioration & Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31514 (June 3, 2010) ("*Tailoring Rule*"). Power plants are scheduled to be among the very first emissions sources regulated under those rules, beginning in January 2011. *Id.* at 31516. Thus, beginning a mere four months from now, certain new and modified power plants that qualify as "[m]ajor emitting facilit[ies]" will be required to obtain permits certifying that they are "subject to the best available control technology" for GHGs. 42 U.S.C. § 7475(a)(4).

Underscoring the flexibility of the political branches to consider all forms of evidence bearing on every facet of the issues they seek to address, EPA explained that the new rules are the product of

"extensive study, debate and hundreds of thousands of public comments." EPA, *EPA Sets Thresholds for Greenhouse Gas Permitting Requirements/Small Businesses & Farms Will Be Shielded* (May 13, 2010) (statement of EPA Administrator Lisa P. Jackson).[3] EPA also explained why it decided to take an incremental approach: " 'Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop;' * * * instead they may permissibly implement such regulatory programs over time, 'refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed.' " *Tailoring Rule*, 75 Fed. Reg. at 31544 (quoting *Massachusetts*, 549 U.S. at 524). And it stated that its goal was to "minimize[ ] economic burdens" by allowing permitting agencies to take "energy, environmental, and economic considerations into account" when determining the best available control technology for large sources to lower their emissions. *Id.* at 31590.

The new large-source rules are just one of several GHG-regulating initiatives EPA has launched since this Court's decision in *Massachusetts*. The Solicitor General's brief in support of petitioners catalogues these initiatives in detail. *See* U.S. Br. 25-27. Among other things, the agency has "commit[ted] to undertake another rulemaking, to begin in 2011 and conclude no later than July 1, 2012," that will consider "additional step[s] for phasing in GHG permitting" and that may eventually result in permitting requirements for emissions sources as small as 50,000 tons per year. EPA, *Final Rule: Prevention of*

---

[3] *Available online at* http://yosemite.epa.gov/opa/admpress nsf/0/EA1BF25579E541B1852577220055C20C (last checked Aug. 21, 2010).

Significant Deterioration & Title V Greenhouse Gas Tailoring Rule, Fact Sheet at 2-3 (May 13, 2010).[4] The agency likewise has stated that it is considering whether to subject stationary sources to "new source performance standards" for CO_2—in other words, whether to set standards for the amounts of CO_2 a new source can produce. *See* U.S. Br. 29-30; 42 U.S.C. § 7411.

The important point is that Congress has already delegated authority to EPA to regulate GHG emissions. And while that alone justifies dismissing this federal common-law action, *see infra* at 23, that is not all that has occurred. On the contrary, EPA has recognized its authority and has already promulgated rules that regulate GHG emissions. And the agency has extended its reach beyond stationary sources: In April 2010, EPA and the Department of Transportation "set the first-ever national greenhouse gas emissions standards * * * [for] all new passenger cars and light trucks sold in the United States." EPA, *DOT, EPA Set Aggressive National Standards for Fuel Economy & First Ever Greenhouse Gas Emission Levels for Passenger Cars & Light Trucks* (Apr. 1, 2010).[5]

2. Under the Clean Air Act, states have their own role to play in the burgeoning regulation of GHG emissions. Indeed, one of the key components to the Act's regulatory scheme is Congress's deliberate choice to let state regulators "take the lead in carry-

---

[4] *Available online at* http://www.epa.gov/nsr/documents/20100413fs.pdf (last checked Aug. 20, 2010).

[5] *Available online at* http://yosemite.epa.gov/opa/admpress.nsf/8b770facf5edf6f185257359003fb69e/562b44f2588b871a852576f800544e01!OpenDocument (last checked Aug. 20, 2010).

ing out the Clean Air Act" and "enforc[ing] Clean Air Act regulations." EPA, *Understanding the Clean Air Act* (2008).[6] After all, the state political branches are uniquely well suited to crafting "solutions for pollution problems that require special understanding of local industries, geography, housing, and travel patterns, as well as other factors." *Id.*

Thirty-three states participate in regional initiatives—including the Midwest Greenhouse Gas Reduction Accord, the Western Climate Initiative, and the Regional Greenhouse Gas Initiative ("RGGI")—that have as their goal limiting emissions through long-term reduction targets. *See* Pew Center on Global Climate Change, *Regional Initiatives* (updated July 2010) ("*Pew Regional Map*").[7] Twenty-three states have adopted GHG-emissions targets calling for dramatic reductions over time. *See* Pew Center on Global Climate Change, *Greenhouse Gas Emissions Targets* (updated June 2010).[8] Colorado's law, for example, sets the statewide GHG-emissions goal at 20 percent below 2005 levels by 2020 and 80 percent below 2005 levels by 2050. *Id.* And at least five states have adopted current emissions-control standards for electric power plants that cap emissions, require plants to cut emissions, or both. *See*

---

[6] *Available online at* http://www.epa.gov/air/peg/understand.html (last checked Aug. 20, 2010).

[7] *Available online at* http://www.pewclimate.org/what_s_being_done/in_the_states/regional_initiatives.cfm (last checked Aug. 20, 2010).

[8] *Available online at* http://www.pewclimate.org/what_s_being_done/in_the_states/emissionstargets_map.cfm (last checked Aug. 20, 2010).

Pew Center on Global Climate Change, *Emissions Caps for Electricity* (updated June 2010).[9]

Nor have these regulatory efforts stopped at emissions mandates, caps, or trading regimes. At least 30 states impose renewable energy requirements—*i.e.*, requirements that by a certain date, a specified percentage of the state's electricity be produced using wind, hydroelectric, solar, and other power sources that do not generate greenhouse gases. *See* Federal Energy Regulatory Comm'n, *Renewable Portfolio Standards (RPS) & Goals* (updated Aug. 2010).[10] These requirements will reduce GHG emissions as electrical generation from renewable sources grows. Twenty-one states have adopted performance incentives to promote efficient electric-power end use. *See* Institute for Elec. Efficiency, *State Electric Efficiency Regulatory Frameworks* at 1 (July 2010).[11] And more than a dozen states have passed laws ensuring that utilities are not punished with lower cost recovery when their customers end up using less energy as a result of efficiency gains. *See id.* at 2-3. Moreover, under traditional utility regulation (which applies to utilities serving two-thirds of the electric customers in the nation), state regulatory commissions approve utility rates. As part of that process, they rule directly on the relative economic, energy, and environmental considerations involved in different fuel

---

[9] *Available online at* http //www pewclimate org/what_s_being _done/in_the_states/cap_and_offset_map.cfm (last checked Aug 20, 2010)

[10] *Available online at* http://www ferc gov/market-oversight/ othr-mkts/renew/othr-rnw-rps.pdf (last checked Aug 20, 2010).

[11] *Available online at* http://www.edisonfoundation net/IEE/ issueBriefs/IEE_StateRegulatoryFrame_0710 pdf (last checked Aug 20, 2010)

choices, including alternative energies and technologies. *See, e.g.*, Final Order, *In re Application of Appalachian Power Co.* at 19-21, No. PUE-2009-00030 (Va. S.C.C. July 15, 2010) (evaluating cost-effectiveness of utility's carbon-capture project).

* * *

The policy-oriented decisions described above are of the sort that expert agencies and commissions are well qualified to make. *See Tailoring Rule*, 75 Fed. Reg. at 31548. After all, these decisions must be implemented in a way that reduces GHG emissions while "minimiz[ing] economic burdens" for industry and consumers. *Id.* at 31590. They must be tied to emerging technologies, apply innovative programs like market-based tools and offsets, and take into account the effects regulation will have on existing energy sources. *See infra* at 13-20. These are unmistakably regulatory endeavors committed to the political branches. As we explain below, that is precisely why judicial involvement in GHG regulation is both unworkable and unnecessary.

II. INJECTING "JUDICIAL REGULATION" INTO THIS MIX WOULD SUBSTANTIALLY UNDERMINE THE REGULATORY SCHEME.

The key attributes that allow the political branches to effectively regulate GHG emissions—subject-matter expertise, political accountability, institutional consistency, and coordinated comprehensive planning—are absent in the federal judiciary. A single federal district court judge, called upon to resolve a nuisance lawsuit instituted at the whim of a plaintiff against a subset of defendants, is simply

unable to formulate the type of comprehensive GHG-emissions policy that is necessary to redress the global, aggregative phenomenon at issue here. This Court should grant the petition to clarify that the federal judiciary's role in regulating GHG emissions is no different than the one it plays in all other matters covered by the Clean Air Act: to exercise judicial review over regulatory decisions made under laws enacted by the political branches, not to formulate those decisions in the first instance.

A. Judges Adjudicating Individual Nuisance Lawsuits Cannot Make Comprehensive Policy.

As an initial matter, GHG-regulation-by-nuisance-suit would be neither comprehensive nor rational. Different judges could impose completely different emissions constraints or caps, and different time frames for compliance, even within the same industry. Some industries could face stringent mandates to cut their GHG emissions "by a specified percentage each year for at least a decade," Pet. App. 178, and others not. Indeed, portions of the *same* industry could face caps and others not, depending on whom a given plaintiff chooses to sue and where. And of course, subsets of an industry could face additional draconian punishments—including monetary damages and even plant-shutdown requirements—constrained only by individual judges' conceptions of what level of GHG emissions is "unreasonable."

It makes little sense to encourage a landscape in which Company *A* faces strict court-mandated emissions limits and monetary outlays while Company *B* faces more finely calibrated regulation under the

Clean Air Act, even though both are from the same industry, produce the same emissions, and have the same effect on the nation's total GHG output. *See Legislative Proposals to Reduce Greenhouse Gas Emissions: An Overview: Hearing Before the Subcomm. on Energy and Air Quality of the H. Comm. on Energy and Commerce*, 110th Cong. (June 19, 2008) (statement of EEI President Thomas R. Kuhn at 12) ("Kuhn Testimony")[12] ("[A] ton of GHGs is a ton of GHGs, no matter where it is reduced, avoided, or stored."). That is just one of many reasons why the GHG problem is best addressed by regulation.

B. Judges Cannot Tie Emissions Mandates To The Tools Needed To Achieve Them.

There is a second, equally important reason why judicial GHG regulation would be detrimental: Judges lack the institutional competence to link emission targets to the new technologies, taxes, and market-based tools that can facilitate GHG reductions.

1. *Technology*. Electric-power companies spend billions of dollars each year on new technologies and operational measures designed to protect the environment, and the result has been steep cuts in air emissions. However, there is currently no feasible technology to reduce fossil-fuel power plants' CO_2 emissions, in contradistinction to the technologies available to control traditional air pollutants. *See* Kuhn Testimony at 4, 33-36. Thus GHG-emissions cuts—especially the sorts of sharp reductions con-

---

[12] *Available online at* http://energycommerce.house.gov/images/stories/Documents/Hearings/PDF/Testimony/EAQ/110-eaq-hrg.061908 Kuhn-testimony pdf (last checked Aug 20, 2010).

templated to mitigate global warming—cannot be instituted overnight. On the contrary, they will require the adoption of an array of advanced no- or low-carbon technologies, including increased use of wind, solar, incremental hydroelectric and nuclear power, as well as carbon capture and geologic sequestration ("CCS") for coal and natural gas. Those technologies, in turn, take years to develop and deploy commercially. Technologies such as wind and solar are intermittent resources and expensive. Kuhn Testimony at 29-30. Additional nuclear power requires substantial up-front investment and long lead times for construction. *Id.* at 32-33. All of these power sources will be subject to "technical, economic, and regulatory challenges," including "transmission siting, building, and integration constraints." *Id.* at 30-31. And emissions-reducing approaches such as CCS are still in the demonstration stage; they will require billions of dollars, and long-term research and development, before they are deployable at reasonable prices. *See id.* at 32-36.

A recent study by the Electric Power Research Institute ("EPRI") throws the connection between these new technologies and further GHG reductions into stark relief. The study concluded that "the aggressive development and deployment of several advanced technologies"—including water and solar power, advanced light-water nuclear reactors, and CCS—"could reduce U.S. electricity sector CO_2 emissions by roughly 45% by 2030," compared to 2007 figures. EPRI, *The Power to Reduce CO_2 Emissions: The Full Portfolio* at 2-3 (2007) ("*EPRI PRISM*

Study").[13] But, the study warned, this sort of reduction—which is in line with the GHG goals many states have set, *see supra* at 10—will only be possible if industry and regulators work together to put in place an "expanded and multi-decade [research and development] program." *Id.* at 3-14. Without that coordinated public-private effort and investment, aggressive CO_2 cuts would be either impossible or exorbitantly expensive.

In short, "[f]or any carbon policy to reduce GHG emissions effectively * * * compliance timeframes must correspond to the availability of technologies needed to reduce emissions." EEI, *Understanding EEI's Global Climate Change Points of Agreement* at 2 (Feb. 2009) ("*Understanding Points of Agreement*").[14] Legislators and regulators understand that. Working pursuant to federal and state laws, they have taken steps to align reduction goals with the availability of technologies that will facilitate them. For example, California has mandated that one-third of electricity sales come from renewable sources by 2020—and it has done so on the explicit rationale that "substantially increased development of renewable energy" is "needed to meet the greenhouse reduction goal of 1990 levels by 2020 and 80 percent below 1990 levels by 2050." Exec. Order No. S-21-09 (Cal. Sept. 15, 2009).[15]

Legislators and regulators also can (and do) design financial incentives—including direct incentives for

---

[13] *Available online at* http://mydocs.epri.com/docs/public/DiscussionPaper2007.pdf (last checked Aug. 20, 2010).

[14] *Available online at* http://www.eei.org/ourissues/TheEnvironment/Climate/Documents/PointsofAgree-EEIcommunFINAL.pdf (last checked Aug. 20, 2010)

[15] *Available online at* http://gov.ca.gov/press-release/13273/ (last checked Aug. 20, 2010).

renewable development—to help new technology reach the market. *See supra* at 10-11. Finally, they can (and do) decide whether particular investments in renewable-energy technology are worthwhile given their costs to customers. *See, e.g.*, Order, *In re Application of Ky. Power Co. for Approval of Renewable Energy Purchase Agreement*, No. 2009-00545, 2010 WL 2640998 (Ky. P.S.C. June 28, 2010) (denying utility permission to add wind power to its portfolio on the grounds that it would not produce the lowest cost for consumers).

The judiciary, of course, lacks the institutional competence to take any of these crucial steps. If a single judge were to impose emissions mandates through an individual nuisance suit, those mandates would be formulated in the vacuum of a single lawsuit. They would be untethered from industry realities familiar to the legislators and regulators who grapple with these issues every day.

2. *Taxes or market-based tools.* Nor do judges have at their disposal the taxes or market-based regulatory tools that might incentivize or support emissions cuts in a cost-effective manner. Legislators and regulators across the nation (and world), for example, have considered emissions taxes and various approaches to emissions caps and offset mechanisms as a way to reduce emissions efficiently. *See, e.g.*, Congressional Budget Office, *Policy Options for Reducing CO_2 Emissions* (Feb. 2008); Pew Center on Global Climate Change, *North American Cap & Trade Initiatives* (2010).[16] Offsets authorize industry to make cuts in the most efficient way and at the

---

[16] *Available online at* http://www.pewclimate.org/what_s_being_done/in_the_states/NA-capandtrade (last checked Aug. 20, 2010).

most appropriate location, domestically and internationally. *See generally* Congressional Research Serv., *The Role of Offsets in a Greenhouse Gas Emissions Cap-and-Trade Program: Potential Benefits & Concerns* (Apr. 2008).[17] A judge cannot begin to consider—much less design or impose—such systems.

C. Judicial Regulation Risks Economic Harm By Causing The Costs Of Cutting GHG Emissions To Rise Quickly And Substantially.

Dramatically reducing the nation's GHG emissions will be expensive no matter what the approach. But the cost may well be much higher if judges issue emissions-reduction mandates that are divorced from technological progress.

That is so in part because the electric-power industry (among others) could be forced to try to meet short-term emissions targets by switching to natural gas, which is not a cost-effective long-term approach. As the then-chairman of the Federal Energy Regulatory Commission ("FERC") warned two years ago, "poorly-designed" GHG rules that "exclude the role of coal and nuclear power * * * would undermine" regulators' ability to "ensure adequate electricity supplies at a reasonable price." *See* Carbon Control News, *FERC Faces Climate Challenge* (Oct. 28, 2008) (statement of Joseph T. Kelliher) (available upon request).

A recent EPRI study compared the cost of reaching aggressive long-term GHG-reduction targets under

---

[17] *Available online at* http://www.nationalaglawcenter.org/assets/crs/RL34436.pdf (last checked Aug. 20, 2010).

two scenarios: one in which the United States comprehensively encourages new technologies as part of its regulatory scheme, and another in which the nation is less effective in bringing these technologies to market. The study concluded that under the second scenario, "natural gas [would] become[ ] the dominant generation fuel by 2030, and CO_2 reduction policies [would] only be met through large reductions in electricity demand, placing severe constraints on economic growth." EPRI, *Modeling the Technology Mix* at 18 (2007).[18] The study also concluded that real electricity prices would rise nearly *six times* more by 2050 under the second scenario—260 percent, versus 45 percent. *Id.* That is because natural gas—the only fuel besides nuclear, hydropower, and coal to provide the around-the-clock generation needed to serve the electric grid—produces about half as much CO_2 as coal for an equivalent amount of energy. This is too high an emissions rate to satisfy long-term GHG reduction goals. Thus the expenses involved in a "dash to gas"—including extensive capital investment in new natural-gas pipeline transportation and generating facilities—would be wasteful. The new facilities would have to be replaced or retrofitted long before the end of their useful lives by investing in even lower-emitting technologies (if commercially available) to achieve long-term reduction goals. *See generally EPRI PRISM Study.*

Judicial regulation, which by definition cannot tie emissions mandates to technological incentives, is tailor-made to produce the vastly more expensive

---

[18] *Available online at* http://mydocs.epri.com/docs/Corporate-Documents/EPRI_Journal/2007-Fall/1016127_ModelingtheTechMix.pdf (last checked Aug. 20, 2010).

second scenario. As EEI recently told Congress: "If targets and timetables are not aligned with the nearer-term capabilities of expanded energy-efficiency and enhanced renewables, and the longer-term, widespread deployment of new nuclear plants and advanced coal and CCS technologies, the costs of compliance would become astronomical." Kuhn Testimony at 5. And the trickle-down effect of those costs could be severe: "[C]onsumers would be compelled to curtail their use of electricity dramatically, with resulting consequences to the economy and the standard of living." *Id.*

Judicial regulation would also produce added expense for another reason: It could open the door to large monetary judgments against the electric industry (among others). Such judgments would be inequitable, for the reasons already discussed. *See supra* at 13-14. But they would also raise costs further still, and would deplete the resources that businesses could otherwise invest in research, development, and deployment of next-generation fuel technologies. These costs would ultimately be paid by electricity customers, affecting the entire economy.

D. Judicial Regulation Is Inappropriate From An Institutional Perspective.

Finally, even putting aside its practical flaws, GHG-regulation-by-nuisance-lawsuit is inappropriate from an institutional perspective: It would place courts in the position of second-guessing the federal government and the states on how they balance the benefits versus the costs of using different fuels and technologies to produce electricity.

This lawsuit is a perfect example. The petitioner electric utilities face multiple layers of regulation—

under the Clean Air Act; regional accords such as the RGGI, to which numerous plaintiffs are parties; state climate laws; and state renewable portfolio standards. Through these laws and rules, the political branches have already made judgments about which emissions cuts are required, when they are required, and—most importantly—*what level of emissions is currently reasonable*. *Compare* Pet. App. 80a (opinion of court below, defining public nuisance as "an *unreasonable* interference with a right common to the general public") (emphasis added); Restatement (Second) of Torts § 821B(1) (1979). The nuisance approach thus requires judges to effectively revisit and second-guess regulatory determinations that the political branches have already made. But judges cannot meaningfully evaluate the adequacy of those determinations in the first instance (as opposed to reviewing those determinations under a deferential standard of review through administrative proceedings). As this Court has emphasized, the federal courts' occasional prerogative to create common law does not mean "courts are better suited to develop national policy in areas governed by federal common law than they are in other areas, or that the usual and important concerns of an appropriate division of functions between the Congress and the federal judiciary are inapplicable." *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 313 (1981) ("*Milwaukee II*").

III. THE SECOND CIRCUIT'S APPROACH WOULD FORCE THE COURTS INTO A QUASI-PERMANENT OVERSIGHT ROLE.

The Second Circuit's decision portends a colossal and unmanageable role for the federal courts. GHG reductions take time—the timeline for significant

cuts is measured in decades—and any judicial mandates likely would have to be revisited over the years, much like a consent decree, as technologies advance, demand for electricity changes, new power plants are built, and the underlying regulatory scheme shifts. *See Angela R. by Hesselbein* v. *Clinton*, 999 F.2d 320, 326 (8th Cir. 1993) ("Although a consent decree may save federal judicial resources in the short term, its entry is often only the beginning of extended judicial involvement."). Moreover, the Second Circuit's decision, if left intact, no doubt will lead to more lawsuits against industries that emit GHGs. The result: Multiple federal district courts could find themselves embroiled in near-permanent, ongoing oversight of standing decrees—at least to the extent those courts see fit to impose liability.

This Court has expressed skepticism about legal theories that would embroil the federal courts in oversight minutiae, stating that they "often squander[ ] judicial resources with little offsetting benefit to anyone." *Sandin* v. *Conner*, 515 U.S. 472, 482 (1995). There is no reason to drain the judiciary's resources in this way, particularly given that legislators and regulators are already addressing the problem in the very states that are plaintiffs in this litigation—*see Pew Regional Map* (highlighting GHG initiatives in Connecticut, New York, New Jersey, Rhode Island, Vermont, Wisconsin, Iowa, and California)—as well as in the many other states in which petitioners operate. Plaintiffs' attempt to deputize the federal courts as adjunct environmental regulators is as ill-considered as it is unnecessary.

IV. CONGRESS HAS DISPLACED FEDERAL COMMON LAW IN THIS AREA.

The comprehensive regulatory regime discussed above counsels, as a practical matter, against any attempt by the federal courts to impose emissions mandates of their own. But the regime's existence also highlights one of the Second Circuit's legal errors—namely, its conclusion that the federal courts have the authority to impose such mandates using the common law. They do not. Through the Clean Air Act, Congress chose to regulate GHGs and to delegate the details to the EPA. *See supra* at 6-9. EPA is actively exercising that authority. Thus "Congress has not left the formulation of appropriate federal standards to the courts through the application of often vague and indeterminate nuisance concepts." *Milwaukee II*, 451 U.S. at 318.

As petitioners rightly point out, Pet. 21, the authority Congress has claimed to regulate air pollution is sufficient to displace federal common law under *Milwaukee II*. The court below admitted that the Clean Air Act is a "comprehensive legislative scheme" to regulate air quality. Pet. App. 131a-132a; *compare Milwaukee II*, 451 U.S. at 317 (Clean Water Act was a "comprehensive regulatory program" to regulate water quality). And "Congress' intent in enacting" the Clean Air Act "was clearly to establish an all-encompassing program of [air] pollution regulation." *Milwaukee II*, 451 U.S. at 317.

Rather than examine the Clean Air Act, the Second Circuit focused on the fact that EPA's regulatory scheme under the Act remains a work in progress. *See* Pet. App. 135a-141a. But that misunderstands the issue. As petitioners correctly observe, the

displacement inquiry turns primarily "on Congress' decisions," not EPA's. Pet. 23. And this Court has made clear that Congress, through the Clean Air Act, authorized EPA to consider and implement GHG-emissions standards. Indeed, among other things, the Act authorizes EPA to (i) "require[ ] new or modified sources to install state-of-the-art pollution controls," (ii) "pursue judicial and administrative enforcement actions for injunctive relief and civil penalties," and (iii) "establish Federal standards of performance" for new stationary sources of emissions. EPA, *CAA National Enforcement Programs* (May 2010).[19] That EPA has not yet exercised every aspect of this power with respect to GHGs does not change the fact that Congress has given it the authority to do so. EPA is entitled to "implement [its] regulatory programs over time, 'refining [its] preferred approach as circumstances change and as [it] develop[s] a more nuanced understanding of how best to proceed.'" *Tailoring Rule*, 75 Fed. Reg. at 31544 (quoting *Massachusetts*, 549 U.S. at 524). Any judicial attempt to impose emissions mandates would not be "filling a gap"; it would be overwriting the regulatory scheme the political branches have affirmatively chosen. *Milwaukee II*, 451 U.S. at 324 n.18. That is precisely what the doctrine of displacement is designed to prevent.

Moreover, to the extent regulatory action under the Clean Air Act is relevant to the displacement analysis,[20] the gaps the Second Circuit perceived in the

---

[19] *Available online at* http://www.epa.gov/oecaerth/civil/caa/caaenfprog.html (last checked Aug. 20, 2010).

[20] *See Illinois* v. *City of Milwaukee*, 406 U.S. 91, 107 (1972) (observing that "new federal laws *and new federal regulations* may in time pre-empt the field of federal common law of

regulatory scheme have vanished. Every major EPA action to regulate GHGs under the Act has occurred *since* the Second Circuit's decision issued in September 2009. *See supra* at 6-9. Those actions will subject various industries, including certain power plants, to PSD and other regulation as soon as January 2011. *See supra* at 7. Thus the Second Circuit's pointed observations that EPA had made only "*proposed*" findings about the effect of GHG emissions, Pet. App. 140a (emphasis in original), that EPA "does not currently regulate carbon dioxide under the CAA," Pet. App. 135a, and that EPA might still "determine * * * that regulation of greenhouse gases is * * * inappropriate under the terms of the Act," *id.* at 140a-141a, are no longer accurate. And the conclusion the court reached on the basis of those observations—that "the CAA does not * * * regulate greenhouse gas emissions," *id.* at 144a—is inaccurate on its face. It is clear that the EPA has the statutory power to regulate GHGs, and it is doing so. Accordingly, there is no room for the federal courts to exercise their "severely limited" power to create common law. *In re Gaston & Snow*, 243 F.3d 599, 606 (2d Cir. 2001).

---

nuisance") (emphasis added); *Texas* v. *Pankey*, 441 F.2d 236, 241 (10th Cir. 1971). *See also* U.S. Br. at 24.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD H. COMER
Vice President and
General Counsel
WILLIAM L. FANG
EDISON ELECTRIC INSTITUTE
701 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 508-5615

CHRISTOPHER T. HANDMAN*
DOMINIC F. PERELLA
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5719

SUSAN N. KELLY
Vice President of Policy
Analysis and General
Counsel
AMERICAN PUBLIC POWER
ASSOCIATION
1875 Connecticut Ave., N.W.,
Suite 1200
Washington, D.C. 20009-5715
(202) 467-2933

RAE E. CRONMILLER
Environmental Counsel
NATIONAL RURAL ELECTRIC
COOPERATIVE ASSOCIATION
4301 Wilson Boulevard
Arlington, VA 22203-1860
(703) 907-5500

*Counsel of Record

Counsel for Amici Curiae

AMICUS CURIAE BRIEF

Supreme Court, U.S
FILED
SEP 03 2010
OFFICE OF THE CLERK

No. 10-174

IN THE

Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY, INC., *et al.*,
Petitioners,

v.

STATE OF CONNECTICUT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE STATES OF INDIANA, ARKANSAS, HAWAII, KANSAS, KENTUCKY, NEBRASKA, NORTH DAKOTA, OHIO, PENNSYLVANIA, SOUTH CAROLINA, UTAH, AND WYOMING, AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

GREGORY F. ZOELLER
Attorney General
THOMAS M. FISHER*
Solicitor General
HEATHER L. HAGAN
ASHLEY TATMAN HARWEL
Deputy Attorneys General

*Counsel of Record

Counsel for Amici *States*

(Additional counsel listed inside cover)

ADDITIONAL COUNSEL

DUSTIN MCDANIEL
Attorney General
State of Arkansas

MARK J. BENNETT
Attorney General
State of Hawaii

STEVE SIX
Attorney General
State of Kansas

JACK CONWAY
Attorney General
State of Kentucky

JON BRUNING
Attorney General
State of Nebraska

WAYNE J. STENEHJEM
Attorney General
State of North Dakota

RICHARD CORDRAY
Attorney General
State of Ohio

THOMAS W. CORBETT, JR.
Attorney General
State of Pennsylvania

HENRY D. MCMASTER
Attorney General
State of South Carolina

MARK L. SHURTLEFF
Attorney General
State of Utah

BRUCE A. SALZBURG
Attorney General
State of Wyoming

QUESTION PRESENTED

The court of appeals held that States and private plaintiffs may maintain actions under federal common law alleging that defendants—in this case, five electric utilities—have created a "public nuisance" by contributing to global warming, and may seek injunctive relief capping defendants' carbon dioxide emissions at judicially-determined levels.

The question presented by the Petition that the *Amici* States address is as follows:

Whether claims seeking to cap defendants' carbon dioxide emissions at "reasonable" levels, based on a court's weighing of the potential risks of climate change against the socioeconomic utility of defendants' conduct, would be governed by "judicially discoverable and manageable standards" or could be resolved without "initial policy determination[s] of a kind clearly for nonjudicial discretion." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI* STATES 1

SUMMARY OF THE ARGUMENT 2

REASONS FOR GRANTING THE PETITION 4

I. As a Threshold Issue in This Nationally Important Case, the Justiciability of Plaintiffs' Nuisance Claims in Light of the Political Question Doctrine Warrants Immediate Review 4

A. The political question doctrine is eroded when cases are improperly allowed to proceed to judgment 4

B. The institutional harm of permitting this litigation to proceed is particularly acute given the multi-layered regulatory scheme that already exists 7

II. The Second Circuit Erred in Rejecting Application of the Political Question Doctrine 16

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

Allen v. Wright,
468 U.S. 737 (1984) 19

Baker v. Carr,
369 U.S. 186 (1962) ..... i, 4, 5, 16, 17

Chisholm v. Georgia,
2 U.S. 419 (1793) 22

Coal. for Responsible Regulation v. EPA,
No. 09-1322 (D.C. Cir. December 23, 2009) 10

Coleman v. Miller,
307 U.S. 433 (1939) 23

Elk Grove Unified Sch. Dist. v. Newdow,
542 U.S. 1 (2004) 19

Elrod v. Burns,
427 U.S. 347 (1976) 7

Flast v. Cohen,
392 U.S. 83 (1968) 4

Ga. Coal. for Sound Envtl. Policy v. EPA,
No. 10-1200 (D.C. Cir. July 30, 2010) 10

Gilligan v. Morgan,
413 U.S. 1 (1973) 7, 23

Holtzman v. Schlesinger,
484 F.2d 1307 (2d Cir. 1973) 24

CASES (CONT'D)

Japan Whaling Ass'n v. Am. Cetacean Soc.,
478 U.S. 221 (1986) 24

Luther v. Borden,
48 U.S. (7 How.) 1 (1849) 23

Massachusetts v. EPA,
549 U.S. 497 (2007) 8, 10

Mitchell v. Forsyth,
472 U.S. 511 (1985) 6

Nevada v. Hall,
440 U.S. 410 (1979) 22

Nixon v. United States,
506 U.S. 224 (1993) 23

Schlesinger v. Reservists Comm. to Stop the War,
418 U.S. 208 (1974) 4

Schneider v. Kissinger,
412 F.3d 190 (D.C. Cir. 2005) 23

U.S. Dep't of Commerce v. Montana,
503 U.S. 442 (1992) 24

United States v. Munoz-Flores,
495 U.S. 385 (1990) 4

United States v. Nixon,
481 U.S. 683 (1974) 7

Vieth v. Jubelirer,
541 U.S. 267 (2004) (plurality op.) 23

STATUTES

Clean Air Act, 42 U.S.C. § 7401 *et seq*..... 8

Tit. I, 42 U.S.C. § 7401 *et seq*.:

§ 110, 42 U.S.C. § 7410(a) 12

§ 116, 42 U.S.C. § 7416..... 12

OTHER AUTHORITIES

68 Fed. Reg. (2003):

p. 52922 18

p. 52928 18

74 Fed. Reg. (2009):

p. 66496 9

p. 66497 9

p. 66505 9

p. 66506 9

75 Fed. Reg. (2010):

p. 25324 ..... 9, 10

p. 31514 9

p. 31516 9

p. 52916 10

p. 31,519 21

OTHER AUTHORITIES (CONT'D)

About Major Moves, Indiana Department of Transportation, http://www.in.gov/indot/7039.htm 22

Action to Ensure Authority to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call, http://www.epa.gov/NSR/documents/20100810FinalGHGSIPCallProposal.pdf (August 12, 2010) 10

American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009) 11

California Air Resources Board, *Climate Change*, http://www.arb.ca.gov/cc/cc.htm 13

California Environmental Protection Agency Air Resources Board, Clean Car Standards – Pavley, Assembly Bill 1493, http://www.arb.ca.gov/cc/ccms/ccms.htm 14

Campus Coal Plants, SourceWatch, http://www.sourcewatch.org/index.php?title=Campus_coal_plants 20, 21

Clark Williams-Derry, *Increases in Greenhouse-Gas Emissions from Highway Widening Projects* 2 (2007), *available at* http://www.sightline.org/research/energy/res_pubs/analysis-ghg-roads 22

Clean Energy Jobs and American Power Act, S. 1733, 111th Cong. (2010) 11

OTHER AUTHORITIES (CONT'D)

Climate Change in Alaska, http://www.climate change.alaska.gov/ 15

H.R. Rep. No. 111-137 (2010), *available at* http://frwebgate.access.gpo. gov/cgi-bin/getdoc.cgi?dbname=111_cong_reports& docid=f:hr137.pdf 11

Idaho Department of Environmental Quality, *Greenhouse Gas Emissions Reduction Action Plan for 2008-2009* (May 2008), *available at* http://www.deq.state.id. us/air/prog_issues/ghg/pdfs/ghg_action_ plan_final_052908.pdf. 15

Kentucky Climate Action Plan Council, *Kentucky Climate Action Planning Council (KCAPC) Process*, http://www.kyclimate change.us/stakeholder.cfm 15

Midwestern Greenhouse Gas Reduction Accord, http://midwesternaccord.org/..... 12, 13

North Carolina, *Climate Action Plan Advisory Group*, http://www.ncclimate change.us/ 15

Pennsylvania Dep't of Environmental Protection, *Pennsylvania Climate Change Advisory Committee*, http://www.portal. state.pa.us/portal/server.pt/community/cli mate_change_advisory_committee/10412..... 15

Pew Center on Global Climate Change, *State and Local Net Greenhouse Gas Emissions Reduction Programs*, http://www.pew climate.org/states.cfm?ID=45 14

OTHER AUTHORITIES (CONT'D)

Pew Center on Global Climate Change, *U.S. States and Regions*, http://www.pewclimate.org/states-regions 14

Platts 2010 UDI Directory of Electric Power Producers and Distributors (Platts ed., 118th ed. 2009)..... 20, 21

Regional Greenhouse Gas Initiative, http://www.rggi.org/docs/RGGI_Fact_Sheet.pdf..... 12, 13

Restatement (Second) of Torts, § 821B cmt. e (1979)..... 17, 18

The Federalist No. 22 (Alexander Hamilton) 22

Virginia Governor's Commission on Climate Change, *Final Report: A Climate Change Action Plan* (2008), *available at* http://www.deq.state.va.us/export/sites/default/info/documents/climate/CCC_Final_Report-Final_12152008.pdf..... 14

VTrans Climate Change Action Plan, http://www.aot.state.vt.us/planning/Documents/Planning/VTransClimateActionPlanfinal1.pdf (June 2008) 14

Western Climate Initiative, http://www.westernclimateinitiative.org/wci-partners 12, 13

INTEREST OF THE *AMICI* STATES[1]

The justiciability of climate change lawsuits under federal common law is an issue of extraordinary national importance. To permit federal adjudication of claims seeking damages for past emissions and injunctions curtailing future emissions would heighten the risks and uncertainties for businesses and countless other entities, including state agencies, which may suddenly find themselves as defendants in a federal suit. The list of potential defendants is limitless because the plaintiffs' theory of liability involves nothing more specific than prosecuting the emission of carbon dioxide ("CO_2"). The prospect that federal courts may use such suits to confound the political branches' legislative and administrative processes by establishing emissions policy (more likely, multiple *conflicting* policies) on a piecemeal, *ad hoc*, case-by-case basis under the aegis of federal common law presents an issue warranting the Court's immediate attention.

States have an especially strong interest in this case because, as utility owners, power plant operators, and generally significant CO_2 emitters (through facilities, vehicle fleets and highway construction, among other functions), they may be

---

[1] Pursuant to Supreme Court Rule 37 2(a), counsel of record for all parties have received notice of the *Amici* States' intention to file this brief more than 10 days prior to the due date of this brief.

future defendants in similar actions. The theory of liability being advanced here has no limiting principle. It would permit federal courts to impose CO_2 emission limits on any entity in the country, and one might reasonably expect that the major economic actors of each state, not to mention state government entities themselves, would be on a list of potential defendants.

What is more, this lawsuit threatens substantial impact on state environmental regulatory schemes. Each of the defendant utilities operates under state-issued pollution control permits, as do all power plants and large pollution emitters. To the extent that this lawsuit would enable a court to cap CO_2 emissions that states would permit (either because state law has not heretofore defined CO_2 as an endangering pollutant or because future CO_2 emission limits will be set higher than a federal court's standard), allowing some states to seek common-law injunctions against industries in other states would undermine the entire state-federal regulatory scheme. Exercising their role in this cooperative regulatory effort, state political branches have struck balances between economic development and environmental protection that deserve respect in federal court.

SUMMARY OF THE ARGUMENT

Immediate review of this case is justified because, if allowed to proceed in the district court, it will embroil the federal judiciary in one of the most high-profile and contentious political debates of our time. Reasonable people disagree on many levels over the

extent to which greenhouse gas emissions, and especially CO_2 emissions, should be regulated. Given that every industry, and indeed every living mammal, constantly emits CO_2, such emissions cannot simply be banned outright, no matter what the harm to the environment. Someone has to make a policy determination as to how much is acceptable and how much is too much.

That someone should not be the federal judiciary. The point at which the volume of CO_2 emissions justifies regulation admits of no discernible, judicially manageable principle. Under the Court's political question doctrine, the federal judiciary has no jurisdiction over cases where the judiciary cannot decide liability without resolving profound policy questions. With regard to CO_2 emissions, politically accountable officials, not life-tenured judges, must decide where to draw the regulatory line—as they have done or are in the midst of doing on both federal and state levels.

For a federal court even to attempt to use something as nebulous as common law to decide whether and how to impose greenhouse gas regulations on a select list of defendants can only erode public confidence in the judiciary as courts of law rather than policy. This is particularly true in light of federal and state efforts underway to regulate greenhouse gas emissions, and the ongoing national debate over whether additional federal laws, such as proposed "cap and trade" legislation, are proper. The Court needs to step in now to decide whether this case presents claims that a federal court may properly adjudicate. Waiting until after

final judgment will be too late, regardless of outcome.

REASONS FOR GRANTING THE PETITION

I. As a Threshold Issue in This Nationally Important Case, the Justiciability of Plaintiffs' Nuisance Claims in Light of the Political Question Doctrine Warrants Immediate Review

A. The political question doctrine is eroded when cases are improperly allowed to proceed to judgment

Article III courts lack jurisdiction over political questions. *Flast v. Cohen*, 392 U.S. 83, 95 (1968) ("[N]o justiciable controversy is presented when the parties seek adjudication of only a political question . . . ."); *see also Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974) (the political question doctrine is a "jurisdictional limitation[] imposed upon federal courts by the 'case or controversy' requirement of Art[icle] III"). Thus, "the presence of a political question . . . prevent[s] the power of the federal judiciary from being invoked by the complaining party." *Schlesinger*, 418 U.S. at 215.

In the political question context, therefore, justiciability is a threshold determination that must be made at the outset of a case. *See id.* The political question doctrine is "primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210 (1962). At its core, the doctrine is "designed to

restrain the Judiciary from inappropriate interference in the business of the other branches of Government." *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990). It embraces the pragmatic if unglamorous reality that there are certain issues the judiciary is simply ill-suited to resolve.

Federal courts inevitably lose credibility and stature—and, ultimately, the faith of the citizenry—when they wade into matters that can practically be resolved only by the political branches and the will of the people. Such participation only fuels public suspicion that judges will "legislate from the bench" in the guise of amorphous legal doctrine whenever it suits them. Indeed, while the Court in *Baker* identified "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government" as but one basis for applying the political question shield, *Baker*, 369 U.S. at 217, surely the need to avoid expressing institutional disrespect underlies the doctrine as a whole.

In this regard, an errant foray into politics by the lower courts, and the institutional disrespect such a venture inevitably expresses (even unintentionally), cannot entirely be remedied by post-judgment review in this Court. That is, later reversing or vacating what is essentially a political, not legal, judgment by lower courts cannot wipe away the institutional mistrust such a decision is likely to engender in the meantime.

Nor does the prospect that defendants might ultimately prevail on the merits ameliorate these

concerns. Even a defense verdict would carry a tinge of disrespect for coordinate branches and levels of government. It would convey the message that, while federal courts are not interfering this time, all concerned, including government officials with responsibility for creating environmental policy, operate at the sufferance of the federal judiciary. There is simply no way around the fact that allowing lower federal courts to proceed to judgment—any judgment—on a verboten political question causes irreparable harm to the judicial system.

We are talking here of course only about reasons for this Court to exercise discretionary review prior to final judgment, not anyone's right to appeal before final judgment. But an analogy to the collateral order doctrine still has some utility. When lower courts reject governmental immunity claims, for example, the defendant may take an appeal (even successive appeals) prior to final judgment because the right to immunity from *suit* (*i.e.*, discovery, trial, etc.), as distinct from immunity from *liability* cannot effectively be reviewed once the official has had to endure the entire litigation process. *See Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985). With regard to the political question doctrine, similarly, the complete protection it affords the federal judiciary from politics will be eroded if the doctrine is not vindicated until after final judgment. To be sure, reversal of a final judgment in a political question case will effectively remove the courts from the political arena on that issue, but it cannot undo the significant reputational harm to the federal judiciary as courts of law, not politics, that will already have occurred.

The Court has acknowledged this reality in previous cases by granting *certiorari* in order to determine whether a case presents a nonjusticiable political question before allowing the case to proceed to judgment in the lower courts. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 349-52 (1976) (granting *certiorari* to determine justiciability based on political question doctrine and whether constitutional challenge of patronage practices stated a valid claim for relief); *United States v. Nixon*, 481 U.S. 683, 686-90 (1974) (granting *certiorari* on denial of motion to quash subpoena and denial of claim of executive privilege); *Gilligan v. Morgan*, 413 U.S. 1, 3-4 (1973) (granting *certiorari* before case could be remanded to district court in order to determine justiciability of question regarding proper training of Ohio National Guard troops).

As in these cases, this Court's review is warranted prior to final judgment here in order to determine whether the plaintiffs' claims in this case present nonjusticiable political questions.

B. The institutional harm of permitting this litigation to proceed is particularly acute given the multi-layered environmental regulatory scheme that already exists

Allowing this case to proceed poses a particular threat to respect for federal courts as limited-power institutions because so many layers of environmental regulation already exist at the hands of politically accountable officials—with more on the

way. Air pollution generally—and greenhouse gas emissions in particular—are already regulated by the federal government, regional state alliances, and individual states. The threatened addition of a judicial layer to this regulatory hierarchy disturbs the delicate balance struck between ecologic and economic health by these various regulatory authorities. In fact, the very pendency of the claim on the merits may prompt emitters to adjust their activities, or even deter future industrial competitors from launching, in anticipation of highly uncertain future judicial decrees. Furthermore, to the extent that a judicial injunction could, at some future point, regulate states—who are also significant greenhouse gas emitters—the decision below threatens state sovereignty.

1. Much of the complex web of federal and state environmental regulations that already govern those who emit large levels of CO_2 and other pollutants arises from the Clean Air Act, 42 U.S.C. § 7401 *et seq.* ("CAA"). The CAA requires the United States Environmental Protection Agency ("EPA") to establish national health-based air quality standards to protect against common environmental pollutants. States play a significant role in enforcing these standards.

With regard to CO_2 emissions in particular, the Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), triggered a regulatory review leading to EPA's 2009 finding that "greenhouse gases in the atmosphere may reasonably be anticipated both to endanger public health and to endanger public welfare." Endangerment and Cause or Contribute

Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496, 66497 (December 15, 2009). That finding, known as the "endangerment finding," was the first step in EPA's plan to establish a regulatory program for greenhouse gas emissions under the CAA. *Id.* at 66505-06.

EPA has also promulgated rules under the CAA that require preconstruction and operating permits for stationary sources of greenhouse gas emissions, and that also tailor application of those requirements so that large new and modified stationary sources are regulated first, with progressively smaller sources brought into the program over time. *See* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31514, 31516 (June 3, 2010) ("In particular, EPA is establishing with this rulemaking a phase-in approach for [prevention of significant deterioration] and title V applicability, and is establishing the first two steps of the phase-in for the largest emitters of [greenhouse gases]. We also commit to certain follow-up actions regarding future steps beyond the first two[.]").

Building on its endangerment finding, EPA has also promulgated vehicle emissions standards and proposed modifications to existing CAA permitting regimes. *See* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25324 (May 7, 2010); Action to Ensure Authority to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas

Emissions: Federal Implementation Plan, 75 Fed. Reg. 52916 (August 30, 2010); Action to Ensure Authority to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call, http://www.epa.gov/NSR/documents/20100810FinalGHGSIPCallProposal.pdf (August 12, 2010).

EPA's actions in the wake of *Massachusetts v. EPA* have not been without controversy. Both the endangerment finding and the tailoring rule have generated legal challenges from states (including *Amici* States Hawaii, Indiana, Kentucky, Nebraska, North Dakota, Pennsylvania, South Carolina, and Utah), industry groups, and independent organizations. *See Ga. Coal. for Sound Envtl. Policy v. EPA*, No. 10-1200 (D.C. Cir. July 30, 2010) (consolidating 21 separate challenges to the endangerment finding and tailoring rule); *Coal. for Responsible Regulation v. EPA*, No. 09-1322 (D.C. Cir. December 23, 2009) (consolidating 16 separate challenges to the greenhouse gas endangerment finding).

But, like *Massachusetts v. EPA* itself, these legal challenges seek only to hold EPA to regulatory limits imposed by Congress, not to involve the federal judiciary in the underlying decision whether and how much to regulate CO_2 emissions.

In addition, Congress has of late been debating whether to add to the federal air pollution regulatory scheme through so-called "cap and trade" legislation. *See* Clean Energy Jobs and American Power Act, S.

1733, 111th Cong. (2010); American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009). This legislation, if passed, would create nationwide CO_2 emission caps and allow regulated emitters to trade permits amongst themselves. *See* American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009). Many oppose such additional restrictions as too costly in light of the expected benefits for the environment. H.R. Rep. No. 111-137 at 725-26 (2010) (discussing opposition views regarding American Clean Energy and Security Act of 2009), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_reports&docid=f:hr137.pdf. Public debate and federal elections will dictate which view prevails.

At the federal level, then, the political branches' regulation of greenhouse gases remains the subject of energetic regulatory efforts and vigorous policy debates. As the brief of the Tennessee Valley Authority in Support of the Petitioners suggests, some level of further review is warranted because permitting federal common law nuisance claims for alleged injuries resulting from greenhouse gas emissions is not compatible with the existing federal regulatory scheme. *See* TVA Br. at 31-32 (explaining how EPA regulatory activity following the Second Circuit's decision illustrates the CAA's displacement of the federal common law).

2. The States exercise considerable authority over the implementation of the CAA. The Act requires states to adopt their own State Implementation Plans for compliance with National

Ambient Air Quality Standards within three years of EPA promulgation of such standards. *See* 42 U.S.C. § 7410(a). While such plans must meet basic requirements and are subject to EPA approval or disapproval, they must be adopted through a process involving public input, ensuring that the plans are adapted to the particular circumstances of each state. *Id.* States are free to choose how best to meet federal requirements within their borders and are expressly allowed to have more stringent requirements than the basic federal mandate. *See* 42 U.S.C. § 7416. As a consequence, no two State Implementation Plans are identical.

States have also formed numerous regional alliances attempting to address problems associated with greenhouse gas emissions and climate change. *See, e.g.,* Western Climate Initiative, http://www.westernclimateinitiative.org/wci-partners (regional alliance between Arizona, British Columbia, California, Manitoba, Montana, New Mexico, Ontario, Oregon, Quebec, Utah, and Washington); Midwestern Greenhouse Gas Reduction Accord, http://midwesternaccord.org/ (regional alliance between Iowa, Illinois, Kansas, Manitoba, Michigan, Minnesota, and Wisconsin); Regional Greenhouse Gas Initiative, http://www.rggi.org/docs/RGGI_Fact_Sheet.pdf (regional alliance between Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island and Vermont).

These alliances work to create uniform policies and regulations across member states to facilitate greenhouse gas regulation. *See, e.g.,* Western

Climate Initiative, http://www.westernclimate initiative.org/designing-the-program (providing blueprint for regional cap-and-trade and offset program to begin in 2012 and for complementary energy policies); Midwestern Greenhouse Gas Reduction Accord, http://midwesternaccord.org/ (issuing recommendations and model rules to member governors to facilitate regional cap-and-trade agreement); Regional Greenhouse Gas Initiative, http://www.rggi.org/design (ongoing regional "cap and trade" program based on individual member implementation of model rule). The alliances attempt to craft emission policies that are appropriate for each geographic region as a whole, in response to the complex and interconnected nature of the problem.[2]

In addition to their CAA responsibilities and these regional alliances, many states individually regulate greenhouse gases in a variety of ways. At least 21 states have begun reducing emissions through some combination of emission caps, carbon offsets, permit trading, renewable energy requirements, energy efficiency requirements, or agricultural changes to improve carbon sequestering. *See, e.g.*, California Air Resources Board, *Climate*

---

[2] Notably, each of the plaintiff states is a member of the alliance associated with its region. *See* Western Climate Initiative, http://www.westernclimateinitiative.org/wci-partners (listing California as a member), Midwestern Greenhouse Gas Reduction Accord, http://midwesternaccord.org/ (listing Iowa and Wisconsin as members), Regional Greenhouse Gas Initiative, http://www.rggi.org/design (listing Connecticut, New Jersey, New York, Rhode Island and Vermont as members).

Change, http://www.arb.ca.gov/cc/cc.htm (listing California's environmental programs, including energy efficiency and emission cap and trade); Pew Center on Global Climate Change, *State and Local Net Greenhouse Gas Emissions Reduction Programs*, http://www.pewclimate.org/states.cfm?ID=45 (describing Nebraska's efforts toward increasing carbon sequestration); Virginia Governor's Commission on Climate Change, *Final Report: A Climate Change Action Plan* (2008), *available at* http://www.deq.state.va.us/export/sites/default/info/documents/climate/CCC_Final_Report-Final_12152008.pdf; *see also* Pew Center on Global Climate Change, *U.S. States and Regions*, http://www.pewclimate.org/states-regions (providing a dynamic map of state and regional activities in the United States). For many states, a large part of this regulation consists of regulating motor vehicle greenhouse gas emissions in particular. *See, e.g.*, California Environmental Protection Agency Air Resources Board, Clean Car Standards – Pavley, Assembly Bill 1493, http://www.arb.ca.gov/cc/ccms/ccms.htm (detailing California's attempts to secure more stringent GHG standards than provided for under federal law); VTrans Climate Change Action Plan, http://www.aot.state.vt.us/planning/Documents/Planning/VTransClimateActionPlanfinal1.pdf (June 2008).

At least six other states are engaged in administrative or legislative inquiries into possible additional greenhouse gas regulation. *See, e.g.*, *Climate Change in Alaska*, http://www.climatechange.alaska.gov/; Kentucky Climate Action Plan Council, *Kentucky Climate Action Planning Council*

(KCAPC) Process, http://www.kyclimatechange.us/stakeholder.cfm; North Carolina, *Climate Action Plan Advisory Group*, http://www.ncclimatechange.us/; Pennsylvania Dep't of Environmental Protection, *Pennsylvania Climate Change Advisory Committee*, http://www.portal.state.pa.us/portal/server.pt/community/climate_change_advisory_committee/10412. Inquiries of this sort result in plans which, while they may not have the force of law, form the basis of future state action. *See, e.g.*, Idaho Department of Environmental Quality, *Greenhouse Gas Emissions Reduction Action Plan for 2008-2009* (May 2008), *available at* http://www.deq.state.id.us/air/prog_issues/ghg/pdfs/ghg_action_plan_final_052908.pdf.

Though the goals of these regulations are similar, each state pursues them differently—a natural result of the social, political, environmental, and economic diversity that exists among states. A plan to modify greenhouse gas emissions that is acceptable to Vermont may be unacceptable to Indiana, Georgia, Texas, or Washington, for example. By asking a single federal court in New York to impose emission limits on defendant companies, each of which is presumably compliant with the regulations of each state in which it operates, plaintiffs are pushing the courts to ignore this diversity and export plaintiffs' preferred environmental policies to other states. The decision below is effectively an open invitation for federal courts to undertake collateral review of state environmental policies. The Court should take this case now to prevent such possible interference with the results of ongoing, vigorous public debates across

the country concerning regulation of greenhouse gas emissions.

II. The Second Circuit Erred in Rejecting Application of the Political Question Doctrine

The Second Circuit held that exercising federal jurisdiction in this case is appropriate because "federal courts have successfully adjudicated complex common law public nuisance cases for over a century." Pet. App. 28a. The jurisdictional problems of this case, however, stem not from its "complex" nature but from the fact that it can be adjudicated only by judicial resolution of highly sensitive policy tradeoffs that carry global impacts. The decision below fails to acknowledge that, precisely because it lacks electoral accountability, the judicial branch is not institutionally competent to make tradeoffs affecting far more than a single local emissions problem, or to divine standards to carry them out.

1. In *Baker v. Carr*, this Court laid out six "formulations" which "may describe a political question." 316 U.S. 186, 217 (1962). They are: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department," (2) "a lack of judicially discoverable or manageable standards for resolving" the issue, (3) "the impossibility of deciding [the issue] without an initial policy determination of a kind clearly for nonjudicial discretion," (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate

branches of government," (5) "an unusual need for unquestioning adherence to a political decision already made," or (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.*

The plaintiffs' claims implicate at least two of the circumstances identified in *Baker*, and are thus barred by the political question doctrine. The claims in this case, premised on the allegations that defendants' emissions are "unreasonable," would require the court to "weigh[] . . . the gravity of the harm against the utility of the conduct." Restatement (Second) of Torts, § 821B cmt. e (1979). Because climate change is a phenomenon attributed to the *global* aggregation of greenhouse gas emissions, a court would first need to determine a "reasonable" global level of emissions and then determine worldwide which particular sectors and industries (indeed which individual entities and facilities) should be responsible for reducing their emissions by what amounts in order to achieve that global level. A court lacks "judicially discoverable and manageable standards" to decide these *ad hoc* policy questions and would first require "initial policy determination[s] of a kind clearly for non-judicial discretion." *Baker*, 369 U.S. at 217 (*Baker* factors 2 and 3).

Deciding what constitutes a "reasonable" level of emissions requires a balancing of economic, social, environmental, foreign policy and national security interests far beyond the institutional competence of the judiciary and requiring multiple threshold policy determinations by the electorally accountable

branches of the government. As EPA itself has recognized, "[i]t is hard to imagine any issue in the environmental area having greater 'economic and political significance' than regulation of activities that might lead to global climate change." Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52922, 52928 (Sept. 8, 2003).

Nonetheless, the Second Circuit characterized this case as an "ordinary tort suit." Pet. App. 38a-39a (quotation omitted). The court deflected concerns about the lawsuit's broad implications by noting that "[n]owhere in their complaints do Plaintiffs ask the court to fashion a comprehensive and far-reaching solution to global climate change, a task that arguably falls within the purview of the political branches." *Id.* at 25a-26a. It is hard to imagine, however, that in the context of a lawsuit seeking to prevent global climate change, a court which undertakes to "weigh[] the gravity of the harm against the utility of the conduct" to determine what is "reasonable," Restatement (Second) of Torts § 821B cmt. e (1979), could *avoid* fashioning a comprehensive and far-reaching solution if it hopes to redress injuries alleged by the plaintiffs.

On a related point, this "reasonableness" balancing inquiry does not create any clear standard for choosing defendants from among the countless CO_2 emitters in the United States. This underscores the reality that a federal court must either be prepared to formulate a vast remedy or else conclude that no useful remedy exists.

The TVA echoes these concerns in its brief. *See* TVA Br. at 17 ("The confluence in this case of several factors—including the myriad potential plaintiffs and defendants, the lack of judicial manageability, and the unusually broad range of underlying policy judgments that would need to be made—demonstrates that plaintiffs' global-warming nuisance claims should be resolved by the representative Branches, not federal courts."). It posits, however, that prudential standing principles rather than limits on Article III justiciability bar consideration of plaintiffs' claims. *See* TVA Br. at 11-22. There would be very little practical difference between dismissing this case on prudential standing grounds and dismissing it on political question grounds. Both doctrines prevent courts from adjudicating claims having no clear standards that require underlying policy determinations "more appropriately addressed in the representative branches." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). TVA suggests that prudential standing offers a "more deferential and restrained basis for dismissing suits like plaintiffs' because the basis for dismissal can be revisited by Congress." TVA Br. at 19-20. Congress would be equally capable, however, of providing these plaintiffs with an enforceable CO_2 emission claim in response to dismissal of this suit on political question grounds. From the standpoint of the justiciability of plaintiffs' claims regarding greenhouse gas emissions, the problem here is not with a dearth of Congressional power to address such claims, but with an abundance of power that Congress at this point has

not seen fit to exercise in the way that plaintiffs would prefer.

2. Of particular concern to the *Amici* States is that they themselves might be targets either of a far-reaching district court remedy in this case or of some future lawsuit. States are significant CO_2 emitters and hosts of other emitters, which would seem to make them prime targets for a public nuisance lawsuit such as this one.

Even if this lawsuit is understood to implicate only the emissions of utilities, eight states own and operate coal-fired electric utilities that emit CO_2. *See* Platts 2010 UDI Directory of Electric Power Producers and Distributors (Platts ed., 118th ed. 2009) (listing state-owned electric utilities in Alaska, Arizona, California[3], Massachusetts, Nevada, New York, South Carolina, and Texas). In addition, 24 state-owned universities in 15 states operate campus coal-fired power plants. *See* Campus Coal Plants, SourceWatch, http://www.sourcewatch.org/index.php ?title=Campus_coal_plants.[4] Four states that are

---

[3] California-owned utilities have largely embraced hydroelectric power, but the Northern California Power Agency continues to operate at least one fossil-fired steam plant. *See* Platts 2010 UDI Directory of Electric Power Producers and Distributors (Platts ed., 118th ed. 2009).

[4] The 24 state-owned universities currently operating coal-fired power plants are Ball State University (Indiana), Eastern Illinois University, Indiana University, Iowa State University, Michigan State University, Morehead State (Kentucky), Northern Michigan University, Ohio University, Pennsylvania

plaintiffs in this case (California, Iowa, New York, and Wisconsin) are also possible future defendants because they own utilities, or have state universities that operate power plants. *See id;* Platts 2010 UDI Directory of Electric Power Producers and Distributors (Platts ed., 118th ed. 2009).

What is more, because plaintiffs' common-law theory is not limited to capping utility emissions, *all* states are vulnerable to environmental nuisance claims in light of their significant CO_2 emissions, such as through large vehicle fleets and major highway projects. For example, Indiana owns and operates a fleet of approximately 10,000 vehicles—a significant source of CO_2 emissions. *See* 75 Fed. Reg. at 31,519 (stating that one-third of all energy-related emissions come from transportation). And Indiana's "Major Moves" program—a 10-year, $12 billion transportation plan launched in 2005—calls for a total of 104 new roadways by 2015 with 1,600 lane

---

State University, Purdue University (Indiana), Southeast Missouri State University, Southern Illinois University at Carbondale, University of Alaska at Fairbanks, University of Illinois at Urbana-Champaign, University of Iowa, University of Kentucky, University of Missouri at Columbia, University of North Dakota, University of North Carolina at Chapel Hill, University of Northern Iowa, University of Tennessee, University of Wisconsin at Madison, Virginia Tech, and West Virginia University. *See* Campus Coal Plants, SourceWatch, http://www.sourcewatch.org/index.php?title=Campus_coal_plants (last visited Aug. 30, 2010).

miles.[5] After accounting for the manufacture of concrete, steel, and other energy-intensive construction materials, as well as fuel consumed by construction equipment and vehicles, building one mile of roadway releases between 1,400 and 2,300 tons of CO_2. Clark Williams-Derry, *Increases in Greenhouse-Gas Emissions from Highway Widening Projects* 2 (2007), *available at* http://www.sightline.org/research/energy/res_pubs/analysis-ghg-roads. Over the long term, adding one mile of new highway lane increases CO_2 emissions from automobiles by more than 100,000 tons over 50 years, according to one estimate. *Id.* at 1. Thus, every state qualifies as an environmental nuisance defendant when all sources of CO_2 are considered.

And, as the broad injury claims of the plaintiffs suggest, perhaps every state could also qualify as a CO_2 nuisance plaintiff. Yet it should not be the case that one group of states may regulate the emissions, or emissions policies, of other states through federal common law litigation. To say the least, such interference would pose a grave threat to each state's recognized "right to govern," *Nevada v. Hall*, 440 U.S. 410, 415 (1979) (citing *Chisholm v. Georgia*, 2 U.S. 419, 472 (1793)), and upset the balance of federalism and equality among the states. *See* The Federalist No. 22 (Alexander Hamilton) (observing that, to allow some states to control others "would be not merely to be insensible to the love of power, but

---

[5] As of the end of 2009, 34 of these roadways had been completed and 16 were under construction. *See* About Major Moves, Indiana Department of Transportation, http://www.in.gov/indot/7039.htm.

even to sacrifice the desire of equality. It is neither rational to expect the first, nor just to require the last.").

3. The need to protect sovereign power from gradually migrating to another branch of government (or to another sovereign entirely) goes to the heart of considerations underlying the political question doctrine, which embraces the humble but realistic notion that the judiciary can neither answer all questions nor remedy all injuries. *See, e.g., Vieth v. Jubelirer*, 541 U.S. 267, 305-06 (2004) (plurality op.) (concluding that no judicially manageable standards exist under which to adjudicate political gerrymandering claims); *Nixon v. United States*, 506 U.S. 224, 230 (1993) (holding that use of word "try" in Impeachment Clause lacks precision to provide judicial standards, especially in light of clear, constitutional commands to Senate on impeachment procedure); *Gilligan v. Morgan*, 413 U.S. 1, 11 (1973) ("[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence" than the "composition, training, equipping, and control of a military force"); *Coleman v. Miller*, 307 U.S. 433 (1939) (holding question of reasonable ratification period for constitutional amendment to require "an appraisal of a great variety of relevant conditions, political, social and economic" better suited to the political branches); *Luther v. Borden*, 48 U.S. (7 How.) 1, 38-41 (1849) (explaining the lack of power in the court to determine the legitimacy of a state government and inability to order effective relief); *Schneider v. Kissinger*, 412 F.3d 190, 196 (D.C. Cir. 2005) ("Unlike the executive, the judiciary has no covert

agents, no intelligence sources, and no policy advisors. The courts are therefore ill-suited to displace the political branches in such decision-making."); *Holtzman v. Schlesinger*, 484 F.2d 1307, 1309-11 (2d Cir. 1973) (holding that the determination of questions of military policy is beyond the competency of the courts).

Even in cases rejecting application of the political question doctrine, courts acknowledge the limits of institutional judicial competence. *See U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 457-59 (1992) ("In invoking the political question doctrine, a court acknowledges the possibility that a constitutional provision may not be judicially enforceable."); *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986) ("The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly ill suited to make such decisions . . . .").

Here, in contrast with cases where federal courts review the legality of agency rules by reference to how Congress has resolved a political debate, the Second Circuit's decision proposes to resolve by judicial fiat the ongoing public debate over greenhouse gas regulation. Such regulation requires determinations of national, regional, and local policy outside of the competency of the judiciary. Only statutes and regulations duly enacted by representatives accountable to the citizenry can legitimately define CO_2 limits. Accordingly,

permitting the federal judiciary to impose its own understanding of when the costs of CO_2 emission outweigh the benefits would constitute an impermissible intrusion into the political realm.

CONCLUSION

The Court should grant the Petition and reverse the decision below.

Respectfully submitted,

Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 West Washington St.
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

**Counsel of Record*

GREGORY F. ZOELLER
Attorney General
THOMAS M. FISHER*
Solicitor General
HEATHER L. HAGAN
ASHLEY TATMAN HARWEL
Deputy Attorneys General

Counsel for Amici *States*

Dated: September 3, 2010

AMICUS CURIAE BRIEF

170

No. 10-174

Supreme Court, U.S.
FILED
SEP 3 - 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

AMERICAN ELECTRIC
POWER COMPANY INC., et al.,

Petitioners,

v.

STATE OF CONNECTICUT, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

DAVID B. RIVKIN, JR
Counsel of Record
LEE A. CASEY
MARK W. DELAQUIL
BAKER & HOSTETLER LLP
Washington Square, Suite 1100
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
drivkin@bakerlaw.com
(202) 861-1500

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	6
I. The Second Circuit's Decision Presents Recurring Issues Of Great National Importance	6
A. Greenhouse Gas Public Nuisance Actions Are The Wrong Mechanism For Addressing An Issue Of Manifest Importance To The Nation, Global Climate Change	7
B. The Second Circuit's Decision Presents A Recurring Problem That The Court Should Resolve Now	10
C. The Second Circuit's Decision Has Negative Ramifications For The Judicial And Political Processes	12
II. The Second Circuit's Decision Is Erroneous	18
A. Respondents Lack Standing Because The Court Cannot Redress Their Alleged Injuries	18
B. Respondents' Claims Present A Non-Justiciable Political Question	20
CONCLUSION	24

TABLE OF AUTHORITIES

Page

CASES:

American Isuzu Motors, Inc. v. Ntsebeza, 553 U.S. 1028 (2008) 17

Antolok v. United States, 873 F.2d 369 (D.C. Cir. 1989) 21

Baker v. Carr, 369 U.S. 186 (1962) 21

Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888 (1988) 9

California v. Gen. Motors Corp., No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), *appeal dismissed*, No. 07-16908 (9th Cir. June 24, 2009) 10, 22, 23

Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948) 21

City of Milwaukee v. Illinois, 451 U.S. 304 (1981) 15

Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009), *reh'g granted*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010) 1, 3, 10, 16

Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005) 22, 24

Connecticut v. Am. Elec. Power Co., 582 F.3d 309 (2d Cir. 2009) ..... *passim*

Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221 (1986) 22

TABLE OF AUTHORITIES – Continued

Page

Korsinsky v. EPA, No. 05-cv-859 (NRB), 2005 WL 2414744 (S.D.N.Y. Sept. 29, 2005).....4, 10

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).....19

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).....14, 20

Massachusetts v. EPA, 549 U.S. 497 (2007).....*passim*

Milwaukee v. Illinois, 451 U.S. 304 (1981).....8

Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009).....4, 10, 22, 23, 24

Nixon v. United States, 506 U.S. 224 (1993).....22

North Carolina v. TVA, No. 09-1623, 2010 WL 2891572 (4th Cir. July 26, 2010).....1, 4, 8, 10

Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77 (1981).....23

O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994).....14, 23

Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26 (1976).....20

United States ex rel. Joseph v. Cannon, 642 F.2d 1373 (D.C. Cir. 1981).....22

Vieth v. Jubelirer, 541 U.S. 267 (2004).....21

Warth v. Seldin, 422 U.S. 490 (1975).....20

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION, STATUTES, AND REGULATIONS:

28 U.S.C. § 1350 17

74 Fed. Reg. 56,264 (2009) 15

74 Fed. Reg. 66,4977 (2009) 15

75 Fed. Reg. 25,324 (2010) 15

75 Fed. Reg. 31,514 (2010) 15

75 Fed. Reg. 31,540 (2010) 11

U.S. Const. Art. I 14

OTHER AUTHORITIES:

American Clean Energy and Security Act of 2009, H.R. 2254, 111th Cong. (2009) 12

Gabriel Nelson, *Obama Admin Urges Supreme Court to Vacate "Nuisance" Ruling*, Greenwire (Aug. 25, 2010) 13

Gene J. Koprowski, *Global Warming Advocates Threaten Blizzard of Lawsuits*, FOXNews (Mar. 29, 2010) 11

Judicial Watch, Judicial Financial Disclosure Database, http://www.judicialwatch.org/judicial-financial-disclosure 17

Key Judge Downplays Prospects for Successful Climate Damages Suits, Inside EPA, Mar. 5, 2010 14

TABLE OF AUTHORITIES – Continued

Page

Laurence H. Tribe, et al., *Too Hot for Courts To Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* 15 (Wash. Legal Found., Working Paper No. 169, 2010) 11, 20, 22

Mark Latham, *Environmental Liabilities and Federal Securities Laws: A Proposal for Improved Disclosure of Climate Change-Related Risks*, 39 Envtl. L. 647 (2009) 4

Press Release, Connecticut Attorney General's Office, Attorney General Praises Appeals Court Ruling Reinstating Global Warming Lawsuit (Sept. 21, 2009) 24

Restatement (Second) of Torts (1979) 9

Robin Bravender, *Carbon Cap Likely Dead This Year – Lieberman*, EENews PM (July 29, 2010) 12

W. Keeton, et al., *Prosser and Keeton on The Law of Torts* (5th ed. 1984) 8

William L. Prosser, *Nuisance Without Fault*, 20 Tex. L. Rev. 399 (1942) 4

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are law professors with an interest and expertise in constitutional, administrative, environmental, and general issues of regulatory law issues. Each is concerned with the status and development of the law in these areas, and believes that the questions raised by this case are of the highest importance and merit the Supreme Court's exercise of its discretion to review the Second Circuit's decision. Many have participated as *amici* to courts of appeals that have considered public nuisance actions brought against emitters of greenhouse gases or conventional pollutants, including the proceedings below and those in *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *reh'g granted*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010), and *North Carolina v. TVA*, No. 09-1623, 2010 WL 2891572 (4th Cir. July 26, 2010).

John S. Baker, Jr., is the Dale E. Bennett Professor of Law (retired), Louisiana State University Law Center. He has written widely on the U.S. legal

---

[1] Pursuant to Supreme Court Rule 37 6, counsel for *amici* represents that it entirely authored this brief and no party, its counsel, or any other entity but *amici* and their counsel made a monetary contribution to fund the brief's preparation or submission. All parties have consented to the filing of this brief, and undersigned counsel notified Counsel of Record for all parties of *amici curiae's* intent to file this brief at least 10 days before September 3, 2010 Letters reflecting their consent are filed with the Clerk.

system, separation of powers, administrative law, and tort law.

Steven G. Calabresi is the George C. Dix Professor of Law, Northwestern University Law School, where he teaches administrative law, comparative law, and constitutional law.

Honorable Ronald A. Cass, Dean Emeritus of Boston University School of Law, has written and taught about administrative law for more than 30 years. He is co-author of a leading text on administrative law, a former federal regulatory official, and remains deeply engaged with matters of administrative and judicial process.

Robert A. Destro is Professor of Law and director and founder of the Interdisciplinary Program in Law & Religion, Catholic University of America, Columbus School of Law. He teaches and has written extensively on constitutional law.

Jason S. Johnston is the Henry L. and Grace Doherty Charitable Foundation Professor of Law and Nicholas E. Chimicles Research Professor of Business Law and Regulation, University of Virginia School of Law. His recent research has focused on the law and economics of climate change policy, and he teaches courses in natural resource law, law and economics, and climate change law.

Stephen B. Presser is the Raoul Berger Professor of Legal History, Northwestern University Law

School, where he teaches American jurisprudence and legal history.

Ronald D. Rotunda is the Doy & Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law. He is the author of leading course books on constitutional law and legal ethics and is co-author of a six-volume treatise on constitutional law.

John C. Yoo is Professor of Law, University of California, Boalt Hall, where he teaches constitutional law and history.

The views expressed herein are those of the individual *amici curiae*, and do not necessarily represent the views of any group or organization with which they may be affiliated.

SUMMARY OF THE ARGUMENT

Far from being an "ordinary tort suit" the Second Circuit's decision below in *Connecticut v. American Electric Power Co.*, 582 F.3d 309 (2d Cir. 2009), is an attempt to judicially regulate greenhouse gas emissions from the entities Respondents allege are the five largest greenhouse gas emitters in the United States. Respondents' action is part of a broader, misguided push for judicial regulation, and is mirrored by suits brought by Gulf Coast residents, *see Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *reh'g granted*, 598 F.3d 208 (5th Cir. 2010),

appeal dismissed, 607 F.3d 1049 (5th Cir. 2010), Native Americans, *see Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal pending*, No. 09-17490 (9th Cir. Nov. 5, 2009), and officious intermeddlers, *see Korsinsky v. EPA*, No. 05-cv-859 (NRB), 2005 WL 2414744 (S.D.N.Y. Sept. 29, 2005). The initial targets of these attempts at judicial regulation have been America's core industries – electric utilities, automobile manufacturers, energy producers, and chemical companies – but the legal principles underlying these suits could extend to any business that emits greenhouse gases.

Greenhouse gas emissions should not, however, be regulated in accordance with "the same principles we use to regulate prostitution, obstacles in highways, and bullfights." *North Carolina v. TVA*, No. 09-1623, 2010 WL 2891572 (4th Cir. July 26, 2010). The effects that this decision and its sister actions could have on the United States economy are undisputed: liability in this and other cases could amount to billions of dollars. *See* Mark Latham, *Environmental Liabilities and Federal Securities Laws: A Proposal for Improved Disclosure of Climate Change-Related Risks*, 39 Envtl. L. 647, 666 (2009).

The harm that the Court of Appeals' decision causes to the political and judicial processes is no less troubling. Greenhouse gas public nuisance suits have poisoned the judiciary by giving judges the opportunity to use this "legal garbage can" of a tort, *see* William L. Prosser, *Nuisance Without Fault*, 20 Tex. L. Rev. 399, 410 (1942), as a prod for advancing their

preferred political agenda. This is not an appropriate role for a judiciary that must say what the law is, not what it ought to be. Greenhouse gas public nuisance actions threaten to allow litigants to undermine the judicial process in another way – through the very recusal system that is supposed to protect judicial integrity. With legal theories under which nearly any business is a potential defendant, plaintiffs have the power to "pick and choose" their judges through the selection of defendants in which disfavored judges have publicly disclosed their financial holdings. This threatens neutrality, impartiality, and ultimately the perception and reality of justice.

All of this might not matter if the Second Circuit's holding were correct, but it is not. Every district court that has been presented with a greenhouse gas public nuisance action has determined that it would be impossible to reach a principled resolution without overstepping the constitutional limits on judicial power. These courts have rightfully abstained from making piecemeal environmental policy on the basis of testimony proffered by a handful of paid experts and in the face of serious and significant political and administrative disputes about how best to address the global phenomenon of climate change.

The Court has previously recognized the "unusual importance" of EPA's statutory authority to regulate greenhouse gas emissions under the Clean Air Act. *Massachusetts v. EPA*, 549 U.S. 497, 506 (2007). Definitive resolution of whether federal common law provides an avenue for piecemeal judicial regulation

of greenhouse gas emissions is no less important. The Court should grant certiorari and finally determine whether it is the province of the judiciary or the political branches to set global warming policy.

ARGUMENT

I. The Second Circuit's Decision Presents Recurring Issues Of Great National Importance.

This case presents recurring questions of great importance that only this Court can resolve. The tort of public nuisance is neither an effective nor an appropriate mechanism for addressing the complex scientific, social, economic, and political issues involved in environmental protection and management, let alone those surrounding the phenomenon of global climate change. The Second Circuit's decision, however, threatens to make it the primary regulatory tool in that court's footprint and throughout the country. The Second Circuit's decision may also distort the political and administrative processes, and it gives plaintiffs an opportunity to undermine the legitimacy of the courts. The Court should grant certiorari to decide the questions presented by the Petitioners.

A. Greenhouse Gas Public Nuisance Actions Are The Wrong Mechanism For Addressing An Issue Of Manifest Importance To The Nation, Global Climate Change.

There is no dispute that global climate change is an issue of paramount national importance. In *Massachusetts v. EPA*, this Court expressly found that global climate change was sufficiently important to justify the Court's exercise of its certiorari jurisdiction in the absence of a circuit split and in the face of very serious jurisdictional issues: "Notwithstanding the serious character of th[e] jurisdictional argument and the absence of any conflicting decisions . . . , the unusual importance of the underlying issue persuaded us to grant the writ." 549 U.S. at 505-06. The court below has similarly attested to the importance of the issues this action seeks to address: "It cannot be gainsaid that global warming poses serious economic and ecological problems that have an impact on both domestic politics and international relations." *Connecticut*, 582 F.3d at 325.

In light of the importance of these issues, it is critical that any regulatory program addressing greenhouse gas emissions be the product of a *political* process that balances the myriad of interests at stake and that is able to arrive at manageable standards. In a recent decision reversing a district court decision finding that conventional pollutant emissions from TVA power plants in the State of Tennessee constitute a public nuisance in the State of North Carolina, the

United States Court of Appeals for the Fourth Circuit convincingly explained why public nuisance law is not up to this task:

> [W]hile public nuisance law doubtless encompasses environmental concerns, it does so at such a level of generality as to provide almost no standard of application. If we are to regulate smokestack emissions by the same principles we use to regulate prostitution, obstacles in highways, and bullfights, we will be hard pressed to derive any manageable criteria by which to make decisions.

North Carolina, 2010 WL 2891572 at *7 (Wilkinson, J.) (citations omitted). This Court has recognized the "often vague and indeterminate" nature of nuisance law as well. *Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981). *See also* W. Keeton, et al., *Prosser and Keeton on The Law of Torts* § 86, at 616 (5th ed. 1984) (footnotes omitted) ("There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie."). And make no mistake, public nuisance determinations – especially those made with respect to a gas that is emitted by virtually every corporate and natural person on the planet to contribute collectively and indistinguishably to a global phenomenon – are regulation.

The decision below reflects nuisance law's shortcoming. The legal standard articulated by the Second

Circuit is whether Respondents' activities constitute "an unreasonable interference with a right common to the general public." *Connecticut*, 582 F.3d at 352. Determining what is and is not reasonable necessarily involves "weighing of the gravity of the harm against the utility of the conduct." *Restatement (Second) of Torts* § 821B cmt. e (1979). A more vacuous legal standard, particularly when applied outside of the traditional narrow framework of nuisance actions, is hard to imagine – determining whether a particular method for providing affordable, reliable electric generation is more socially beneficial than its particular contribution to the harms Respondents allege they will suffer is akin to "judging whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., dissenting). And while the federal judiciary is fully capable of resolving complex cases and controversies, federal judges are neither technical experts nor accountable political actors. Courts should not use federal common law and rely on dueling experts to set emission control limits (or to award monetary damages) when confronted with one of the most controversial and significant social, economic, environmental, and political questions of our times.

The inevitable consequence of allowing the proliferation of global climate change tort claims would be for different courts to establish different levels of, and rules for calculating, the "reasonable" level of emissions from the same class of facilities –

and perhaps from the same facilities themselves. *See North Carolina*, 2010 WL 2891572 at *7 ("We are hardly at liberty to ignore the Supreme Court's concerns and the practical effects of having multiple and conflicting standards to guide emissions. These difficulties are heightened if we allow multiple courts in different states to determine whether a single source constitutes a nuisance."). The effect would be to hold every emitter subject to an uncertain standard, while failing to establish any sort of viable national climate change policy.

B. The Second Circuit's Decision Presents A Recurring Problem That The Court Should Resolve Now.

Far from being unique, this action has parallels both in the Second Circuit and around the Country. As discussed in the Petition for a Writ of Certiorari, the United States Court of Appeals for the Fifth Circuit was recently seized of this issue in *Comer*, and the United States Court of Appeals for the Ninth Circuit is currently considering it in *Kivalina*, after yet another appeal before it was voluntarily dismissed. *See California v. Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), *appeal dismissed*, No. 07-16908 (9th Cir. June 24, 2009). The present action was followed by a copycat suit, a "cut-and-paste" complaint by a private plaintiff that was dismissed because the plaintiff lacked standing. *See Korsinsky v. EPA*,

No. 05-cv-859 (NRB), 2005 WL 2414744 (S.D.N.Y. Sept. 29, 2005).

Media reports suggest that the Second Circuit's decision, if left unchecked, will precipitate even more public nuisance actions. Gene J. Koprowski, *Global Warming Advocates Threaten Blizzard of Lawsuits*, FOXNews (Mar. 29, 2010), http://www.foxnews.com/scitech/2010/03/29/global-warming-advocates-threaten-blizzard-lawsuits/. The presence in New York of many large corporations makes it likely that the Second Circuit will become the forum of choice for these suits. And given the ubiquity of greenhouse gas emissions, there is no shortage of potential defendants. Laurence H. Tribe, et al., *Too Hot for Courts To Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* 15 (Wash. Legal Found., Working Paper No. 169, 2010) ("[C]limate change results only from the non-linear, collective impact of millions of fungible, climactically [sic] indistinguishable, and geographically dispersed emitters."). EPA has estimated that over 6 million different sources in the United States emit over 100 tons per year of carbon dioxide equivalent emissions, and at least 15,000 sources emit over 100,000 tons per year of carbon dioxide equivalent emissions. *See* 75 Fed. Reg. 31,540 (2010). If litigation is the appropriate response to global climate change, it is no exaggeration to say that the only appropriate litigation would have to include virtually every natural and corporate person worldwide as simultaneous plaintiffs and defendants.

C. The Second Circuit's Decision Has Negative Ramifications For The Judicial And Political Processes.

Beyond being an issue of great national importance that will recur in the Second Circuit and other federal courts, public nuisance actions based on greenhouse gas emissions pose unique challenges to the judicial and political processes.

The Court previously had the opportunity to consider the multitude of legislative enactments addressing global climate change. *Massachusetts*, 549 U.S. at 506-07. The legislative process continues: the House of Representatives passed a greenhouse gas emission control bill earlier this term, American Clean Energy and Security Act of 2009, H.R. 2254, 111th Cong. (2009), but the leading greenhouse gas bill in the Senate has lost sponsors and appears unlikely to be enacted, *see* Robin Bravender, *Carbon Cap Likely Dead This Year – Lieberman*, EENews PM (July 29, 2010), http://www.eenews.net/eenewspm/2010/07/29/2/. (Notably, none of the major bills considered by the House of Representatives or Senate contains provisions that in any way resemble a public nuisance remedy.) Extending common law public nuisance liability to regulated entities exerts artificial pressure on the political process and may drive the political process in the direction of particular actions that would not otherwise occur:

> Because the White House supports legislation to limit greenhouse gas emissions,

> many attorneys expected the Obama administration['s response to the Second Circuit's decision] to avoid criticizing a ruling that could become so disruptive that it would force Congress to take action. Jonathan Zesloff, a law professor at the University of California, Los Angeles, said in a recent blog post that the White House would undermine its goals by siding with utilities.
>
> If the Supreme Court does not take the case, he wrote, "then the only way to get rid of the suit is for Congress to displace it. And the only way for Congress to displace it is to pass legislation. As is the case with EPA authority to regulate carbon, this puts more bargaining power on the side that wants regulation."

Gabriel Nelson, *Obama Admin Urges Supreme Court to Vacate "Nuisance" Ruling*, Greenwire (Aug. 25, 2010), http://www.eenews.net/Greenwire/2010/08/25/1/. Judicial power should not, of course, be co-opted to nudge the political process.

Beyond simply impacting the political process incidentally, the Second Circuit's decision could allow judges to use their positions as a tool for political action. Judge Hall, the author of the Second Circuit's decision, has publicly expressed his hope that the decision would prompt political action:

> . . . Hall nevertheless said he hopes the ruling and others like it will pressure both the executive branch and Congress to implement climate policies, because its burdensome "nuisance action by nuisance action"

> approach is hanging over their heads like a "sword of Damocles."
>
> "To the extent there is out there . . . some opportunity to pursue or continue to pursue a nuisance action, that may help in a political sense," he said, at least to get the executive branch moving to develop regulations and to control the fight that will emerge once regulations are promulgated. He also hoped that the existence of this nuisance action may influence the Senate to provide 60 votes to pass a climate bill.
>
> He said that until federal policies displace the damages cases, "the litigation may provide a backstop to the regulations and perhaps some small impetus [for regulatory and legislative action]." He added that the litigation is viable "at least in the 2nd Circuit."

Key Judge Downplays Prospects for Successful Climate Damages Suits, Inside EPA, Mar. 5, 2010, at 18.

But "[i]t is emphatically the duty of the Judicial Department to say what the law is," and not what it ought to be, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and legislative power is vested in Congress, not the Judiciary. *See* U.S. Const. Art. I, § 1. Federal common law accordingly is disfavored, and "cases in which judicial creation of a special federal rule would be justified . . . are few and restricted." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994). It is neither legitimate nor consistent with this Court's jurisprudence to decide cases so as to

spur political action, particularly where the tool wielded – federal common law – is disfavored under the best of circumstances.

The Second Circuit's decision would likewise negatively impact the administrative process. Congress' "establishment of a comprehensive regulatory program supervised by an expert administrative agency" displaces federal common law. *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981). The Clean Air Act is just such a comprehensive regulatory program supervised by an expert agency, the EPA, that has finalized the following rules in the time since the Second Circuit's decision:

- A greenhouse gas emission reporting rule that EPA expects will inform any decision about whether to regulate greenhouse gases. 74 Fed. Reg. 56,264 (2009).
- An "endangerment finding" under Clean Air Act § 202 determining that greenhouse gases may reasonably be anticipated to endanger public health or welfare. 74 Fed. Reg. 66,4977 (2009).
- A light-duty vehicle greenhouse-gas emission control rule. 75 Fed. Reg. 25,324 (2010).
- A "tailoring rule" rewriting Congress' emission rate standards for the prevention of significant deterioration and Title V permitting programs to allow for regulation of greenhouse gases. 75 Fed. Reg. 31,514 (2010).

When these regulatory actions are considered together, it is beyond cavil that EPA has regulated greenhouse gas emissions under the Clean Air Act both for mobile sources and for stationary sources of the type that Petitioners are alleged to operate. It is simply no longer the case that "EPA has yet to make any determination that such emissions are subject to regulation under the [Clean Air] Act, much less endeavor *actually* to regulate the emissions." *Connecticut*, 582 F.3d at 381.

Finally, the decision below could allow future greenhouse gas public nuisance plaintiffs to undermine the judicial process through the recusal system. Recusals have already been a problem in another major greenhouse gas public nuisance action. In *Comer v. Murphy Oil USA*, the United States Court of Appeals for the Fifth Circuit granted rehearing and vacated a panel decision that would have allowed a putative class action to proceed on greenhouse gas public nuisance theories, but then dismissed the appeal for lack of quorum after one of the Judges who participated in the decision to rehear the case en banc later recused herself. The *Comer* plaintiffs named over thirty companies allegedly responsible for causing or contributing to Hurricane Katrina, and had lodged yet another complaint that included an additional *one hundred and ten* companies.

Recusals similarly have been problematic in other situations where a multitude of major corporations were named as defendants. For instance, this Court lacked a quorum to decide the petition for

certiorari in *American Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008), an Alien Tort Statute, 28 U.S.C. § 1350, action brought by victims of the South African apartheid regime against multinational corporations that did business with that country's government.

Plaintiffs will attempt to ensure the most favorable consideration of their action by strategically choosing defendants to force the recusal of federal judges they perceive to be unsympathetic to their claims. In the case of greenhouse gas public nuisance claims, this problem is uniquely acute, however, because of the lack of substance inherent in the cause of action and the corresponding lack of limitations on the universe of potential defendants – millions of sources in the United States emit significant quantities of greenhouse gases. The costs of strategic defendant selection are also minimal. *See* Judicial Watch, Judicial Financial Disclosure Database, http://www.judicialwatch.org/judicial-financial-disclosure (offering, for free, "a browsable and searchable archive of financial disclosure reports for all Supreme Court justices, appellate court and district court judges"). This problem may be unavoidable where courts discharge their duty under federal statute, but courts should not extend federal common law causes of action in situations that have a significant potential for abuse, such as that presented here.

II. The Second Circuit's Decision Is Erroneous.

The Second Circuit's decision to exercise jurisdiction over Respondent's claims was erroneous. In *Massachusetts*, this Court held that EPA could act to regulate greenhouse gases where Congress affirmatively exercised its constitutional power and enacted a broad regulatory statute encompassing air quality issues and that states could challenge EPA's decision not to do so. What the Court did not hold was that the judicial power extends outside the realm of congressionally articulated procedural rights to claims by States or private actors. And without congressional action – either to establish standing by articulating a chain of causation that the political branches deemed sufficient or to make initial policy determinations and set standards that provide substance for judicial adjudication – such suits have been, and remain, outside the set of cases and controversies that Article III Courts may permissibly decide.

A. Respondents Lack Standing Because The Court Cannot Redress Their Alleged Injuries.

The Second Circuit erred in determining that the Respondents had standing to bring their greenhouse gas public nuisance claims. *Massachusetts* held only that States, in their *parens patriae* capacity, could challenge EPA's rational for refusing to act under the Clean Air Act, in which Congress defined the injury and articulated the chain of causation giving rise to a

case or controversy where none existed before. 549 U.S. at 516 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in judgment)). Even the Second Circuit recognized the significance of Congress' creation of this procedural right and stated that it "was 'of critical importance to the standing inquiry'" because it allowed the *Massachusetts* petitioners to avoid meeting "'all the normal standards for redressability and immediacy'" incumbent on plaintiffs in federal court. *Connecticut*, 582 F.3d at 309 (quoting *Massachusetts*, 549 U.S. at 516-17).

Despite the undisputed fact that the Respondents asserted no statutory procedural right, the Second Circuit held that *Massachusetts* "disposed of" the argument that courts may not "redress the injuries about which Plaintiffs complain because global warming will continue despite any reduction in Defendants' emissions." *Connecticut*, 582 F.3d at 348. That is simply not the case. The Respondents in this action have alleged no more than that the remedy they seek would "achieve the . . . share of the . . . reductions necessary to significantly slow the rate and magnitude of warming." Compl. ¶ 148, No. 04-5669 (S.D.N.Y. July 21, 2004). But they did not, and cannot, allege that the relief requested would actually slow the rate and magnitude of warming. Redressability is not plausible, given that Petitioners' emissions are a very small portion of the historic, global pool of accumulated carbon in the atmosphere. Moreover, the effectiveness of any relief depends on

speculation about the actions of third parties. And regardless of the outcome of this action, emissions from China, India, and other jurisdictions beyond the Court's control have the final word on whether Respondents will suffer the injuries alleged under their own theory of the case.

The political branches have the prerogative to legislate futile administrative schemes, but at the very least it is not within the purview of the federal judiciary to speculate about the actions of third parties, *see Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976); *Warth v. Seldin*, 422 U.S. 490, 509 (1975), or otherwise to entertain suits where the Plaintiffs cannot allege that their requested relief would redress their injury. The Court should grant certiorari and reverse the Second Circuit's decision on standing.

B. Respondents' Claims Present A Non-Justiciable Political Question.

The claims Respondents presented in the court below present a non-justiciable political question. "[I]t has been axiomatic throughout our constitutional history that there exist some questions beyond the proper reach of the judiciary." Tribe, *supra*, at 3. Article III power therefore does not extend to situations where courts cannot assign responsibility in the absence of antecedent legal principles reflecting the political branches' policy judgments. *See id.* (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170

(1803), and *Baker v. Carr*, 369 U.S. 186, 217 (1962)). Two specific circumstances that place a case outside Article III jurisdiction are the "lack of judicially discoverable and manageable standards for resolving" the issue and "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. Tort claims may state political questions. *See Antolok v. United States*, 873 F.2d 369, 383 (D.C. Cir. 1989) (Sentelle, J.).

Contrary to the Second Circuit's decision, there are no judicially discoverable and manageable standards for resolving Respondents' claims. Questions that are "delicate, complex, and involve large elements of prophecy," *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948), or that would plunge the court into a "sea of imponderables," *Vieth v. Jubelirer*, 541 U.S. 267, 290 (2004) (plurality opinion), lack judicially discoverable and manageable standards. Every district court that has been asked to adjudicate a greenhouse gas public nuisance action has recognized that the issue simply is not decidable – absent any standards, there is simply no principled way for a federal judge to resolve whether the safe, reliable, and affordable production of energy, including a retrospective analysis of alternatives available in the past, does or does not outweigh the possible future benefits of potentially reducing the occurrence of adverse weather events, taking into account both whether emissions would have leaked to a foreign country and the impact of

emissions from millions of other sources. *See Kivalina*, 663 F. Supp. 2d 863; *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005); *California*, 2007 WL 2726871.

The "difficulty of fashioning relief" also evidences a lack of judicially discoverable and manageable standards. *Nixon v. United States*, 506 U.S. 224, 236 (1993). Parallel to the inability of courts to redress the injuries Respondents allege is courts' inability to bind parties that are not before them, which "automatically makes [courts] institutionally ill-suited to entertain lawsuits concerning problems [as] irreducibly global and interconnected in scope" as global climate change. Tribe, *supra*, at 21. The federal judiciary's inability to remedy effectively Respondents' alleged harm further evidences the existence in this action of a non-justiciable political question that the Second Circuit disregarded.

The Second Circuit also failed to recognize that deciding Respondents' claims would require it to make an initial policy determination of a kind clearly unfit for judicial discretion. This Court has recognized that federal judges "have neither the expertise nor the authority to evaluate . . . policy judgments" concerning whether and how to regulate greenhouse gas emissions. *Massachusetts*, 549 U.S. at 533; *see also Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (quoting *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1379 (D.C. Cir. 1981) ("'courts are fundamentally underequipped to formulate national policies or develop standards for matters

not legal in nature'"). Determining whether Petitioners' methods for providing affordable, reliable energy (or the frequency with which they use those methods) are more or less socially beneficial than the harms to which the Petitioners are alleged to contribute, considered in the context of millions of contributing emitters beyond the Court's control, requires a policy judgment that the political branches have struggled for decades to make. In addition to simply being an ineffective way to regulate greenhouse gas emissions, this determination requires far more than an inquiry into what is or is not "reasonable." *See, e.g.*, *California*, 2007 WL 2726871, at **6-7; *accord O'Melveny & Myers*, 512 U.S. at 89 (refusing to create federal common law tort malpractice liability standards because "[w]hat sort of tort liability to impose on lawyers and accountants . . . who provide services to federally insured financial institutions . . . 'involves a host of considerations that must be weighed and appraised'" and "'is more appropriately for those who write the laws, rather than for those who interpret them'") (quoting *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 98 n.41 (1981)).

Reversing the district court's decision required the Second Circuit to make other contentious policy determinations. The Second Circuit *sub silentio* chose to decide whether particular types of greenhouse gas emission limits should be or should have been imposed on emitters – the very same policy determination with which the political branches are currently grappling. *See Kivalina*, 663 F. Supp. 2d at 876-77;

Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 272 (S.D.N.Y. 2005). The Second Circuit also decided *sub silentio* that Petitioners should be required to bear the cost of remedying any harms that Respondents can prove were caused by greenhouse gas emissions. *See Kivalina*, 663 F. Supp. 2d at 877 ("Plaintiffs are . . . asking this Court to make a political judgment that the two dozen Defendants named in this action should be the only ones to bear the cost of contributing to global warming. . . . [T]he allocation of fault – and cost – of global warming is a matter appropriately left for determination by the executive or legislative branch in the first instance."). These are inherently political questions.

The Court should grant certiorari and hold that Respondents' claims present a political question that cannot be considered or resolved by the federal courts.

CONCLUSION

After the Second Circuit issued its decision, Connecticut Attorney General Richard Blumenthal stated that it "set a precedent for all who threaten our planet." Press Release, Connecticut Attorney General's Office, Attorney General Praises Appeals Court Ruling Reinstating Global Warming Lawsuit (Sept. 21, 2009). Whether or not Petitioners' alleged actions "threaten our planet," the precedent set by the decision below is erroneous, places undue

pressure on the political and judicial processes, and licenses wasteful legal actions in areas beyond the judicial competence. For the foregoing reasons, as well as the reasons set forth by Petitioners and their other Amici, the petition for a writ of certiorari should be granted, and the Second Circuit's decision should be reversed.

Respectfully submitted,

DAVID B. RIVKIN, JR.
Counsel of Record
LEE A. CASEY
MARK W. DELAQUIL
BAKER & HOSTETLER LLP
Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
drivkin@bakerlaw.com
(202) 861-1500

Counsel for Amici Curiae

AMICUS CURIAE BRIEF

(6)

No. 10-174

Supreme Court, U.S.
FILED
SEP 3 - 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY INC., *et al.*,

Petitioners,

v.

STATE OF CONNECTICUT, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

STEVEN J. LECHNER
Counsel of Record
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
lechner@mountainstateslegal.com

Attorney for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether States and private parties have standing to seek judicially fashioned emissions caps on four private utility companies for their alleged contribution to harms claimed to arise from global climate change caused by more than a century of emissions by billions of independent sources.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
IDENTITY AND INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	3
THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE TENSION BETWEEN *MASSACHUSETTS* AND *LUJAN*	6
I. *Lujan* Reaffirmed The "Immutable" Requirements Of Article III Standing	6
II. *Massachusetts* Is In Tension With *Lujan*	9
III. The Tension Between *Massachusetts* And *Lujan* Has Created Confusion In The Lower Courts	17
IV. This Case Presents An Excellent Opportunity For This Court To Resolve The Tension Between *Massachusetts* And *Lujan*	22
CONCLUSION	24

TABLE OF AUTHORITIES

Page

CASES

Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592 (1982) 5, 11, 16

Allen v. Wright, 468 U.S. 737 (1984) 2, 7, 13, 14

Apprendi v. New Jersey, 530 U.S. 466 (2000) 23

Bennett v. Spear, 520 U.S. 154 (1997) 7

Center for Biological Diversity v. U.S. Department of the Interior, 563 F.3d 466 (D.C. Cir. 2009) 16, 20, 21, 22

Clinton v. New York, 524 U.S. 417 (1998) 1

Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009) 19, 22

Comer v. Murphy Oil USA, 598 F.3d 208 (5th Cir. 2010) 19

Comer v. Murphy Oil USA, 607 F.3d 1049 (5th Cir. 2010) 19

Connecticut v. American Electric Power, Inc., 406 F.Supp.2d 265 (S.D. N.Y. 2005) 4

Connecticut v. American Electric Power, Inc., 582 F.3d 309 (2nd Cir. 2009) 4, 5, 6, 17, 18

DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006) 18

Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) 7

TABLE OF AUTHORITIES – Continued

Page

Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658 (D.C. Cir. 1996) 8, 12

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167 (2000) 15

Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979) 8

Hester v. United States, 265 U.S. 57 (1924) 23

Lewis v. Casey, 518 U.S. 343 (1996) 18

Los Angeles v. Lyons, 461 U.S. 95 (1983) 18

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) ..... *passim*

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 15

Massachusetts v. EPA, 549 U.S. 497 (2007) ..... *passim*

Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991) 2

Michigan v. Clifford, 464 U.S. 287 (1984) 23

Michigan v. Tyler, 436 U.S. 499 (1978) 23

Morrison v. Olson, 487 U.S. 654 (1988) 2

Native Village of Kivalina v. ExxonMobil Corp., 663 F.Supp.2d 863 (N.D. Cal. 2009), *appeal pending*, No. 09-17490 (9th Cir.) 19, 20, 22

Okla. Tax Comm'n v. Citizen Band P. Indian Tribe of Okla., 498 U.S. 505 (1991) 23

TABLE OF AUTHORITIES – Continued

Page

Oliver v. United States, 466 U.S. 170 (1984) 23

Raines v. Byrd, 521 U.S. 811 (1997) 8

Ring v. Arizona, 536 U.S. 584 (2002) 23

Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) 2

Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26 (1976) 12

Summers v. Earth Island Inst., ___ U.S. ___, 129 S.Ct. 1142 (2009) 15

United States v. Richardson, 418 U.S. 166 (1974) 2

Valley Forge Christian College v. Americans United for Separation of Church and States, 454 U.S. 464 (1982) 7

Wainwright v. Witt, 469 U.S. 412 (1985) 23

Walton v. Arizona, 497 U.S. 639 (1990) 23

Witherspoon v. Illinois, 391 U.S. 510 (1968) 23

CONSTITUTIONAL PROVISION

U.S. Const. art. II, § 3 9

U.S. Const. art. III ..... *passim*

STATUTES

16 U.S.C. § 1540(g) 6

42 U.S.C. § 7607(b)(1) 10, 12

TABLE OF AUTHORITIES – Continued

Page

RULE

Supreme Court Rule 37 1

OTHER AUTHORITY

Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 Colum. J. Envtl. L. 293 (2005) 16

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION

Pursuant to Supreme Court Rule 37.2, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioners.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system.

Separation of powers is an essential feature of the American constitutional system and is necessary for the preservation of individual liberty. *Clinton v. New York*, 524 U.S. 417, 450 (1998) ("Separation of

[1] Pursuant to Supreme Court Rule 37.2, letters indicating MSLF's intent to file this amicus curiae brief were received by counsel of record for all parties at least 10 days prior to the due date of this brief. The parties have consented to the filing of this brief. Finally, pursuant to Supreme Court Rule 37.6, MSLF affirms that no counsel for a party authored this brief in whole or in part and that no party, person, or entity made a monetary contribution specifically for the preparation or submission of this brief.

powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty.") (Kennedy, J., concurring); *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) ("The ultimate purpose of . . . separation of powers is to protect the liberty and security of the governed."); *Morrison v. Olson*, 487 U.S. 654, 710 (1988) (Scalia, J., dissenting) ("While the separation of powers may prevent [the Judiciary] from righting every wrong, it does so in order to ensure that we do not lose liberty.").

The Article III requirement of standing is an essential part of the separation of powers. *Allen v. Wright,* 468 U.S. 737, 752 (1984) ("[T]he law of Article III standing is built on a single basic idea – the idea of separation of powers"). "To permit a complainant who has no concrete injury to require a court to rule" on important questions of national importance "would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.'" *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 222 (1974); *see also United States v. Richardson,* 418 U.S. 166, 192 (1974) (Powell, J., concurring) ("[W]e risk a progressive impairment of the effectiveness of the federal courts if their limited resources are diverted increasingly from their historic role to the resolution of public-interest

suits brought by litigants who cannot distinguish themselves from all taxpayers or all citizens.").

In the instant case, a two-judge panel of the Second Circuit, relying on this Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), ruled that eight States, a municipality, and three non-profit land trusts had Article III standing to bring common law tort claims against Petitioners for the purported consequences of global climate change. If this decision is allowed to stand, it would open the floodgates to federal court litigation with respect to an issue of national and global importance that should be addressed by the politically accountable branches of the federal government. Therefore, MSLF respectfully submits this amicus curiae brief in support of the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Fearing the uncertain future effects from elevated levels of carbon dioxide in the atmosphere, eight States, three private land trusts, and a municipality (collectively "States") seek to hold four private utility companies ("Petitioners") jointly and severally liable for an ongoing phenomenon, *i.e.*, global climate change. *See generally*, Pet. App. 8a-11a. The States argue that Petitioners' carbon dioxide emissions contribute to atmospheric levels of greenhouse gases ("GHGs"), which contribute to global climate change, which, in turn, will allegedly cause various injuries someday.

Pet. App. 10a-11a. Future injuries alleged by the States include beach erosion, marsh and aquifer salinization caused by rising sea levels, impairment of shipping and recreation in the Great Lakes region caused by declining lake levels, and, more generally, destruction of ecosystems and reduced biodiversity. *Id.* The States themselves are uncertain as to when these alleged injuries would occur but suggest that they might occur sometime within the next 10 to 100 years. Pet. App. 10a-11a.

The district court dismissed the claims as presenting non-justiciable political questions. *Connecticut v. American Electric Power, Inc.*, 406 F.Supp.2d 265, 274 (S.D. N.Y. 2005). In so doing, the district court reasoned that, because climate change is a global phenomenon attributed to global GHG emissions, resolution of the claims would necessarily involve a number of "policy determination[s]," which the Framers intended would be made by the representative Branches. *Id.* at 272. In light of this conclusion, the district court found it unnecessary to address whether the States had standing to bring their claims. *Id.* at 271 n.6.

On appeal, a two-judge panel of the Second Circuit reversed. *Connecticut v. American Electric Power, Inc.*, 582 F.3d 309 (2nd Cir. 2009). As to standing, the panel ruled that the States had both *parens patriae* and proprietary standing in their quasi-sovereign and proprietary capacities, respectively. *Id.* at 392. In so doing, the panel noted that this Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007),

"arguably muddled state proprietary and *parens patriae* standing." *Id.* at 337. Nonetheless, the panel purportedly followed *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982) ("*Snapp*"), to conclude that the States had *parens patriae* standing to protect their quasi-sovereign interests. *Connecticut,* 582 F.3d at 338-39.

Importantly, the panel recognized that this Court's decision in *Massachusetts* had "called into question" whether *Snapp*'s *parens patriae* test satisfied Article III. *Connecticut*, 582 F.3d at 336; *see also*, *Massachusetts,* 548 U.S. at 539 (Roberts, C.J., dissenting) (Criticizing the majority for "tak[ing] what has always been regarded as a necessary condition for *parens patriae* standing – a quasi-sovereign interest – and convert[ing] it into a sufficient showing for purposes of Article III."). Thus, the panel asked two questions: "What is the role of Article III *parens patriae* standing in relation to the test set out in [*Lujan v. Defenders of Wildlife*, 504 U.S. 555, (1992)]?" and "Must a state asserting *parens patriae* standing satisfy both the *Snapp* and *Lujan* tests?" *Connecticut*, 582 F.3d at 338. The panel conveniently avoided answering these important questions because it determined that the States had proprietary standing under *Lujan*. *Connecticut*, 582 F.3d at 339-49. In so doing, the panel purportedly applied *Lujan*'s well-known "injury-causation-redressability" test. *Connecticut*, 582 F.3d at 339-40. Although the States did not have a purported procedural right that was of critical importance in *Massachusetts,* the Second Circuit still

applied *Massachusetts*'s relaxed injury-causation-redressability requirements to conclude that States had standing to seek injunctive relief with respect to Petitioners' purported contribution to global climate change. *Connecticut*, 582 F.3d at 339-49.

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE TENSION BETWEEN *MASSACHUSETTS* AND *LUJAN*.

I. *LUJAN* REAFFIRMED THE "IMMUTABLE" REQUIREMENTS OF ARTICLE III STANDING.

In *Lujan*, environmental groups brought an action, under the citizen-suit provision of the Endangered Species Act, 16 U.S.C. §1540(g), challenging the Secretary of the Interior's regulations that required other agencies to consult only with respect to federally funded projects in the United States and on the highs seas.[2] 504 U.S. at 558-59. In holding that the environmental groups lacked standing, this Court reaffirmed that the "irreducible constitutional minimum" of standing contains three requirements:

[2] The citizen-suit provision provides, in relevant part, that "any person may commence a civil suit on his own behalf . . to enjoin any person, including the United States and any other governmental instrumentality or agency . . who is alleged to be in violation of any provision of this chapter" 16 U.S.C. § 1540(g)(1)(A)

> First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

504 U.S. at 560-61 (1992) (citations, quotations, ellipses, brackets, and footnotes omitted). Importantly, these "immutable" requirements of Article III standing may not be modified or abrogated by either the federal judiciary or Congress.[3] *Bennett*, 520 U.S.

---

[3] In addition to these immutable requirements, this Court also adheres "to a set of prudential principles that bear on the question of standing." *Valley Forge Christian College v. Americans United for Separation of Church and States*, 454 U.S. 464, 471-72 (1982). "Like their constitutional counterparts, these judicially self-imposed limits on the exercise of federal jurisdiction are founded in concern about the proper – and properly limited – role of the courts in a democratic society[.]" *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (quotations omitted). One important prudential principal is the "rule barring adjudication of generalized grievances more appropriately addressed in the representative branches. . . ." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (quoting *Allen*, 468 U.S. at 751). As aptly demonstrated by Federal Respondent, the States' claims in the instant case are nothing more than generalized

(Continued on following page)

at 162; *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.") (citing *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979)).

In affirming these immutable requirements, this Court recognized a possible narrow exception, *i.e.*, where a plaintiff is "seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest . . . (*e.g.* the procedural requirement of a hearing prior to the denial of their license application . . .)." *Lujan*, 504 U.S. at 572. Under such circumstances, this Court suggested that a plaintiff could establish standing "without meeting all the normal standards for redressability and immediacy."[4] *Lujan*, 504 U.S. at 572 n.7. The basis for

---

grievances that are more appropriately addressed in the representative Branches. Brief for the Tennessee Valley Authority In Support Of Petitioners, at 11-22.

[4] Importantly, this Court did not relax the causation requirement To the contrary, a plaintiff still must show that the impairment of the concrete interest is fairly traceable to the procedural violation. *Lujan*, 504 U.S. at 572 n.8; *Fla Audubon Soc'y v Bentsen*, 94 F.3d 658, 664-65 (D.C. Cir. 1996) (en banc) ("[T]he Court has never freed a plaintiff alleging a procedural violation from showing a causal connection between the government action that supposedly required the disregarded procedure and some reasonably increased risk of injury to its particularized interest. . . . To demonstrate standing . . a procedural-rights plaintiff must show not only that the defendant's acts omitted some procedural requirement, but also that it is *substantially probable* that the procedural breach will cause the

(Continued on following page)

the relaxed requirements of redressability and immediacy is to ensure the federal government's compliance with the procedural requirements established by either the Constitution or Congress to protect an individual's particularized concrete interest from impairment. *Lujan,* 504 U.S. at 572. Without the threat of impairment to a particularized concrete interest, an individual plaintiff would be able to raise purely public rights, *i.e.*, generalized grievances. *Id.* at 573-78. This, in turn, would allow individuals to usurp the President's most important constitutional duty, *i.e.*, to "take care that the Laws be faithfully executed, Art. II, § 3." *Id.* at 577. Based upon these separation of powers considerations and the lack of injury and redressability, this Court ruled that the environmental groups lacked Article III standing. *Lujan*, 504 U.S. at 563-78.

II. *MASSACHUSETTS* IS IN TENSION WITH *LUJAN.*

In *Massachusetts,* this Court held that that Massachusetts had standing to challenge the Environmental Protection Agency's ("EPA") denial of a rulemaking petition seeking to regulate GHG emissions from new motor vehicles under the Clean Air Act. 549 U.S. at 526. That "Congress ha[d] authorized this type of challenge" in the CAA was "of critical

---

essential injury to the plaintiff's own interest") (emphasis added).

importance" to this Court's standing analysis.[5] *Id.* at 516. Recognizing that a plaintiff normally must meet the immutable requirements of standing, *id.* at 517, this Court relied on the purported procedural right in the CAA to find that Massachusetts did not have to meet the normal requirements for redressability and immediacy. *Id.* at 517-18. ("[A] litigant to whom Congress has 'accorded a procedural right . . . can assert that right without meeting all the normal standards for redressability and immediacy[.]'") (quoting *Lujan*, 504 U.S. at 572, n.7).

Next, this Court noted that the party seeking review was "a sovereign State and not, as it was in [*Lujan*], a private individual." *Id.* at 518. In this Court's view, this was "of considerable relevance," for "States are not normal litigants for the purposes of invoking federal jurisdiction" because they have a "desire to preserve [their] sovereign territory. . . ." *Id.* Thus, this Court concluded: "[g]iven that procedural right and Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to *special solicitude* in our standing analysis." *Id.* at 520 (emphasis added). Inexplicably, this Court then proceeded to analyze Massachusetts's standing as a

---

[5] The provision of the CAA referred to by this Court provides, in relevant part. "A petition for review of action of the Administrator in promulgating any . . standard under section 7521 of this title . . or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia." 42 U.S.C. § 7607(b)(1)

proprietor under *Lujan*. *Massachusetts*, 549 U.S. at 521-26.

This Court found injury based upon alleged rising sea levels that had begun to and would continue to encroach on Massachusetts's coastal land. *Id.* at 522. This Court then found that this injury was fairly traceable to the EPA's refusal to regulate GHG emissions from new motor vehicles because those emissions "contributed" to the injury. *Id.* at 523. Finally, this Court found redressability existed because, if the EPA regulated emissions from new motor vehicles, global warming may be slowed or reduced.[6] *Id.* at 524.

The conflicts between *Massachusetts* and *Lujan* are numerous, but four are of utmost importance. First, *Massachusetts* greatly expands *Lujan's* narrow relaxing of the immutable requirements of Article III standing for procedural rights. In *Lujan*, this Court mentioned this exception in making a distinction

---

[6] It is "not at all clear how the Court's 'special solicitude' for Massachusetts as a State" affects the Court's standing analysis, *id* at 540 (Roberts, C.J., dissenting), especially considering the fusion of proprietary standing, *parens patriae* standing, and the procedural-right exception. For example, "[t]he Court asserts that Massachusetts is entitled to 'special solicitude' due to its 'quasi-sovereign interests,' . . . but then applies Article III standing test to the asserted injury of the Commonwealth's loss of coastal property" *Id* at 539 (Roberts, C.J , dissenting) (citations omitted). State ownership of property, however, has historically been recognized as a "'non-sovereign interest[.]'" *Id.* at 539 (Roberts, C J., dissenting) (quoting *Snapp*, 458 U S at 601)

between "[those who] are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest . . . ," *Lujan*, 503 U.S. at 572, and putative plaintiffs who had not suffered an injury but had been given a right of review by Congress. *Id.* Tellingly, in *Massachusetts* the purported "procedural right" conferred by the CAA, 42 U.S.C. § 7607(b)(1), which formed the basis for this Court's holding, is simply a judicial review provision. It is not a procedural safeguard designed to protect a particularized concrete interest. *See Lujan*, 504 U.S. at 572 (noting that such a procedural safeguard would be the procedural requirement for a hearing prior to the denial of a license application). The similarity between the citizen-suit provision in *Lujan* and the judicial review provision in *Massachusetts* yet the differing outcomes demonstrates the tension between the two cases. Indeed, *Lujan* had already explicitly rejected the idea that a simple judicial review provision could confer Article III standing. 504 U.S. at 571-78.

Second, *Massachusetts* essentially eliminated the causation requirement, at least where a procedural right is involved. *Lujan* demands that the plaintiff show that the complained of injury be "fairly traceable" to the defendant's conduct and not "'the result of the independent action of some third party not before the court.'" *Lujan*, 504 U.S. at 560 (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976)); *see also Fla. Audubon Soc'y*, 94 F.3d at

663 (The plaintiff must show that "it is substantially probable . . . that the challenged acts of the defendant, not of some absent third party, will cause the particularized injury of the plaintiff."). The more attenuated the causal chain between the challenged conduct and the asserted injury, the less likely the plaintiff will be able to establish causation. *Allen*, 468 U.S. at 757-58.

In *Massachusetts,* this Court found causation based upon the following syllogism:

- Man-made GHG emissions contribute to global warming;
- Global warming and the concomitant rising of sea levels have caused Massachusetts to lose a portion of its coastline, and future increases in global temperatures would cause it to lose more;
- A minute portion of global warming is attributable to GHG emissions from new motor vehicles sold in the United States;
- The EPA's failure to regulate those emissions have caused total GHG emissions to be higher than they would have been with such regulation; and
- Therefore, Massachusetts's injury is "fairly traceable" to the EPA's failure to regulate GHG emissions from new motor vehicles sold in the United States.

See Massachusetts, 549 U.S. at 542-43 (Roberts, C.J., dissenting).

This attenuated causal chain is inconsistent with *Lujan*'s requirement that the plaintiff's injury not be the result of the independent action of some third party. 504 U.S. at 560. Indeed, "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Lujan*, 504 U.S. at 562 (quoting *Allen*, 468 U.S. at 758). It stretches credulity to suggest that Massachusetts's asserted injury is "fairly traceable" to the EPA failure to regulate GHG emissions from new motor vehicles. *See Massachusetts*, 549 U.S. at 544 (Roberts, C.J., dissenting) (noting over 95 percent of the global GHG emissions come from sources other than domestic new motor vehicles). To overcome this infirmity, this Court suggested that causation was satisfied because EPA failure to regulate GHG emissions from new motor vehicles "contributes" to Massachusetts's loss of coastline. *Id.* at 523.

Third, *Massachusetts* created a new redressability requirement. In *Lujan* this Court ruled that it must be "likely," as opposed to merely "speculative," that the plaintiffs' alleged injury will be "redressed by a favorable decision." 504 U.S. at 560-61. *Massachusetts* changed this requirement so that, in certain circumstances, redressability is satisfied if any problem may be redressed, even slightly. Indeed, this is evident from the following:

> While it may be true that regulating motor-vehicle emissions will not by itself *reverse*

> global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it. Because of the enormity of the potential consequences associated with man-made climate change, the fact that the effectiveness of a remedy might be delayed during the (relatively short) time it takes for a new motor-vehicle fleet to replace an older one is essentially irrelevant. Nor is it dispositive that developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century: A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.

Massachusetts, 549 U.S. at 525-26 (emphasis in original) (citation and footnote omitted). The flaw with this logic is that the purported remedy (lowering emissions from new motor vehicles) is not "likely" to redress Massachusetts's alleged injury (loss of coastal land). Moreover, "the province of the court is, solely, to decide on the rights of individuals," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803), not to vindicate the public interest in environmental protection or a stable climate. *See Lujan*, 504 U.S. at 576-77; *Summers v. Earth Island Inst.*, ___ U.S. ___, 129 S.Ct. 1142, 1149 (2009) (an allegation of harm to the environment, in and of itself, will not support standing); *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 181 (2000) ("The relevant showing for purposes of Article III standing . . . is not injury to the environment but

injury to the plaintiff."); *Center for Biological Diversity v. U.S. Department of the Interior*, 563 F.3d 466, 478 (D.C. Cir. 2009) ("Standing analysis does not examine whether the environment in general has suffered an injury.").

Finally, this Court seemingly relaxed Article III's immutable standing requirements simply because a State was involved. *Massachusetts*, 549 U.S. at 520 ("Given . . . Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis."). This Court believed that doing so was permissible because *Lujan* involved private entities. *Id.* at 518 ("It is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual."). There is no basis in either *Lujan* or any of this Court's precedents for the proposition that standing requirements are relaxed whenever a State is a plaintiff. *See Snapp,* 458 U.S. at 602 (recognizing that when a State sues as *parens patriae* to protect its quasi-sovereign interests it must still satisfy Article III standing requirements); *see also*, *Massachusetts* 549 U.S. at 536 (Roberts, C.J., dissenting) ("Relaxing Article III standing requirements because asserted injuries are pressed by a State . . . has no basis in our jurisprudence. . . ."); Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 Colum. J. Envtl. L. 293, 304-05 (2005) (recommending that when a State sues in

federal court to vindicate a quasi-sovereign interest, the State "should be subject to the same Article III and prudential standing limitations that apply to suits by aggrieved citizens."). Granted, *Lujan* involved private entities and their individual members, but there is no suggestion in *Lujan* that the immutable requirements of Article III standing apply only to private entities. Rather, in describing the immutable requirements, this Court used the generic word "party" that applies to individuals, organizations, and States alike. *Lujan*, 504 U.S. at 561 ("The *party* invoking federal jurisdiction bears the burden of establishing these elements.") (emphasis added).

III. THE TENSION BETWEEN *MASSACHUSETTS* AND *LUJAN* HAS CREATED CONFUSION IN THE LOWER COURTS.

Needless to say, the tension between *Massachusetts* and *Lujan* has created confusion in the lower courts. For example, in the instant case, the Second Circuit extended *Massachusetts* to find that the States had standing to bring common law nuisance claims for alleged future injuries from global climate change. *Connecticut*, 582 F.3d at 345-47. Although the States did not have a purported procedural right that was of importance in *Massachusetts*, the Second Circuit still applied *Massachusetts*'s relaxed standing requirements to conclude that States had standing to seek injunctive relief with respect to Petitioners'

purported contribution to global climate change. For example, the panel found that an alleged reduced snow pack in California was a current injury-in-fact similar to the purported coastal loss in *Massachusetts*.[7] *Connecticut*, 582 F.3d at 341. Based upon *Massachusetts*, the panel also found that the States' alleged future injuries that might occur within the next 10 to 100 years if global climate change were not abated was injury-in-fact. *Id.* at 342-44. The panel applied *Massachusetts*'s "contributor theory" to find causation because Petitioners' emissions arguably contribute to the States' alleged future injuries. *Connecticut*, 582 F.3d at 345-47. Finally, the panel found that, although Petitioners emit only a small fraction of the world's man-made carbon dioxide emissions, the States satisfied the redressability requirement because in *Massachusetts* it was sufficient to show that the requested remedy would "'*slow* or *reduce*'" global climate change. *Connecticut*, 582 F.3d at 347-49 (quoting *Massachusetts*, 549 U.S. at 525) (emphasis in original).

---

[7] An alleged current injury would seem to be irrelevant because the States are not seeking damages, but only injunctive relief to redress alleged future injuries *Connecticut*, 582 F.3d at 318 As this Court explained in *Los Angeles v. Lyons*, 461 U.S. 95, 102-13 (1983), alleged current injuries may establish standing for damages but do not establish standing for injunctive relief against possible future injuries Indeed, just as "[s]tanding is not dispensed in gross[,]" *Lewis v Casey*, 518 U.S. 343, 358, n.6 (1996), neither is equitable relief. *Cf. DaimlerChrysler Corp v. Cuno*, 547 U S 332, 352 (2006) (a plaintiff must demonstrate standing for each claim and type of relief)

Similarly, in *Comer v. Murphy Oil USA*, 585 F.3d 855, 859-60 (5th Cir. 2009), a group of Mississippi residents and property owners filed a putative class action seeking compensatory and punitive damages from dozens of oil, coal, chemical, and utility companies for harms caused by Hurricane Katrina. The plaintiffs alleged that the defendants' emissions of GHGs contributed to global warming that, in turn, caused a rise in sea levels, which added to the ferocity of Katrina. *Id.* at 859. The plaintiffs raised, *inter alia*, various claims under state common-law tort theories. *Id.* at 859-69. The district court dismissed the case. *Id.* at 860. A three-judge panel of the Fifth Circuit reversed. In so doing, the panel applied *Massachusetts*'s "contributor theory" of causation to conclude that the plaintiffs had standing. *Id.* at 864-67. Ultimately, the panel's decision was vacated on the grant of rehearing en banc and the appeal was later dismissed. *Comer v. Murphy Oil USA*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010). Yet, that the panel applied *Massachusetts*'s "contributor theory," even though a State was not a plaintiff seeking to enforce a procedural right, shows the confusion caused by the tension between *Massachusetts* and *Lujan*.

Conversely, in *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F.Supp.2d 863 (N.D. Cal. 2009), *appeal pending*, No. 09-17490 (9th Cir.), a native village and a city brought nuisance claims

against numerous oil, energy, and utility companies seeking compensation for costs to be incurred in relocating their village. 663 F.Supp.2d at 868-69. The plaintiffs alleged that global climate change has reduced the Arctic sea ice on the coast, threatening the village and city with destruction from winter storms that erode the coastline, which would, ultimately, require the plaintiffs to relocate. *Id.* In accordance with *Lujan*, the district court correctly dismissed the case for lack of standing because the plaintiffs could not trace their alleged injuries to any of the defendants' emissions. *Id.* at 880 n.7 ("[I]t is illogical to conclude that the mere contribution of greenhouse gases into the atmosphere is sufficient to establish that a plaintiff's injury is fairly traceable to a defendant's conduct.").

In cases not involving tort claims, the courts are similarly confused as to how to reconcile *Massachusetts* and *Lujan*. For example, in *Center for Biological Diversity* the petitioners challenged an offshore oil and gas leasing program on both substantive and procedural grounds. In short, the petitioners argued that the federal agency had failed to consider the effects of GHG emissions associated with the program and the effects of climate change on the wildlife in the areas to be leased. 563 F.3d at 475.

The D.C. Circuit ruled that the petitioners lacked standing to challenge the leasing program on substantive grounds. *Id.* at 476-79. Purporting to eschew the relaxed standing requirements from *Massachusetts* because a State was not a party, the D.C. Circuit

found that petitioners failed to establish standing because their alleged injury from global climate change to the wildlife they enjoy was too general. *Id.* at 476-78. The D.C. Circuit also ruled that, even if the petitioners would have been able to satisfy the injury requirement, they still would have lacked standing because they could not establish a causal link between the challenged agency action and their alleged injury. *Id.* at 478-79. In so doing, the D.C. Circuit ruled that the following casual chain was too attenuated:

- The leasing program will bring about drilling;
- Drilling will bring about more oil;
- This oil will be consumed;
- Consumption of this oil will result in additional carbon dioxide being emitted into the air;
- This carbon dioxide will consequently cause climate change;
- This climate change will adversely affect the wildlife that the petitioners enjoy; and
- Therefore, the petitioners are injured by the adverse effects on the wildlife they enjoy.

Id. at 478-79. The D.C. Circuit properly rejected this causal chain because "[s]uch a causal chain . . . rel[ies] on the speculation that various different

groups of actors not present in this case – namely, oil companies, individuals using oil in their cars, cars actually dispersing carbon dioxide – might act in a certain way in the future." *Id.* at 479.

Inexplicably, the D.C. Circuit then ruled that this same causal chain was sufficient for the petitioners to have procedural standing. *Id.* In *Lujan*, this Court explained that only redressability and immediacy were relaxed when a plaintiff asserts a procedural right. 504 U.S. at 572 n.7. This Court did not relax the causation element. Thus, if the D.C. Circuit's ruling is a precursor of what is to come, environmental groups will be able to challenge a federal agency's failure to comply with a procedural requirement without having to prove a causal relationship between the failure to comply with that requirement and the impairment of a concrete interest. *See Lujan*, 504 U.S. at 572 n.8 (Rejecting the idea that the violation of a procedural requirement "satisfies the concrete-injury requirement by itself, without any showing that the procedural violation endangers a concrete interest of the plaintiff. . . .").

IV. THIS CASE PRESENTS AN EXCELLENT OPPORTUNITY FOR THIS COURT TO RESOLVE THE TENSION BETWEEN *MASSACHUSETTS* AND *LUJAN*.

The confusion in the lower courts, as demonstrated by, *inter alia*, the instant case, *Comer*, *Kivalina*, and *Center for Biological Diversity*, is understandable.

So long as that confusion remains, the lower courts will continue to struggle to resolve the tension between *Massachusetts* and *Lujan*. The instant case presents an excellent opportunity for this Court to resolve this tension, just as this Court has done in similar situations. *See, e.g.*, *Ring v. Arizona*, 536 U.S. 584, 598 (2002) (Granting certiorari to resolve the tension between *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Walton v. Arizona*, 497 U.S. 639 (1990)); *Okla. Tax Comm'n v. Citizen Band P. Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991) ("We granted certiorari to resolve an apparent conflict with this Court's precedents and to clarify the law of sovereign immunity with respect to the collection of sales taxes on Indian lands."); *Wainwright v. Witt*, 469 U.S. 412, 417-18 (1985) (Granting certiorari because this "case raises questions on which there is considerable confusion in the lower courts, concerning the degree of deference that a federal habeas court should pay to a state trial judge's determination that a juror may be excused for cause under [*Witherspoon v. Illinois*, 391 U.S. 510 (1968)]"); *Oliver v. United States*, 466 U.S. 170, 173 (1984) (Granting certiorari to clarify the confusion that has arisen as to the continued vitality of the "open fields" doctrine enunciated in *Hester v. United States*, 265 U.S. 57 (1924)); *Michigan v. Clifford*, 464 U.S. 287, 289 (1984) ("We granted certiorari to clarify doubt that appears to exist as to the application of our decision in [*Michigan v. Tyler*, 436 U.S. 499 (1978)]").

CONCLUSION

For the foregoing reasons, this Court should grant Certiorari.

Respectfully submitted by:

STEVEN J. LECHNER
Counsel of Record
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
lechner@mountainstateslegal.com

Attorney for Amicus Curiae

September 3, 2010

AMICUS CURIAE BRIEF

Supreme Court U S

SEP 3 - 2010

No. 10-174

IN THE SUPREME COURT OF THE UNITED STATES

AMERICAN ELECTRIC POWER COMPANY, INC., ET AL.
Petitioners,

v.

STATE OF CONNECTICUT, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF *AMICI CURIAE* NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, AMERICAN PETROLEUM INSTITUTE, AND AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF PETITIONERS

Victor E. Schwartz*
Philip S. Goldberg
Christopher E. Appel
SHOOK, HARDY & BACON L.L.P.
1155 F Street, N.W., Suite 200
Washington, D.C. 20004
(202) 783-8400
vschwartz@shb.com
* *Counsel of Record*

Additional Counsel Listed on Inside Cover

Of Counsel

Karen R. Harned
Elizabeth Milito
NFIB SMALL BUSINESS LEGAL CENTER
1201 F Street, N.W., Suite 200
Washington, D.C. 20004
(202) 314-2061

Harry M. Ng
Michele Schoeppe
AMERICAN PETROLEUM
INSTITUTE
1220 L Street, N.W.
Washington, D.C. 20005
(202) 682-8000

H. Sherman Joyce
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, N.W., Suite 400
Washington, D.C. 20036
(202) 682-1163

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. THIS CASE IS AN UNPRECEDENTED STEP IN THE DECADES-LONG PURSUIT TO TURN THE TORT OF PUBLIC NUISANCE INTO A CATCH-ALL ENVIRONMENTAL "SUPER TORT" 4

A. Public Nuisance Law Has Distinct Elements and Boundaries 4

B. There Has Been a Campaign to Recast Public Nuisance into a "Super Tort" ... 6

C. Courts Have Rejected Efforts to Transform Public Nuisance Into a Catch-All Tort 7

II. RESPONDENTS CANNOT STATE A VIABLE PUBLIC NUISANCE CLAIM 9

A. Respondents' Version of Public Nuisance is Unfounded in Federal and State Law 9

1) Petitioners Have Not Engaged in Objectively Wrongful Conduct..... 10

2) Respondents' Allegations Belie Causation Between Petitioners' Emissions and Respondents' Injuries 11

3) The Trusts' Claims Violate the Special Injury Rule 13

B. Federal Common Law Does Not Provide a Basis for Respondents' Public Nuisance Claims 15

III. RESPONDENTS' CLAIMS RAISE COMPLEX POLITICAL QUESTIONS 16

A. Respondents Are Attempting to "Regulate" Emissions Through the Courts . 18

1) Determining Whether a Petitioner's Emissions Are Reasonable or Unreasonable Requires the Court to Improperly Establish Emission Standards 19

2) Determining Causation, Given the Alleged Global Sources of GHGs, Involves Political Questions..... 21

B. The Litigation's Sponsors Admit this Case Represents Frustration with the Legislative Process 22

IV. THIS LAWSUIT WOULD USHER IN A NEW ERA OF FEDERAL LITIGATION 23

CONCLUSION 24

APPENDIX: LIST OF *AMICI*

TABLE OF AUTHORITIES

Page(s)

CASES

Alaska Native Class v. Exxon Corp., 104 F.3d 1196 (9th Cir. 1997) 14

Baker v. Carr, 369 U.S. 186 (1962)..... 19, 20, 21

California v. General Motors Corp., No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007)..... 18, 19, 21

Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp., 273 F.3d 536 (3d Cir. 2001) 3

Chicago v. American Cyanamid, 2003 WL 23315567 (Ill. Cir. Ct. Oct. 7, 2003) 10

City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099 (Ill. 2004)..... 2, 9

City of Milwaukee v. Illinois and Michigan, 451 U.S. 304 (1981)..... 15

Comer v. Murphy Oil Co., 585 F.3d 855 (5th Cir. 2009), *vacated*, No. 07-60756, 2010 WL 2136658 (5th Cir. May 28, 2010)..... 2, 18, 19

Connecticut v. Am. Elect. Power Co., Inc., 582 F.3d 309 (2d Cir. 2009)..... *passim*

Connecticut v. Am. Elect. Power Co., Inc.,
406 F. Supp. 2d 265 (S.D.N.Y. 2005) 19

Diamond v. General Motors Corp.,
97 Cal. Rptr. 639 (Cal. Ct. App. 1971) 2, 7-8

Eastern Enterprises v. Apfel,
524 U.S. 498 (1998)..... 13

Erie Railroad v. Tompkins,
304 U.S. 64 (1938)..... 15

Exxon Co., U.S.A. v. Sofec, Inc.,
517 U.S. 380 (1996)..... 12

Georgia v. Tenn. Copper Co.,
206 U.S. 230 (1907)..... 11

Gibson v. Am. Cyanamid Co., _ F. Supp. 2d _,
2010 WL 2465498 (E.D. Wis. 2010) 12

Goodwin v. Anheuser-Busch, Inc., No.
BC310105, 2005 WL 280330 (Cal.
Super. Ct. order Jan. 28, 2005) 9

Illinois v. City of Milwaukee,
406 U.S. 91(1972)..... 15

In re Lead Paint Litig.,
924 A.2d 484 (N.J. 2007) 9

*Massachusetts v. U.S. Environmental
Protection Agency*, 549 U.S. 497 (2007) 17, 18

*Michie v. Great Lakes Steel Div., Nat'l Steel
Corp.*, 495 F.2d 213 (6th Cir. 1974)..... 12

Missouri v. Illinois, 180 U.S. 208 (1901)..... 11

Native Village of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009) .....*passim*

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991)..... 10

Penelas v. Arms Tech., Inc., 778 So. 2d 1042 (Fla. Dist. Ct. App. 2001)..... 23

Riegel v. Medtronic, Inc., 552 U.S. 312 (2008)..... 3

Spitzer v. Sturm, Ruger & Co., 309 A.D. 91 (N.Y. App. Div. 2003)..... 23

State v. Lead Indus. Ass'n, 951 A.2d 428 (R.I. 2009) 2, 4, 9

State v. Schenectady Chems., Inc., 459 N.Y.S.2d 971 (Sup. Ct. 1983)..... 8

St. Louis v. Benjamin Moore & Co., 226 S.W.3d 110 (Mo. 2007)..... 9

Texas v. American Tobacco Co., 14 F. Supp. 2d 956 (E.D. Tex. 1997) 9

Texas Carpenters Health Benefit Fund, IBEW-NECA v. Philip Morris, Inc., 21 F. Supp. 2d 664 (E.D. Tex. 1998)..... 12

Tioga Pub. Sch. Dist. v. U.S. Gypsum Co., 984 F.2d 915 (8th Cir. 1993) 8

United States v. City of Las Cruces,
289 F.3d 1170 (10th Cir. 2002)..... 15

United States v. O'Brien,
391 U.S. 367 (1968)..... 17

U.S. Steel Corp. v. Save Sand Key, Inc.,
303 So. 2d 9 (Fla. 1974) 14

STATUTES

42 U.S.C. § 7521(a)(1) 18

OTHER AUTHORITIES

2 Am. Law Inst., Enterprise Responsibility for Personal Injury: Reporter's Study 87 (1991)..... 24

Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After* Boomer, 54 Alb. L. Rev. 359 (1990) 14

Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 Ecol. L.Q. 755 (2001)..... 6, 7

Theodore J. Boutrous, Jr. & Dominic Lanza, *Global Warming Tort Litigation: The Real "Public Nuisance,"* 35 Ecology L. Currents 80 (2008)..... 15

John Carey & Lorraine Woellert, *Global Warming: Here Come the Lawyers*, Bus. Week, Oct. 30, 2006 18

CRS Report for Congress, China's Greenhouse Gas Emissions and Mitigation Policies, Sept. 10, 2008 *at* http://www.fas.org/sgp/crs/row/RL34659.pdf 21

Dan B. Dobbs, *The Law of Torts* § 180 (2000) 12

Jessica Dye, *Lugar Floats New Energy Plan Minus Cap-And-Trade*, Law 360, March 10, 2010 17

Jessica Dye, *Senate Punts Climate Bill to Fall, Puts Focus on BP*, Law 360, July 22, 2010 17

Environmental Litigation: Law and Strategy 1 (Cary R. Perlman, ed. 2009) 18

Richard A. Epstein, *Federal Preemption, and Federal Common Law, in Nuisance Cases*, 102 N.W.U. L. Rev. 551 (2008) 15

Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741 (2003) 4

Fowler V. Harper, *et al.*, The Law of Torts § 20.2 (1986) 12

Jack H. Friedenthal *et al.*, Civil Procedure 223 (1985) 15

W. Page Keeton *et al.*, *Prosser & Keeton on Torts* 616 (5th ed. 1984) 6, 11

Key Judge Downplays Prospects for Successful Climate Change Suits, Clean Air Report, Vol. 21 Iss. 5, Mar. 2, 2010 23

Robert Meltz, Cong. Research Serv. Rep. for Cong., Climate Change Litigation: A Growing Phenomenon 33 (2008), *at* http://www.elaw. org/system/files/CRS_4_7_08.pdf..... 22

Natural Sources and Sinks of Carbon Dioxide, Environmental Protection Agency, Climate Change – Greenhouse Gas Emissions, *at* http://www.epa.gov/climatechange/emissions/co2_natural.html 21

Matthew F. Pawa & Benjamin A. Krass, *Global Warming as a Public Nuisance: Connecticut v. American Electric Power*, 16 Fordham Envtl. L. Rev. 407 (2005)..... 22

Robert B. Reich, *Don't Democrats Believe in Democracy?*, Wall St. J., Jan. 12, 2000, at A22 3

Restatement (Second) of Torts § 432 (1979)..... 12

Restatement (Second) of Torts § 433B (1979)..... 13

Restatement (Second) of Torts § 821A (1979)..... 5

Restatement (Second) of Torts § 821B (1979)..... 2, 10

Restatement (Second) of Torts § 821C (1979) 5, 13-14

Restatement (Second) of Torts § 840D (1979) 11, 13

S. Res. 98, 105th Cong. (1997) 17

Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541 (2006) 5

Symposium, *The Role of State Attorneys General in National Environmental Policy: Global Warming Panel, Part I*, 30 Colum. J. Envtl. L. 335 (2005) 22

INTEREST OF *AMICUS CURIAE*[1]

The National Federation of Independent Business Small Business Legal Center, American Petroleum Institute and American Tort Reform Association ("*Amici*") represent large and small businesses throughout the United States. They have a substantial interest in ensuring that courts follow constitutional and traditional tort law principles. The nature of this case extends far beyond these individual petitioners and respondents. It represents an effort to circumvent the legislative and executive branches on environmental policy issues, and has national and international implications. Should the Second Circuit ruling stand and subject utilities and other businesses engaged in lawful conduct to liability for alleged impacts of global climate change, *amici*'s members would be adversely affected.

STATEMENT OF THE CASE

Amici adopt Petitioners Statement of the Case.

SUMMARY OF ARGUMENT

The Second Circuit's ruling represents an unprecedented and unwise expansion of federal common law in the area of public nuisance. The tort of public nuisance is a centuries-old tort with distinct elements and purpose: to allow governments to stop

---

[1] Per Rule 37.2, at least 10 days notice was given to the parties of *amici's* intention to file this brief. The parties consented to the filing of this brief and their letters of consent have been lodged with the Clerk of the Court. Per Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

someone from engaging in objectively wrongful behavior that invades a public right and, when appropriate, require the abatement of that nuisance. *See* Restatement (Second) of Torts § 821B cmt. a (1979) (historically classifying such conduct as quasi-criminal). The Second Circuit ruling removes the core public nuisance requirement that the defendant engaged in such wrongful conduct. It also dilutes causation so any connection to a public nuisance can establish liability. The result is a warped federal "super tort" for subjecting American businesses to liability for nearly any environmental harm.

For the past forty years, efforts to enlarge public nuisance doctrine have largely been tried under state common law. Most have failed. The cases have ranged from attempts to subject businesses to liability for smog in Los Angeles to gun violence in cities to lead paint in people's homes. *See Diamond v. General Motors Corp.*, 97 Cal. Rptr. 639 (Cal. Ct. App. 1971); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004); *State v. Lead Indus. Ass'n*, 951 A.2d 428 (R.I. 2009). Judges schooled in the character and elements of the 700 year-old tort dismissed the cases for failure to state a claim or, as with recent climate change cases, on political question grounds. *See, e.g.*, *Comer v. Murphy Oil Co.*, 585 F.3d 855, 860 n.2 (5th Cir. 2009) (reciting the district court's bench ruling that courts are "ill-equipped or unequipped" to adjudicate the claims), *vacated*, No. 07-60756, 2010 WL 2136658 (5th Cir. May 28, 2010). These state and federal judges applying state tort law appreciated that removing wrongful causation from public nuisance theory would be as extreme as removing breach and causation from negligence; the result would be a "monster that would devour in one

gulp the entire law of tort." *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001).

For proponents, the lure of such a leap in tort law is the creation of a powerful tool for advancing political agendas outside of the checks and balances of the political process. *See Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 877 (N.D. Cal. 2009) ("Plaintiffs are in effect asking this Court to make a political judgment"). Liability would force businesses to change practices or facilitate regulatory or legislative changes. *See Riegel v. Medtronic, Inc.*, 552 U.S. 312, 328-29 (2008) (explaining that tort duties "directly regulate" conduct). Former Clinton Labor Secretary Robert Reich termed lawsuits with such a purpose "regulation through litigation," calling them "faux legislation, which sacrifices democracy." Robert B. Reich, *Don't Democrats Believe in Democracy?*, Wall St. J., Jan. 12, 2000, at A22.

Here, Respondents are trying to "regulate" – via the courts – emission reductions not achieved through the political process. Respondents strategically filed their claims under federal common law, where public nuisance doctrine is not as well-developed as in the states. They found a receptive court in the Second Circuit, whose expanded view of federal public nuisance claims, as expressed in this opinion, is that "if regulatory gaps exist, [federal common law can fill] those interstices." *Connecticut v. Am. Elect. Power Co., Inc.*, 582 F.3d 309, 330 (2d Cir. 2009).

This Court should grant this Petition to provide clarity on the limited scope and application of the federal common law, particularly in the area of pub-

lic nuisance. Otherwise, "gap-filling" litigation envisioned by this decision will create a rapid expansion of federal lawsuits in many areas of the law. It also would be unsound for the federal common law to make a leap largely rejected in the states.

This brief responds to the second and third questions presented. It grounds Respondents' claims in public nuisance doctrine and explains why lawsuits naming private sector companies for global climate change injuries fail to state a cause of action; they are also barred under the political question doctrine.

ARGUMENT

I. THIS CASE IS AN UNPRECEDENTED STEP IN THE DECADES-LONG PURSUIT TO TURN THE TORT OF PUBLIC NUISANCE INTO A CATCH-ALL ENVIRONMENTAL "SUPER TORT"

A. Public Nuisance Law Has Distinct Elements and Boundaries

The tort of public nuisance has centuries of jurisprudence defining its purpose, elements and boundaries. *See* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741 (2003). The four time-honored elements of public nuisance theory are: (1) the existence of a "public right"; (2) unreasonable conduct by the alleged tortfeasor in interfering with that public right; (3) control of the nuisance; and (4) proximate cause between defendant's unreasonable conduct and the public nuisance, and any alleged injury. *See State v. Lead Indus. Ass'n*, 951 A.2d 428, 452-53 (R.I. 2009) (detailing the four elements as "essential to establish" a

public nuisance claim). States have applied the tort in slightly different ways, as is customary with common law, though the essence of public nuisance liability has remained constant.

The quintessential public nuisance is a barrier stopping the use of a public road. If the person blocked the road for a reasonable purpose, such as landing a distressed plane, there is no liability. *See* Restatement (Second) of Torts § 821A cmt c. (1979) ("If the conduct of the defendant is not of a kind that subjects him to liability . . . the nuisance exists, but he is not liable for it."). But, if a person unreasonably interfered with travel on a public road, for example as part of an unauthorized protest, the government can enjoin the person from blocking the road and require him or her to abate any damage caused to the road. *See* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541, 570 (2006) (noting that governments cannot recover damages because such public nuisance actions are not compensatory or punitive).

Governments, namely states and municipalities, are the principal plaintiffs in public nuisance suits. Private plaintiffs, such as the land Trusts in this case, generally cannot bring public nuisance claims. The exception is when a plaintiff is injured from the public nuisance in a way "different [in] kind from that suffered by other persons exercising the same public right." Restatement (Second) of Torts § 821C cmt. b (1979) ("It is not enough that he has suffered the same kind of harm or interference but to a greater extent or degree"). If a private plaintiff can prove the tort's four elements and a different-in-kind in-

jury, it can bring a public nuisance claim for only the special damages. Private plaintiffs cannot seek an injunction or abatement in public nuisance law.

Extending the example, individuals sitting in traffic caused by a blockade, regardless of length or consequences, do not have public nuisance claims. A person specially injured by crashing into the blockade can bring a claim for only the correlated special damages.

As discussed in detail herein, under these long-standing tenets of public nuisance law the state and city Respondents here cannot state a public nuisance claim because each Petitioner's GHG emissions are lawful, not unreasonable, and are not a proximate cause of Respondents' alleged injuries. Further, the Trusts have no cause of action because, even if their allegations are true, they have not sustained a harm different in kind than any other landowner.

B. There Has Been a Campaign to Recast Public Nuisance into a "Super Tort"

In the 1970s, environmental interest group attorneys campaigned to transform public nuisance from a restrained government enforcement tort into a tool for requiring businesses to remediate environmental conditions, regardless of fault. *See* Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 Ecol. L.Q. 755, 838 (2001). They tried to capitalize on the amorphous nature of the word "nuisance." *See* W. Page Keeton *et al.*, *Prosser & Keeton on Torts* 616 (5th ed. 1984) ("There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word

'nuisance.' It has meant all things to all people."). The tort also had not been used much in the post-industrialized era, and many courts did not have a view of how to apply the tort in modern times.

As part of this campaign, several plaintiff environmental lawyers pursued changes to the public nuisance chapters of the Restatement (Second) that would have "[broken] the bounds of traditional public nuisance." Antolini, *supra*, at 838. Most notably, they tried to remove the wrongful conduct requirement so claims could be brought, as attempted here, even when defendants were engaged in lawful activities. *See id.* They also sought to get rid of the special injury rule. Doing so would allow "severe" harms to be compensable even when not different in kind from harms to the public. They also wanted private plaintiffs, including interest groups, to be able to form class actions and seek injunctive relief and abatement costs. *See id.*

Although fully presented, none of these specific changes were included in the black letter of the Restatement (Second). While some ambiguities appear in the comments to the Restatement (Second), the vast majority of courts, as the next section will show, have rejected these changes.

C. Courts Have Rejected Efforts to Transform Public Nuisance Into a Catch-All Tort

Public nuisance has proven not to be a tort without boundaries. The first test case, *Diamond v. General Motors Corp.*, 97 Cal. Rptr. 639 (Cal. Ct. App. 1971), pursued corporations for emitting gases that, when mixed together, allegedly contributed to smog

in Los Angeles. Plaintiffs sued for billions of dollars in compensatory and punitive damages.

The court, in dismissing the claims, appreciated their inconsistency with traditional public nuisance law, the political nature of the underlying issues, and the proper role of the legislature, not the judiciary, in making regulatory decisions: plaintiffs were "simply asking the court to do what the elected representatives of the people have not done: adopt stricter standards over the discharge of air contaminants in this country, and enforce them with the contempt power of the court." *Id.* at 645. The court noted that granting relief would "halt the supply of goods and services essential to the life and comfort of the persons whom plaintiff seeks to represent." *Id.* at 644.

Advocates for expanding public nuisance law have had occasional successes,[2] but all major attempts to morph public nuisance into a "super tort" for speculative lawsuits have failed. In asbestos litigation, for instance, courts rejected cases from municipalities and school districts asserting public nuisance claims against manufacturers to abate asbestos from public and private properties. *See, e.g., Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993) (public nuisance would "give rise to a cause of action . . . regardless of the defendant's degree of culpability"). In state attorney general liti-

---

[2] For example, a court allowed a pollution claim against a business that did not contribute to the pollution and never controlled the polluted land. *See State v. Schenectady Chems., Inc.*, 459 N.Y.S.2d 971 (Sup Ct. 1983) The court admitted that determining responsibility was "a political question to be decided in the legislative arena," but allowed the claim, saying "[s]omeone must pay to correct the problem." *Id.* at 977.

gation against tobacco manufacturers, the only court to address the public nuisance claim rejected it. *See Texas v. American Tobacco Co.*, 14 F. Supp. 2d 956 (E.D. Tex. 1997). Such claims were also unsuccessful in a variety of other contexts, such as harms caused by guns, lead paint, and drunk driving. *See, e.g., Chicago*, 821 N.E.2d at 1099; *Lead Indus. Ass'n*, 951 A.2d at 428; *In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007); *St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007); *Goodwin v. Anheuser-Busch, Inc.*, No. BC310105, 2005 WL 280330, at *8 (Cal. Super. Ct. order Jan. 28, 2005).

II. RESPONDENTS CANNOT STATE A VIABLE PUBLIC NUISANCE CLAIM

Here, Respondents similarly tried to shortcut the elements of public nuisance law. This suit, though, was filed under federal common law – an avenue around these state common law decisions. The Court should grant the Petition to clarify that if federal common law does apply, it is not so broad as to render private parties liable for global climate change or specific weather events.

A. Respondents' Version of Public Nuisance is Unfounded in Federal and State Law

Respondents seek several fundamental changes to public nuisance law. First, both the government and private claims eliminate the unreasonable conduct element and dilute causation. Second, the Trusts' claims are based on future injuries, not actual special injuries, allege severe harm, not different harm, and seek injunctive relief, not damages.

1) Petitioners Have Not Engaged in Objectively Wrongful Conduct

The Second Circuit, in defining "unreasonable" interference, concludes that any known, continuing conduct of a significant or long-lasting impact on a public right is unreasonable. *See id.* at 352-353. There is, however, no consideration of the wrongfulness, acceptability or utility of the petitioners' conduct. Thus, the court broadly expands the kind of conduct that can give rise to public nuisance liability. *See* Restatement (Second) of Torts §821B cmt. b (1979). Such a ruling represents a giant leap from the tort's historical application of defining public nuisance conduct as "common law crimes" and "contrary to common standards of decency." *Id.*

As state and federal courts have recognized, if the objectively wrongful conduct requirement is removed from public nuisance, plaintiffs will "deliberately frame[] [their] case as a public nuisance action" to get around constraints of the American legal system. *Chicago v. American Cyanamid*, 2003 WL 23315567, at *4 (Ill. Cir. Ct. Oct. 7, 2003). Justice O'Connor has observed that such objective standards are necessary because they provide notice that one's actions could lead to liability. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 43 (1991) (O'Connor, J., dissenting) (vagueness doctrine applies to common law liability).

Here, while Respondents clearly do not agree with Petitioners' emissions practices, there has been no objective, wrongful, liability-causing event. Petitioners have not failed to comply with any specific environmental law or regulation; instead Respondents are asking a court to create those standards. This political agenda to curb GHG emissions,

though, does not turn the lawful production of electricity into quasi-criminal or unreasonable conduct.

Should the Court grant this Petition, it can clarify the difference between political controversies such as that alleged here and objectively wrongful conduct as were alleged in previous applications of federal common law public nuisance cases, namely in *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907) (noxious, sulphurous acid gas) and *Missouri v. Illinois*, 180 U.S. 208 (1901) (dumping sewage).

2) Respondents' Allegations Belie Causation Between Petitioners' Emissions and Respondents' Injuries

Under the Second Circuit's causation ruling, any contribution to a public nuisance, regardless of how small, is the basis for a federal common law action. *See* 582 F.3d at 356 (citing Restatement (Second) of Torts § 840D that "the fact that other persons contribute to a nuisance is not a bar to the defendant's liability for his own contribution."). This misinterpretation of the Restatement violates the fundamental tort law principle that "there [must be] some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered." *See* Keeton, *supra*, at § 41, 263. Indeed, when the Restatement (Second) addressed causation, it required a defendant's conduct to be a substantial factor in producing the alleged harm.

Proximate cause requires both factual and legal causation: but-for Petitioners' emissions the alleged injuries would not have occurred, and the injuries are closely related such that a reasonable person would see it as a likely result of his/her conduct. *See*

Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 380 (1996); *cf.* Fowler V. Harper, *et al.*, The Law of Torts § 20.2 (1986). Even taking Respondents' causation allegations as true, no Petitioner could be a "but for" cause of global climate change. *See Kivalina*, 663 F. Supp. 2d at n 4 (if "combustion of fossil fuels is causing global warming, it is evidence that any person, entity or industry which uses or consumes such fuels bears at least some responsibility for Plaintiffs' harm."). Also, no Petitioner could have reasonably foreseen Respondents' alleged injuries such that it "should have avoided the injury" by acting differently on its own. Dan B. Dobbs, *The Law of Torts* § 180, 444 (2000).

Accordingly, Respondents seek a mere "contribution" test unsupported by state tort law or prior explanations of federal common law. *See, e.g., Texas Carpenters Health Benefit Fund, IBEW-NECA v. Philip Morris, Inc.*, 21 F. Supp. 2d 664, 668 (E.D. Tex. 1998) (in industry suits, "the nexus between cause and effect [for each defendant] is too attenuated to justify liability."). This mere contribution test proposes a standard much lower than the "but for", "substantial factor" and "single indivisible injury" tests, and less conventional burden-shifting theories as market-share, risk contribution, or enterprise liability. *See* Restatement (Second) of Torts § 432 (1979); *Michie v. Great Lakes Steel Div., Nat'l Steel Corp.*, 495 F.2d 213, 216 (6th Cir. 1974) ("Like most jurisdictions, Michigan has had great difficulty with the problems posed in tort cases by multiple causes for single or indivisible injuries."); *Gibson v. Am. Cyanamid Co.*, _ F. Supp. 2d _, 2010 WL 2465498 (E.D. Wis. 2010) (risk contribution violates due process).

The actual purpose of Section 840D is to assure that a tortfeasor cannot escape liability just because others contributed to the harm, particularly when the tortfeasor is aware of those contributions. As the Restatement (Second) explains, collective liability theories, where permitted, are only manageable when a discrete and identifiable group of tortfeasors allegedly contributed to an identifiable harm: "The possibility arises that there may be so large a number of actors, each of whom contributes a relatively small and insignificant part to the total harm, that the application of the rule may cause disproportionate hardship to defendants." Restatement (Second) of Torts § 433B cmt. e (1979).

This is the situation under Respondents allegations, which state that a myriad of GHG sources over decades caused climate change. As this Court has observed, such "severe retroactive liability on a limited class of parties that could not have been anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience" deserves constitutional scrutiny. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 528-29 (1998).

3) The Trusts' Claims Violate the Special Injury Rule

The Trusts only claim here is for potential future injury, *i.e.*, "the ecological value of their properties will be diminished" by climate change. *Id.* at 341-42. ("The Trusts do not allege any current injury").

Commonsense, the Restatement (Second), and centuries of jurisprudence on the special injury rule dictate that a private plaintiff can recover only if it has *already* suffered the special injury. *See* Res-

tatement § 821C ("one *must have suffered* harm") (emphasis added); Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After* Boomer, 54 Alb. L. Rev. 359, 362-63 (1990). Without the injury, there is no basis for assessing one's special damages. Expanding special injury liability to include speculative future damages would go beyond even the doctrine's broadest assertions. *See U.S. Steel Corp. v. Save Sand Key, Inc.*, 303 So. 2d 9, 13 (Fla. 1974) (nonprofit seeking to stop business conduct had not suffered a special injury).

Also, diminished property value from climate change, even if it occurs, is not special to the Trusts. Property owners around the globe, particularly those with large holdings or with properties sensitive to weather changes, would be affected by climate change in the same way the Trusts allege. The Second Circuit evades this fact by suggesting that §821C allows severe harm, even if not special, to form the basis of a special injury claim. *See* 582 F.3d at 367. Courts have widely held that severity alone is not a surrogate for the "different in kind" requirement. *See, e.g., Alaska Native Class v. Exxon Corp.*, 104 F.3d 1196, 1198 (9th Cir. 1997) ("spill may have affected Alaskan Natives more severely than other members of the general public, [but] their right to [culture and lifestyle] is shared by all Alaskans.").

Again, the Second Circuit takes federal common law down unwise paths not endorsed by the majority of state common law judges.

B. Federal Common Law Does Not Provide a Basis for Respondents' Public Nuisance Claims

Respondents' casting of their claims in federal common law should be scrutinized. *See* Theodore J. Boutrous, Jr. and Dominic Lanza, *Global Warming Tort Litigation: The Real "Public Nuisance,"* 35 Ecology L. Currents 80, 87-88 (2008).

The Second Circuit's notion of a robust federal common law for gap-filling federal statutes is misguided. *See Erie Railroad v. Tompkins*, 304 U.S. 64, 78 (1938) ("there is no federal general common law"); *United States v. City of Las Cruces*, 289 F.3d 1170, 1186 (10th Cir. 2002) ("reluctance to create common law is a core feature of federal court jurisprudence."); *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 314 n.7 (1981) ("If state law can be applied, there is no need for federal common law"). The Court has identified only a few areas in which federal common law can develop, namely admiralty and maritime cases, interstate disputes, and cases concerning international relations or the legal relations and proprietary interests of the United States. *See* Jack H. Friedenthal *et al.*, Civil Procedure 223 (1985).

In the post *Erie*-era, federal public nuisance cases have largely involved disputes between governments. *See, e.g., Illinois v. City of Milwaukee*, 406 U.S. 91, 104 (1972) (Illinois sought to require Wisconsin cities to abate a nuisance in interstate waters); Richard A. Epstein, *Federal Preemption, and Federal Common Law, in Nuisance Cases*, 102 N.W.U. L. Rev. 551, 562-63 (2008) (federal common law is used if it is inappropriate to apply one state's

law over another). The instant claims against private actors thus fall far outside of the limited reach of federal common law.

III. RESPONDENTS' CLAIMS RAISE COMPLEX POLITICAL QUESTIONS

Federal district courts have correctly understood the political nature and purpose of climate change litigation.

Political interests aligned with Respondents have urged the federal government to limit GHG emissions for 30 years. *See Connecticut,* 582 F.3d at 381-88. Presidents George H.W. Bush, Clinton and Obama negotiated treaties on global emissions and Congress has considered numerous climate-related bills. But, as the Second Circuit points out, these efforts did not result in binding emission caps. *See id.* (requiring "research, planning and strategizing technology development, assessments, and monitoring, but no real action to abate emissions"). The Second Circuit wrongly states that it can conclude from this lack of emission controls that Congress has not "spoken" on this issue, and, thus, there is a basis for applying federal common law to GHG emissions. *See id.* at 388 (stating "until" Congress or EPA sets GHG emissions levels, plaintiffs have a viable claim).

As this Court can appreciate, the lack of strict emission limits does not mean Congress or the EPA has not considered and "spoken" on this issue; it is a reflection that a viable, balanced solution has not been agreed upon. In the 1990s, for example, the United States Senate, in response to the Kyoto Protocol, unanimously (95-0 vote) stated that "the Unit-

ed States should not be a signatory to any protocol. . . which would (A) mandate new commitments to limit or reduce greenhouse gas emissions." S. Res. 98, 105th Cong. (1997). Recently, members of both political parties said they "would not be inclined to support any bill that attached a cost to carbon emissions." Jessica Dye, *Senate Punts Climate Bill to Fall, Puts Focus on BP*, Law 360, July 22, 2010 (reporting legislation calling for a 17 percent reduction over ten years – nearly half the reduction sought here – did not have support of Congress); Jessica Dye, *Lugar Floats New Energy Plan Minus Cap-And-Trade*, Law 360, March 10, 2010 (noting new legislative efforts would "scrap greenhouse gas emission reduction goals"). The Solicitor General's brief details the EPA's extensive efforts on GHG emissions, including in response to *Massachusetts v. U.S. Environmental Protection Agency*, 549 U.S. 497 (2007).

This Court, in other contexts, has considered conduct as speech. *See, e.g., United States v. O'Brien*, 391 U.S. 367 (1968) (flag burning is form of speech). The active, continuing debate in Congress and EPA regarding GHG emissions is a testament to the complexity of setting emissions standards and the appropriateness of developing such limits, if at all, through the political process after adequate research and development. Judicial intervention under the mantle of federal common law "gap-filling" is directly contrary to the other two branches' conduct, regardless of whether Congress or the EPA resolve to implement emission standards. This lawsuit, therefore, has no place before this or any court.

A. Respondents Are Attempting to "Regulate" Emissions Through the Courts

Climate change lawsuits are attempts to take the campaign to cap emissions to a new arena: the courts. *See* Environmental Litigation: Law and Strategy 1 (Cary R. Perlman, ed. 2009) ("[F]our years ago, the issue had no significant legal footprint in the United States. Since then, however, the issue has exploded onto the legal scene, resulting in enormous social and economic shockwaves."). The first case was *Massachusetts*, which settled an issue of administrative law by directing the Bush EPA to respond to a rulemaking petition that asked it to consider whether GHG emissions from certain light duty vehicles "endanger public health or welfare" and should be regulated under the Clean Air Act. *See id.* at 529-35 (quoting 42 U.S.C. § 7521(a)(1)). *Massachusetts* did not directly or indirectly endorse regulation through tort litigation.

Four lawsuits, including this one, were filed against private sector interests associated with producing and using energy products. *See* John Carey & Lorraine Woellert, *Global Warming: Here Come the Lawyers*, Bus. Week, Oct. 30, 2006, at 34 (observing this "ambitious legal war on oil, electric power, auto, and other companies"). These lawsuits seek to directly force companies to adopt limits unachieved in the political process. After the instant case, California's attorney general filed *California v. General Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) against car-makers for making cars that emit exhaust. Two other cases, *Kivalina*, 663 F. Supp. 2d at 877 and *Comer*, 585 F.3d at 855,

sought recovery for specific injuries from weather events allegedly caused or made worse by global climate change.

All four federal trial courts dismissed the claims as political questions. *See Kivalina*, 663 F. Supp. 2d at 877 ("allocation of fault – and cost – of global warming is a matter appropriately left for determination by the executive or legislative branch"); *General Motors*, 2007 WL 2726871 at *13 (claim "expos[es] automakers, utility companies, and other industries to damages flowing from a new judicially-created tort for doing nothing more than lawfully engaging in their respective spheres of commerce"); *Comer*, 585 F.3d at 860 n.2 (citing district court's ruling that the global warming debate "has no place in the court"); *Connecticut v. Am. Elect. Power Co., Inc.*, 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005) ("Because resolution of the issues presented here requires identification and balancing of environmental, foreign policy, and national security interests, an initial policy determination of a kind clearly for non-judicial discretion is required.") (internal citation omitted).

1) Determining Whether a Petitioner's Emissions Are Reasonable or Unreasonable Requires the Court to Improperly Establish Emission Standards

As each federal trial court judge recognized, the constitutional difficulty with these cases is that there are no "judicially discoverable and manageable standards" for assessing unreasonableness of a Petitioner's conduct with respect to emissions of GHGs. *Baker v. Carr*, 369 U.S. 186, 217 (1962). A trial court would have to determine that, for each Petitioner,

emissions above a certain level *unreasonably* contributed to the alleged hazardous conditions, whereas emissions below that level were *reasonable*, even if allegedly contributing to those conditions. Respondents suggest three percent per year for ten years.

Determining whether emissions should be reduced, by how much, and for which industries is exactly the kind of policy determination alluded to in *Baker* as being of "non-judicial discretion" and the province of Congress and federal regulators. *See id.* The activities underlying these lawsuits involve public utilities and other energy sources necessary to modern ways of life. The public relies on these products for turning on lights, heating their homes, having electricity to run everyday appliances, and meeting their most basic transportation needs.

Such global political decisions should not be decided in courts on limited information provided by lawyers on each side of a case. Weighing costs, benefits and social value of producing and using essential resources and factoring in any adverse effects of their production, their use, or the transition to any new regulatory scheme is part of the delicate balancing for which only Congress and administrative agencies are suited. They can conduct public hearings, commission research, engage in meaningful discourse with foreign nations, and consider the interests of all stakeholders. These branches of government, unlike the Judiciary, have the authority and competent tools to investigate and set U.S. emissions policy.

2) Determining Causation, Given the Alleged Global Sources of GHGs, Involves Political Questions

Under Respondents' causation allegations, there are "multiple worldwide sources of [GHGs] across myriad industries and multiple countries." *General Motors*, 2007 WL 2726871, at *15. Man-made sources include fossil fuel combustion, power plants, manufacturing, and auto and airplane exhaust throughout the world. *See* CRS Report for Congress, China's Greenhouse Gas Emissions and Mitigation Policies, Sept. 10, 2008 *at* http://www.fas.org/sgp/crs/row/ RL34659.pdf. Natural sources include volcanic outgassing, animal releases of gas, and breathing of all living aerobic organisms. *See* Natural Sources and Sinks of Carbon Dioxide, Environmental Protection Agency, Climate Change – Greenhouse Gas Emissions, *at* http://www.epa.gov/climatechange/ emissions/co2_natural.html.

Respondents could have named innumerable sources from around the world in this lawsuit, but made a *political* decision to sue only these six entities. This "seemingly arbitrary selection of Defendants, coupled with the gravity and extent of the harm alleged in this case, underscores the conclusion that the allocation of responsibility for global warming is best left to the executive or legislative branch." *Kivalina*, 663 F. Supp. 2d n 4. This Court can clarify that giving Respondents the sole right to make the "political judgment" that these Petitioners should be the only ones to bear the cost of global climate change violates the *Baker* standard that federal courts have a manageable method of discerning the

entities that are creating and contributing to the alleged nuisance.

B. The Litigation's Sponsors Admit this Case Represents Frustration With the Legislative Process

With surprising candor, the litigation's advocates and sponsors acknowledge the political purpose of these lawsuits. *See* Robert Meltz, Cong. Research Serv. Rep. for Cong., Climate Change Litigation: A Growing Phenomenon 33 (2008), *at* http://www.elaw.org/system/files/CRS_4_7_08.pdf (proponents "freely concede that such initiatives are make-do efforts that . . . may prod the national government to act.").

For example, Connecticut Attorney General Richard Blumenthal, the lead attorney general in the case, stated that "this lawsuit began with a lump in the throat, a gut feeling, emotion, that CO_2 pollution and global warming were problems that needed to be addressed. They were urgent and immediate and needed some kind of action, and it wasn't coming from the federal government. . . . [We were] brainstorming about what could be done." Symposium, *The Role of State Attorneys General in National Environmental Policy: Global Warming Panel, Part I*, 30 Colum. J. Envtl. L. 335, 339 (2005).

Matthew Pawa, the case's leading contingency fee attorney, explained his reasoning for picking these defendants: "The electric power sector is the obvious place to begin such emissions reductions because, economically, it is the low-hanging fruit." Matthew F. Pawa & Benjamin A. Krass, *Global Warming as a Public Nuisance: Connecticut v. American Electric Power*, 16 Fordham Envtl. L. Rev. 407 (2005).

Even Second Circuit Judge Peter Hall, who authored the opinion allowing this case to continue, since conceded that "[y]ou really don't want a district judge supervising your relief in all of this stuff" but "[t]o the extent there is out there . . . some opportunity to pursue or continue to pursue a nuisance action, that may help in a political sense." *Key Judge Downplays Prospects for Successful Climate Change Suits*, Clean Air Report, Vol. 21 Iss. 5, Mar. 2, 2010.

Such end-games may entice those sympathetic to a particular political agenda, but they do not give rise to liability. This Court can clarify that Article III does not provide federal courts with authority to settle the national climate change policy debate.

IV. THIS LAWSUIT WOULD USHER IN A NEW ERA OF FEDERAL LITIGATION

If this case proceeds, these and other defendants will face speculative, federal tort cases after every harsh weather event. The alleged damages here, as with ice erosion around Kivalina and Hurricane Katrina, are not unique to these communities. Every hurricane, flood, drought, and heat-related condition could spawn federal climate change claims. Allowing such claims would also revive other "political" public nuisance cases, including those "to mandate the redesign of" products and regulate business methods, no matter how invalid or unpopular with policymakers or the public at-large. *Penelas v. Arms Tech., Inc.*, 778 So. 2d 1042, 1045 (Fla. Dist. Ct. App. 2001).

The result would be the exact catch-all tort that courts expressly rejected for decades. *See Spitzer v. Sturm, Ruger & Co.*, 309 A.D. 91, 96 (N.Y. App. Div. 2003) ("All a creative mind would need to do is con-

struct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets, and/or sells its non-defective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born.").

"Public risk" cases, such as this one, expose the weakness of the judiciary to administer cases where there is no objectively wrongful conduct. *See* 2 Am. Law Inst., Enterprise Responsibility for Personal Injury: Reporter's Study 87 (1991). Congress and agencies can fully vet Respondents' claims and engage in thorough risk-benefit analyses. Liability can then complement their regime by holding companies responsible if they cause harm by operating outside of those duly enacted laws.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully requests that this Court grant the Petition for Writ of Certiorari in this action.

Respectfully submitted,

Victor E. Schwartz*
Phil S. Goldberg
Christopher E. Appel
SHOOK, HARDY & BACON L.L.P.
1155 F Street, N.W., Suite 200
Washington, D.C. 20004
(202) 783-8400
vschwartz@shb.com
Attorneys for Amicus Curiae
* *Counsel of Record*

Karen R. Harned
Elizabeth Milito
NFIB SMALL BUSINESS LEGAL CENTER
1201 F Street, N.W., Suite 200
Washington, D.C. 20004
(202) 314-2061

Harry M. Ng
Michele Schoeppe
AMERICAN PETROLEUM INSTITUTE
1220 L Street, N.W.
Washington, D.C. 20005
(202) 682-8000

H. Sherman Joyce
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, N.W., Suite 400
Washington, D.C. 20036
(202) 682-1163

Of Counsel

Dated: September 3, 2010

APPENDIX

APPENDIX: LIST OF *AMICI*

The NFIB Small Business Legal Center, a non-profit, public interest law firm established to protect the rights of America's small-business owners, is the legal arm of the National Federation of Independent Business ("NFIB"). NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all fifty states. The approximately 350,000 members of NFIB own a wide variety of America's independent businesses from manufacturing firms to hardware stores.

The American Petroleum Institute ("API") is a nationwide, not-for-profit trade association representing over 400 companies engaged in all aspects of the petroleum industry, including exploration, production, refining, transportation and marketing. API frequently represents its members in judicial and regulatory matters affecting the petroleum industry in the United States.

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues.

AMICUS CURIAE BRIEF

170

(12)

No. 10-174

Supreme Court U S
FILED
SEP 2 - 2010
OFFICE OF THE CLERK

In The

Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY INC., *et al.*,

Petitioners,

v.

STATE OF CONNECTICUT, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

AMICUS CURIAE BRIEF OF NATSO, INC. IN SUPPORT OF PETITIONERS

TRISTAN L. DUNCAN*
WILLIAM F. NORTHRIP
SARAH E. LYNN BALTZELL
SHOOK, HARDY & BACON L.L.P.
2555 Grand Boulevard
Kansas City, Missouri 64108
tlduncan@shb.com
(816) 474-6550
Attorneys for Amicus Curiae
**Counsel of Record*

September 2nd, 2010

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. THE SECOND CIRCUIT DECISION VIOLATES THE CORE POSTULATE OF THIS COURT'S POLITICAL QUESTION DOCTRINE JURISPRUDENCE, WHICH REJECTS "SEMANTIC CATALOGUING" AND CONFINES ARTICLE III COURTS TO A LAW APPLICATION, NOT LAW CREATION, FUNCTION 4

A. Certiorari Is Warranted Because The Second Circuit's Attribution Of Decisive Significance To The *Label* Attached To The Plaintiffs' Cause Of Action, And Its Corresponding Failure To Dissect The *Application* Of That Cause Of Action To The Underlying Issue Of Climate Change, Conflicts With The Core Commands Of This Court's Relevant Political Question Doctrine Decisions 8

TABLE OF CONTENTS – Continued

Page

B. The Second Circuit's Category Root Error Stemmed From Its Mistaken Equation Of Climate Change With Traditional Air Pollution Cases When, In Fact, Climate Change Cases Involve Differences In Kind, Not Just Degree, From Ordinary Nuisance Cases 11

II. BY CONTRADICTING THE METHODOLOGY EMPLOYED BY SEVERAL COURTS OF APPEALS AND THE EXPLICIT HOLDINGS OF TWO DISTRICT COURTS, THE SECOND CIRCUIT COMPOUNDED THE DOCTRINAL CONFUSION SURROUNDING THE POLITICAL QUESTION DOCTRINE REQUIRING THIS COURT'S IMMEDIATE GUIDANCE 13

III. THE CIRCUITS ARE SPLIT OVER WHETHER MERE CONTRIBUTION TO A GENERALIZED ENVIRONMENTAL PROBLEM, WITHOUT MORE, CAN GENERATE STANDING 19

A. The Second Circuit Split From The Majority Approach, Which Finds No Article III Standing Under The "Contribution Test" Unless The Plaintiff Can Identify A Geographically Discrete "Zone Of Discharge" In Which She Suffers Injury 20

B. Plaintiffs' Claims Should Be Barred As "Generalized Grievances." 23

TABLE OF CONTENTS – Continued

Page

IV. THESE IMPORTANT ARTICLE III JUSTICIABILITY QUESTIONS HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT BECAUSE PERMITTING COMMON LAW NUISANCE DOCTRINE, WHICH IS FUNDAMENTALLY ILL-SUITED TO GRAPPLE WITH THE NATIONAL AND INTERNATIONAL POLICY COMPLEXITIES OF CLIMATE CHANGE, RISKS CREATING SERIOUS AND IRREVERSIBLE HARM 24

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

Baker v. Carr, 369 U.S. 186 (1962) ..... *passim*

Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888 (1988) 12

Bennett v. Spear, 520 U.S. 154 (1997) 20

Buckley v. Valeo, 424 U.S. 1 (1976) 5

California v. General Motors Corp., No. C06-05755, 2007 WL 2726871 (N.D. Cal. 2007) 14, 15

Carmichael v. Kellogg, Brown & Root Serv., Inc., 572 F.3d 1271 (11th Cir. 2009) 14

Comer v. Murphy Oil, 585 F.3d 855 (5th Cir. 2009), *opinion vacated pending reh'g en banc*, 598 F.3d 208, *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010) 15

Connecticut v. Am. Elec. Power, 406 F. Supp. 2d 265 (S.D.N.Y. 2005) 12

Connecticut v. Am. Elec. Power, 582 F.3d 309 (2d Cir. 2009) ..... *passim*

Corrie v. Caterpillar, Inc., 503 F.3d 974 (9th Cir. 2007) 14

El-Shifa Pharm. Indus v. United States, 607 F.3d 836 (D.C. Cir. 2010) 14

Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp., 95 F.3d 358 (5th Cir. 1996) 21

Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149 (4th Cir. 2000) 21, 22

TABLE OF AUTHORITIES – Continued

Page

Gilligan v. Morgan, 413 U.S. 1 (1973) 9

Harbury v. Hayden, 522 F.3d 413 (D.C. Cir. 2008) 16

In re African-American Slave Descendants Litig., 471 F.3d 754 (7th Cir. 2006) 16

INS v. Chada, 462 U.S. 919 (1983) 6

Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44 (2d Cir. 1991) 16

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 20

Luther v. Borden, 48 U.S. (7 How.) 1 (1849) 8

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 4

Massachusetts v. EPA, 549 U.S. 497 (2007) 12, 22

McKay v. United States, 703 F.2d 464 (10th Cir. 1983) 16

Mistretta v. United States, 488 U.S. 361 (1989) 5, 27

Monaco v. Mississippi, 292 U.S. 313 (1934) 6

Morrison v. Olson, 487 U.S. 654 (1988) 4

Native Village of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009) 15, 17, 22

Nixon v. United States, 506 U.S. 224 (1993) 5

North Carolina v. Tennessee Valley Authority, No. 09-1623, 2010 WL 2891572 (4th Cir. July 26, 2010) 13

TABLE OF AUTHORITIES – Continued

Page

O'Melveny & Myers v. Federal Deposit Insurance Corp., 512 U.S. 79 (1994) 7

Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum, 577 F.2d 1196 (5th Cir. 1978) 14

Public Interest Research Group v. Powell Duffryn Terminals Inc., 913 F.2d 64 (3d Cir. 1990) 20, 21, 22

Schlesinger v. Reservists Cmte. to Stop the War, 418 U.S. 208 (1974) 23, 24

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) 7

Tel-Oren v. Libyan Arab Repub., 726 F.2d 774 (D.C. Cir. 1984) 16

Texas Indep. Producers and Royalty Owners Assoc., 410 F.3d 964 (7th Cir. 2005) 22

U.S. Dept. of Commerce v. Montana, 503 U.S. 442 (1992) 5

Union Elec. Co. v. EPA, 515 F.2d 206 (8th Cir. 1975), *aff'd*, 427 U.S. 246 (1976) 13

United States v. Richardson, 418 U.S. 166 (1974) 23

Vieth v. Jubelirer, 541 U.S. 267 (2004) 9, 10, 17

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 5, 7

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES CONSTITUTION

U.S. Const., Art. I sec. 1 7

U.S. Const., Art. III 10, 19, 20, 24

RULES

United States Supreme Court Rule 37.6 1

OTHER AUTHORITIES

16 AM. JUR. 2D *Constitutional Law*, sec. 62-76 (2009) 5

Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L. J. 1457 (2005) 17

JESSE DUKMINIER, ET AL., PROPERTY (6th ed. Aspen Publishers 2006) 18

RICHARD H. FALLON, JR., ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (6th ed. 2009) 4

Introduction to RESTATEMENT (SECOND) OF TORTS, vol. 4, at viii (1979) 17, 18

Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153 (2009) 12, 21

TABLE OF AUTHORITIES – Continued

Page

Richard J. Lempert, et al., *Capital Cycles and the Timing of Climate Change Policy* (Oct. 2002), available at: http://www.pewclimate.org/docUploads/capital_cycles.pdf 25

PETER READ, RESPONDING TO GLOBAL WARMING: THE TECHNOLOGY, ECONOMICS AND POLITICS OF SUSTAINABLE ENERGY (Zed Books 1994) 12

Joseph A. Siegel, *Collaborative Decision Making on Climate Change in the Federal Government*, 27 PACE ENVT'L L. REV. 257 (2009) 6

Michael Toman, et al., *The Economics of "When" Flexibility in the Design of Greenhouse Gas Abatement Policies*, 24 ANNUAL REV. OF ENERGY AND THE ENVT. 431-460 (1999) 26

Laurence H. Tribe, Joshua D. Branson, and Tristan L. Duncan, Wash. Legal Found., *Critical Legal Issues Series No. 169, Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* (Jan. 2010) 3, 13, 24, 26, 27

INTEREST OF *AMICUS CURIAE*[1]

NATSO, Inc. ("NATSO") is a national trade association representing the travel plaza and truckstop industry. NATSO's members run the gamut from small mom-and-pop stores and family-run businesses to medium and larger sized corporations. NATSO, and its members, are active participants in the ongoing debate before the political branches regarding how to address climate change.

Any judicially imposed emissions cap that might issue in this case to allegedly remedy injuries flowing from a warming earth would directly impact NATSO's members by requiring them to change their business practices or, like the defendants, face the potential for future civil litigation. Additionally, any emissions abatement order in this case would necessarily have adverse implications for the supply of motor fuel, thereby creating negative economic consequences for NATSO's members. Because of this case's precedential significance, it most likely will have direct and adverse impact on the businesses and livelihoods of

---

[1] In accordance with Rule 37.6, *amicus curiae* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. All parties consented to the filing of this brief and their letters of consent have been lodged with the Clerk of Court. NATSO provided the required notice of filing to all parties.

NATSO's members. As a consequence, the Court should allow NATSO's voice to be heard.

STATEMENT OF THE CASE

NATSO adopts Petitioner's statement of the case.

SUMMARY OF THE ARGUMENT

The Petition for Writ of Certiorari should be granted for the following four reasons.

First, the Second Circuit's decision violates a core postulate of this Court's political question doctrine jurisprudence – namely, that justiciability turns on the judiciary's competence to apply coherent legal principles to the specific dispute in front of it (its "law *application* function"), rather than on the plaintiff's ability to couch a claim in the language of a traditional cause of action ("semantic cataloguing"). In doing so, the Second Circuit's decision, in both its reasoning and result, conflicts with relevant decisions of this Court. The judicially administered common-law of nuisance is not a constitutionally permissible mechanism through which to address global climate change. When stripped of its common-law *label*, this lawsuit is exposed as a clear end run around the political law-making process committed to Congress by the text and structure of the Constitution.

Second, the Second Circuit decision, by contradicting both the methodology employed by several courts of appeals and the explicit holdings of two district courts, compounds the doctrinal confusion surrounding the political question doctrine. This doctrinal incoherence cries out for this Court to step in and supply clarity for principled adjudication.

Third, the circuits are split over whether mere contribution to a generalized environmental problem, without more, can generate standing.

Fourth, this is not a case in which mere misapplication of an otherwise correct legal standard has occurred. Rather, the errors are so grave and so likely to recur that immediate review to prevent significant irreparable harm is necessary. Not only will judicial action in this field require costly and irreversible technological change on the part of defendants, but permitting an ad hoc mishmash of common-law regimes will frustrate congressional attempts to design coherent and systematic market-based solutions which can remedy the problem. Laurence H. Tribe, Joshua D. Branson, and Tristan L. Duncan, Wash. Legal Found., *Critical Legal Issues Series No. 169, Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* 22 (Jan. 2010).

Thus, far from providing meaningful redress for the environmental worldwide problem posed, judicial intervention risks making global warming worse. "Frequently an issue of this sort will come before the

Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf." *Morrison v. Olson,* 487 U.S. 654, 699 (1988) (Scalia, J. dissenting).

ARGUMENT

I. THE SECOND CIRCUIT DECISION VIOLATES THE CORE POSTULATE OF THIS COURT'S POLITICAL QUESTION DOCTRINE JURISPRUDENCE, WHICH REJECTS "SEMANTIC CATALOGUING" AND CONFINES ARTICLE III COURTS TO A LAW APPLICATION, NOT LAW CREATION, FUNCTION.

The political question doctrine originated in *Marbury v. Madison*, where Chief Justice Marshall opined that "[q]uestions in their nature political . . . can never be made in this court." 5 U.S. (1 Cranch) 137, 170 (1803). This Court articulated the criteria for identifying political questions in *Baker v. Carr*, 369 U.S. 186, 216 (1962). Among them, and applicable here, are "a textually demonstrable commitment to a coordinate political department; . . . a lack of judicially discoverable and manageable standards . . . ; [and] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Id.* RICHARD H. FALLON, JR. ET AL., HART &

WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 235 (6th ed. 2009) ("No single criterion seems to control, and some appear to . . . have a . . . prudential or functional feel to them.").

In all of its aspects, the political question doctrine is "a function of the separation of powers." *U.S. Dept. of Commerce v. Montana*, 503 U.S. 442, 456 (1992). *Cf. Mistretta v. United States,* 488 U.S. 361, 381 (1989) (quoting *Buckley v. Valeo,* 424 U.S. 1, 122 (1976) (discussing overarching separation of powers principles generally and explaining that their primary purpose is to prevent "encroachment or aggrandizement [by] one branch at the expense of the other[s]"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("Constitution diffuses power the better to secure liberty. . . .").

With respect to the first *Baker* factor, the Second Circuit overlooked that textual commitments need not be express, but may be implied from the Constitution's structure and framework. *See Nixon v. United States,* 506 U.S. 224, 228-29 (1993) ("[T]he concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch."); *see also* 16 AM. JUR. 2D *Constitutional Law*, sec. 62-76 (2009). Accordingly, the Constitution's lack of a "climate change" or "carbon

emissions" clause should not end the analysis. Instead, the more relevant question is whether the Constitution implicitly commits resolution of systemic, interdependent, national and international policy-oriented disputes such as climate change to Congress's regulatory and lawmaking function. Solutions to such inherently global issues are more appropriately assigned to legislative processes that incorporate the views and interests of the many stakeholders, and not the judicial process, which excludes nonparties. *See* Joseph A. Siegel, *Collaborative Decision Making on Climate Change in the Federal Government*, 27 PACE ENVT'L L. REV. 257, 259 (2009).

"Behind the words of the constitutional provisions are postulates which limit and control." *Monaco v. Mississippi*, 292 U.S. 313, 322 (1934). In this case, the controlling postulate marks functions that only Congress or the President could discharge competently as committed, respectively, to Congress and the President. *INS v. Chada*, 462 U.S. 919, 951 (1983) ("The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.").

Responding to the challenges posed by global warming will require policy choices that are inherently legislative and thus inherently committed to Congress. The "Constitution is neither silent nor equivocal about who shall make the laws. . . ." *Youngstown*, 343 U.S. at 587.[2] Article I vests lawmaking power exclusively in Congress, not the federal courts. *See* U.S. Const., Art. I sec. 1 ("All legislative powers herein granted shall be vested in a Congress of the United States"); *see generally O'Melveny & Myers v. Federal Deposit Insurance Corp.*, 512 U.S. 79, 89 (1994) (creation of a new liability rule is "more appropriately for those who write the laws, rather than for those who interpret them."); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004). In this case, plaintiffs ask the courts to legislate. An abatement order would embody a legislative judgment about what carbon emissions policy ought to be, derived from a cost-benefit analysis of costs to plaintiffs versus utility of continued energy production at current levels. In the context of the unique, global, inherently systemic nature of climate change, balancing of competing considerations of costs and utility is not possible in

---

[2] While *Youngstown*, which involved a presidential order to the Secretary of Commerce to take possession of the nation's steel mills to *continue* steel production, is not a political question doctrine case, it is relevant to the separation of powers issues here. As much as the presidential order in *Youngstown*, the requested judicial abatement order against the utilities to *curtail* energy production here would usurp law-making powers that the Constitution vests exclusively in Congress.

any traditional common-law calculus. Indeed, such substantive, noninterstitial, lawmaking in the guise of the common-law unconstitutionally aggrandizes judicial power beyond the Judiciary's law-application function and unconstitutionally violates separation-of-power principles.

A. Certiorari Is Warranted Because The Second Circuit's Attribution Of Decisive Significance To The *Label* Attached To The Plaintiffs' Cause Of Action, And Its Corresponding Failure To Dissect The *Application* Of That Cause Of Action To The Underlying Issue Of Climate Change, Conflicts With The Core Commands Of This Court's Relevant Political Question Doctrine Decisions.

The Second Circuit erred by focusing on the *label*, and not the true nature, of the plaintiffs' claims. Based on the claims' "public nuisance" *label*, the court viewed them as presumptively justiciable and concluded that the issues in the case were not textually committed to the political branches but instead to the judiciary. This analysis, however, would eviscerate the political question doctrine, as lawyers could simply plead around it. Rather, a court must look at the issues underlying claims, not the *labels* placed on them. *Baker*, 369 U.S. at 217; *Luther v. Borden,* 48 U.S. (7 How.) 1, 7 (1849) (common-law trespass claim

was a nonjusticiable political question because underlying issues were for Congress to decide); *Gilligan v. Morgan*, 413 U.S. 1 (1973) (civil rights action under Fourteenth Amendment was nonjusticiable political question because requested injunctive relief seeking judicial creation and supervision of new standards for Militia discipline was for Congress to decide); *Vieth v. Jubelirer*, 541 U.S. 267, 296-97 (2004) (equal protection challenge was a political question due to lack of judicially manageable standards for determining when a political gerrymander goes "too far").

In addition, a rule that invites litigants to escape the thrust of the political question doctrine by nothing more than semantic manipulation constitutes a transparent resort to a form of circular reasoning that *always* leads to a finding of justiciability. This is made clear by the Panel's conclusion that, since the claims presented by plaintiffs were common-law nuisance claims, "judicially manageable standards" for resolving the climate change problems alleged by plaintiffs to be a source of their injuries were provided by the common-law of nuisance. *See Connecticut v. American Electric Power*, 582 F.3d 309 (2d Cir. 2009) ("*AEP*").

The implication of this circular reasoning is clear: As long as a claim is stated under the *label* of a traditional common-law cause of action, that cause of action will always provide judicially manageable standards for addressing whatever problem the complaint asks the court to resolve, and the claim will always be justiciable. The Panel's reliance on this

question-begging technique in itself warrants granting certiorari, for nothing less is at stake than the very survival of the political question doctrine and of the fundamental separation of powers principles it embodies.

Instead of evaluating the types of carbon-specific issues likely to emerge during the litigation, the Court concluded that generalized judicial experience with respect to the plaintiffs' cause of action automatically satisfied *Baker's* second and third prongs. In doing so, the Second Circuit departed from the basic teaching that the political-question doctrine governs the judicial resolution of certain types of disputes, *not* the entertainment of certain causes of action. Article III, through the political question doctrine, limits "judicial action [to action that is] . . . governed by *standard*, by *rule*." *Vieth*, 541 U.S. at 278 (emphasis in original). The determination of whether a dispute is amenable to sufficiently principled resolution to comply with the Article III conception of the "judicial power" requires a "discriminating analysis of the particular question posed" and in particular "the possible consequences of judicial action." *Baker*, 369 U.S. at 211-12. As such, the search for a nonjusticiable political question must be guided by a fact-intensive "discriminating inquiry," not "semantic cataloguing." *Id.* at 217.

B. The Second Circuit's Category Root Error Stemmed From Its Mistaken Equation Of Climate Change With Traditional Air Pollution Cases When, In Fact, Climate Change Cases Involve Differences In Kind, Not Just Degree, From Ordinary Nuisance Cases.

The Second Circuit's most fundamental analytical error was it presumed that any reduction in carbon emissions "slows" global warming and thereby remedies plaintiffs' alleged injuries at least to some degree. This is not so. The court did acknowledge that climate change is caused by numerous sources of greenhouse gases, but then concluded that, merely because the "Plaintiffs' injuries are part of a worldwide problem does not mean Defendants' contribution to that problem cannot be addressed through principled adjudication." *AEP*, 582 F.3d at 329. In taking that step, the court made a fundamental category error: it framed climate change as a traditional pollution problem when in fact it is anything but.

In essence, the Panel assumed that climate change is simply a bigger version of a classic air pollution problem and that the nuisance doctrine is therefore equipped to manage it. That assumption is fatally flawed.[3] Carbon dioxide is unlike any

---

[3] None of the following arguments requires any additional judicial fact-finding inappropriate for the pleading stage of the litigation. The "stock pollutant" description of carbon dioxide merely clarifies what the plaintiffs have already alleged, as it is

(Continued on following page)

traditional pollutant; it is a stock pollutant, meaning that the injuries associated with climate change stem only from the overall concentration of carbon dioxide, irrespective of source. *See* PETER READ, RESPONDING TO GLOBAL WARMING: THE TECHNOLOGY, ECONOMICS AND POLITICS OF SUSTAINABLE ENERGY 153 (Zed Books 1994). The relationship between greenhouse gas emissions and global warming "does not operate like the kind of simple, short-term, more linear relationship between cause and effect that most people . . . assume is at work when they contemplate pollution." Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1164 (2009). Because a linear cause and effect relationship is absent here, the problem of remedying global climate change is even less amenable to reasoned adjudication than attempting to "balance" interests that "are incommensurate." In that context, Justice Scalia wrote "balancing" interests that "are incommensurate" is "more like judging whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J. concurring in judgment).

To ask one court, armed only with the Restatement of Torts, to resolve those issues is to ask the impossible. *See Massachusetts v. EPA*, 549 U.S. 497, 533 (2007) (recognizing that this Court had "neither

---

the scientific theory upon which their allegations rely *See* Complaint ¶¶ 87-94, *Connecticut v. Am. Elec. Power*, 406 F Supp 2d 265 (S.D N Y. 2005).

the expertise nor the authority to evaluate [climate change] policy judgments"); *Union Elec. Co. v. EPA*, 515 F.2d 206, 219 (8th Cir. 1975), *aff'd*, 427 U.S. 246 (1976) ("It is not our role to sit as a super-legislature balancing the necessity of compliance with the clean air standards against competing economic and technological considerations."); *North Carolina v. Tennessee Valley Authority*, No. 09-1623, 2010 WL 2891572, at *3 (4th Cir. July 26, 2010) ("If courts across the nation were to use the vagaries of public nuisance doctrine to overturn the carefully enacted rules governing airborne emissions it would be increasingly difficult for anyone to determine what standards govern. Energy policy cannot beget and the environment cannot prosper, in this way.")

The above arguments are ones that courts, because of their lack of policy expertise and because of their constitutional inability to bind non-parties, are methodologically and institutionally incapable of addressing. Tribe, et al., *supra*, at 21.

II. BY CONTRADICTING THE METHODOLOGY EMPLOYED BY SEVERAL COURTS OF APPEALS AND THE EXPLICIT HOLDINGS OF TWO DISTRICT COURTS, THE SECOND CIRCUIT COMPOUNDED THE DOCTRINAL CONFUSION SURROUNDING THE POLITICAL QUESTION DOCTRINE REQUIRING THIS COURT'S IMMEDIATE GUIDANCE.

Several courts of appeals have rejected the "semantic cataloguing" or "*labeling*" approach adopted by

the Second Circuit and instead followed a methodology whereby the court looks beyond the familiar common-law terminology and instead, tailors the fit between the alleged injury, wrongful conduct, and requested relief to the proper governmental function to determine justiciability. In doing so, courts must be on guard for insuperable problems of unmanageability that might "emerge" as the claim is tried. *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum*, 577 F.2d 1196, 1202 (5th Cir. 1978). Even if the complaint itself does not facially advance a baldly political question, several courts have held common-law claims to be nonjusticiable when the *application* of seemingly traditional causes of action requires judicial resolution of underlying political disputes. *See Carmichael v. Kellogg, Brown & Root Serv., Inc.*, 572 F.3d 1271 (11th Cir. 2009) (negligence); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 983 n.8 (9th Cir. 2007) (wrongful death, public nuisance); *El-Shifa Pharm. Indus v. United States*, 607 F.3d 836 (D.C. Cir. 2010) (defamation).

This concern with the content of a complaint – instead of its mere form – has led two district courts to reach conclusions that conflict flatly with that of the Second Circuit. In *California v. General Motors Corp.*, the Northern District of California held nonjusticiable a similar nuisance claim alleging injury stemming from climate change. No. C06-05755, 2007 WL 2726871 (N.D. Cal. 2007). Because the claim "would require the Court to create a quotient or standard" assessing the harm and the benefit generated by fossil fuel consumption, the court held

that the claim impermissibly asked it to engage in a "balancing of . . . competing interests . . . to be made by the political branches." *Id.* at *8. Two years later, another Northern District of California court directly repudiated the Second Circuit's *AEP* decision, holding that the climate change nuisance claim before it would force the court to venture into sophisticated programmatic analysis of American energy policy, an analysis that was beyond nuisance doctrine's limits. *See Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009). These decisions epitomize the type of "discriminating analysis" of climate change and its intersection with nuisance principles that this Court's holdings demand.

The Second Circuit's misstep – and the direct conflict between its decision and those of the U.S. District Court for the Northern District of California – is symptomatic of the broader doctrinal chaos in this area. In reaching a conclusion similar, but not identical, to the *AEP* court's, a panel of the Fifth Circuit, in a vacated opinion, recently argued that *Baker's* formulations are merely "open-textured, interpretive guides to aid federal courts in deciding" whether a question is nonjusticiable. *Comer v. Murphy Oil*, 585 F.3d 855, 872 (5th Cir. 2009), *opinion vacated pending reh'g en banc*, 598 F.3d 208, *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010). It then concluded that a nuisance suit against carbon emitters was justiciable in large part because "[c]ommon-law tort claims are rarely thought to present nonjusticiable political questions." *Id.* at 873.

The placement of so much weight on the form of the cause of action alleged, however misguided, is unlikely to represent a singular aberration. On the contrary, it seems a predictable consequence of the fact that this Court has provided only sketchy, "open-textured, interpretive guides" to the general process of applying the political question doctrine. In this vein, the D.C. Circuit recently observed that the political question doctrine has become "notorious for its imprecision," *Harbury v. Hayden*, 522 F.3d 413, 418 (D.C. Cir. 2008), echoing Judge Bork's earlier remark that the "murky and unsettled" contours of the doctrine have generated a "lack of consensus about its meaning." *Tel-Oren v. Libyan Arab Repub.*, 726 F.2d 774, 803 n.8 (D.C. Cir. 1984) (Bork, J., concurring).

Nor was the *AEP* Panel alone in its myopic focus on the formulaic *label* attached to the plaintiffs' cause of action. An earlier Second Circuit decision reasoned that where a plaintiff presents an "ordinary tort suit, alleging that the defendants breached a duty of care," the claim is justiciable because tort suits are "constitutionally committed . . . [to] the Judiciary." *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991). Various other courts have similarly centered their inquiries on classifying the cause of action. *See In re African-American Slave Descendants Litig.*, 471 F.3d 754, 758 (7th Cir. 2006) ("[T]he plaintiffs have been careful to cast the litigation as a quest for conventional legal relief."); *McKay v. United States*, 703 F.2d 464, 470 (10th Cir. 1983) ("[T]he political

question theory . . . [does] not ordinarily prevent individual tort recoveries."). In other words, some courts, like the *AEP* panel, allow the plaintiffs' own classification of their legal theory to determine tautologically whether the claim is justiciable, while others, like the court in *Kivalina*, engage in a more searching scrutiny. This Court's review is essential to restore some order in political question doctrine cases, so that the doctrine can once again "constrain . . . jurists from inserting their own ideological beliefs in ad hoc, unreasoned ways." Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L. J. 1457, 1470 (2005).

Indeed, the Second Circuit's reasoning begs the question which is at the heart of *Baker's* third factor: When is a policy determination made by a court properly within the judicial function, and when does a policy determination cross the line and impinge on the legislative function? To suggest that the dividing line can be ascertained merely by reference to the axiom that "law pronounced by the courts must be principled, rational, and based upon reasoned distinctions," *Vieth*, 541 U.S. at 278, does not fully answer the question. In concluding that the RESTATEMENT (SECOND) OF TORTS supplies judicially manageable standards and does not require federal courts to make a policy decision of a nonjudicial nature, the Second Circuit decision suggests that any nuisance case is justiciable. But the Restatement's introduction acknowledges that courts "regard the law of torts as a dynamic set of norms, inviting adaptation as social

conditions and prevailing values change, *within the limits of the judicial function*." Introduction to RESTATEMENT (SECOND) OF TORTS, vol. 4, at viii (1979) (emphasis added).

Thus, the Second Circuit either overlooked or failed to understand the inherent restrictions that the common-law of nuisance, as reflected in the *Restatement*, has always incorporated into the common law-making power. The judgments of national and international policy that plaintiffs ask federal courts to make in this case lie far beyond the scope of properly judicial common-law decision making. The *Restatement* implicitly recognizes as much when it provides that the courts should root their judgments of "unreasonableness" in nuisance cases in "community standards," *id.* § 828 cmt. b, because, apart from community standards, "there is often no uniformly acceptable scale or standard of social values to which courts can refer." *Id.* In this case, for which it is clear that no "community standards" exist, a court could not proceed without making uncabined policy judgments that even the *Restatement* recognizes courts should eschew as "outside the limits of the judicial function." *See generally* JESSE DUKMINIER, ET AL., PROPERTY 665 (6th ed. Aspen Publishers 2006) ("[N]uisance litigation is ill-suited to other than small-scale, incidental, localized, scientifically uncomplicated pollution problems.").

The Restatement's own self-limiting terms therefore suggest that climate change disputes are nonjusticiable both because of lack of judicially

manageable standards and because of the need for a policy decision of a non-judicial nature.

III. THE CIRCUITS ARE SPLIT OVER WHETHER MERE CONTRIBUTION TO A GENERALIZED ENVIRONMENTAL PROBLEM, WITHOUT MORE, CAN GENERATE STANDING.

A conflict now exists between the Second Circuit *AEP* decision and other circuits with respect to the following important federal question: whether an individual emitter's mere contribution to a generalized global environmental phenomenon is sufficient to satisfy Article III standing, where:

(1) the plaintiff has no meaningful connection to the emitter's "zone of discharge," and

(2) no statutory permit exists from which causation can be presumed.

In addition, the Second Circuit decision conflicts with this Court's relevant standing decisions that find that Article III standing is lacking when:

(1) the relief sought does not involve assertion of procedural rights pertaining to the regulation of the discharge, and

(2) an essential dimension of specificity with respect to *both* the plaintiffs' alleged *injuries* and the defendants' alleged wrongful *conduct* is absent.

A. The Second Circuit Split From The Majority Approach, Which Finds No Article III Standing Under The "Contribution Test" Unless The Plaintiff Can Identify A Geographically Discrete "Zone Of Discharge" In Which She Suffers Injury.

It is axiomatic that there is no standing unless the plaintiff demonstrates a "causal connection between the injury and the conduct complained of" such that her injury is "fairly traceable to the actions of the defendant." *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (citation and internal quotation marks omitted); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992).

The Second Circuit incorrectly concluded that the standing doctrine's causation prong was satisfied because plaintiffs alleged that the defendants' emissions "contribute to global warming." *AEP*, 582 at 347. In so doing, it purported to adopt the Third Circuit's test for evaluating standing in Clean Water Act cases, *id.* at 346-47, set forth in *Public Interest Research Group v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 72 (3d Cir. 1990), which requires proof that the defendant: "(1) discharged some pollutant in concentrations greater than allowed by its permit (2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that (3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs." However, the Second Circuit abandoned the

"statutory permit" and "zone of discharge" requirements.

Unlike the effluents regulated under the Clean Water Act or the traditional aerial pollutants regulated under the Clean Air Act, according to plaintiffs' own pleadings, carbon gas does not flow to a demarcated spatial region and cause environmental harm to that region. Instead, the link between particle emission and climate change is both spatially and temporally attenuated; greenhouse gas emissions cause harm only far into the future and in scattered geographic areas wholly unrelated to the location of emissions. *See Lazarus, supra,* at 1176-77. As such, there is no meaningful zone of discharge for carbon emissions, since the effects of those emissions are both cumulative and distributed globally, irrespective of their geographic source.

As the Fourth Circuit emphasized when applying the *Powell Duffryn* test, the Constitution demands that "some distinction . . . be made between plaintiffs who lie within the discharge zone of a polluter and those who are so far downstream that their injuries cannot fairly be traced to that defendant." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 162 (4th Cir. 2000). The Fifth and Seventh Circuits have similarly adopted *Gaston Copper's* reasoning, holding that plaintiffs must allege injury arising out of their use of some spatially limited discharge zone. *See Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.*, 95 F.3d 358, 360-61 (5th Cir. 1996) (finding an eighteen-mile span of

water "too large to infer causation"); *Texas Indep. Producers and Royalty Owners Assoc.*, 410 F.3d 964, 973 (7th Cir. 2005).

The *Powell Duffryn* "Zone of Discharge" test is in square conflict with the Second Circuit's unrestrained misapplication of *Powell Duffryn*. *Cf. Kivalina,* 663 F. Supp. 2d at 878-80 (comparing and contrasting spatially limited approaches to causation with literal applications of *Powell Duffryn*). Indeed, the permissiveness of the Second Circuit's "contribution" formulation has no meaningful limits and enables a state to become a "roving environmental ombudsman seeking to right environmental wrongs wherever [it] might find them." *Gaston Copper*, 204 F.3d at 157. In finding that the plaintiffs have standing under this limitless contribution test, the Second Circuit distorted the Third Circuit's approach and split with a majority of circuits.

In addition, as Petitioners cogently argued and this *amicus* will not duplicate, the Second Circuit also split from the majority approach when it ignored the first prong of the *Powell Duffryn* test, which requires proof of a defendant's emission discharge beyond a statutory permit. Petitioners' Petition for a Writ of Certiorari at 18-20. Furthermore, the Second Circuit decision conflicts with the standing analysis in *Massachusetts v. EPA* because this case does not involve a procedural right pertaining to the regulation of the discharge. *Id.* at 15-18.

B. Plaintiffs' Claims Should Be Barred As "Generalized Grievances."

Of paramount importance to the standing inquiry is the requirement that claims present "something more than generalized grievances." *United States v. Richardson*, 418 U.S. 166, 180 (1974) (internal quotation omitted). In doing so, the plaintiff must articulate a chain of causation from challenged conduct to injury that possesses a constitutionally "essential dimension of specificity." *Schlesinger v. Reservists Cmte. to Stop the War*, 418 U.S. 208, 221 (1974). But the plaintiffs' claim here possesses no specificity; the named defendants are indistinguishable, in their relationship to the plaintiffs' alleged injury, from any other greenhouse gas emitters.

The Second Circuit's test, shorn of any limiting spatial principle, thus runs afoul of *Richardson's* specificity requirement. Granted, both *Richardson* and *Reservists* focused on the problem of undifferentiated *plaintiffs* – in both cases taxpayers – but the problem is no less acute when defendants are targeted not for any particular injury wrought on the plaintiffs but instead on their generic contribution to a global problem.

Such "potential for abuse of the judicial process" cannot be squared with this Court's standing jurisprudence. *Reservists*, 418 U.S. at 222. Under the Second Circuit's holding, where any plaintiff may sue any contributing defendant for systemic problems like climate change, courts would lose an important tool

with which to keep generalized political claims – like a charge that one company's outsourcing of American jobs had disturbed the overall American labor market and thus "contributed to" the recession felt by a plaintiff – out of courts. Tribe, et al., *supra*, at 16-17. ("adjudication of such abstract and undifferentiated claims 'opens the Judiciary to [the] charge of providing 'government by injunction', [*Reservists* at 222]. And government by injunction is neither accountable to majority will nor a product of the 'consent of the governed' ").

IV. THESE IMPORTANT ARTICLE III JUSTICIABILITY QUESTIONS HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT BECAUSE PERMITTING COMMON LAW NUISANCE DOCTRINE, WHICH IS FUNDAMENTALLY ILL-SUITED TO GRAPPLE WITH THE NATIONAL AND INTERNATIONAL POLICY COMPLEXITIES OF CLIMATE CHANGE, RISKS CREATING SERIOUS AND IRREVERSIBLE HARM.

Although only the Second Circuit among the courts of appeals to date has decided the precise issue at stake – the justiciability of common-law nuisance claims targeting greenhouse gas emitters – the urgency and magnitude of the issues involved warrant immediate review by this Court rather than delay to await the development of an intercircuit conflict on the precise question at hand. Specifically, were this

Court to deny the writ in this case, and await the germination of a persistent circuit split on the precise question presented, it would precipitate two destructive consequences: it would (1) impose unrecoverable technological and economic costs on the American energy industry; and (2) inhibit Congress's ability to effectively and comprehensively craft a climate policy.

Because of the sensitivity and complexity of energy systems, mistakes in the institutional design of carbon abatement schemes are extraordinarily costly and not readily reversible. As one report concluded, what "makes climate change such a difficult policy problem is that decisions made today can have significant, uncertain, and difficult to reverse consequences extending many years into the future." Richard J. Lempert, et al., *Capital Cycles and the Timing of Climate Change Policy* (Oct. 2002), available at: http://www.pewclimate.org/docUploads/capital_cycles.pdf.

It is no response that Congress could simply overrule or preempt the operation of common-law remedies if and when it chooses to establish a comprehensive climate change policy. *See AEP*, 582 F.3d at 374-75. Neither is it a response that this Court could choose to wait for more courts of appeals to weigh in on the issue before granting certiorari. Both responses presume carbon reductions can be controlled by a simple on/off switch, and companies can easily comply with an injunction in the short-term and smoothly integrate into a legislatively created emissions trading regime later. But emissions

reductions are not so simple; they necessarily involve the retirement of expensive capital stock and often require vast and expensive technological overhauls within the energy companies. *See* Michael Toman, et al., *The Economics of "When" Flexibility in the Design of Greenhouse Gas Abatement Policies*, 24 ANNUAL REV. OF ENERGY AND THE ENVT. 431-460 (1999) (warning of the dangers of "haste further lead[ing] to wrong choice of technology"). Once companies commit to overhauling their technological infrastructure in order to achieve compliance with an injunction, the changes they make are likely to be extremely difficult and costly to reverse. Not only does this threaten excessive and irretrievable economic costs, but it runs the risk of "locking in" inferior technology as companies rush to innovate quickly enough to comply with short-term reduction requirements. Tribe, et al., *supra*, at 18. This Court should not force energy producers to wait, watch, and pray while the various circuits concoct their common-law "solutions" to the harms of climate change.

CONCLUSION

To rule for the plaintiffs *on their own nuisance theory*, the court would have to strike a balance between costs and benefits so far-reaching and global in character, and so ungrounded in any preexisting body of binding rules or principles, that it would be making rather than applying law. Moreover, in order to provide *meaningful* relief, given the worldwide character of the problems involved, the court would need to launch a regime of nationwide and probably

international regulation, usurping the role of both political branches. Were the court to attempt to resolve the complex and inextricable policy issues that it would necessarily confront while addressing plaintiffs' claims, it would be acting as "a sort of junior-varsity Congress." *Mistretta,* 488 U.S. at 427 (Scalia, J. dissenting). "One can believe strongly in access to courts for the protection of judicially enforceable rights and the preservation of legal boundaries . . . while still deploring the perversion of the judicial process to meddle in matters of policy formation far removed from those judicially manageable realms. Indeed, the two concerns are mutually reinforcing rather than contradictory, for courts squander the social and cultural capital they need in order to do what may be politically unpopular in preserving rights and protecting boundaries when they yield to the temptation to treat lawsuits as ubiquitously useful devices for making the world a better place." Tribe, et al., *supra*, at 2.

Respectfully submitted,

TRISTAN L. DUNCAN*
WILLIAM F. NORTHRIP
SARAH E. LYNN BALTZELL
SHOOK, HARDY & BACON L.L.P.
2555 Grand Boulevard
Kansas City, Missouri 64108
tlduncan@shb.com
(816) 474-6550
Attorneys for Amicus Curiae
**Counsel of Record*

September 2nd, 2010

AMICUS CURIAE BRIEF

170

No. 10-174

Supreme Court, U.S
FILED
SEP 0 1 2010
OFFICE OF THE CLERK

In the

Supreme Court of the United States

AMERICAN ELECTRIC
POWER COMPANY INC., et al.,
Petitioners,

v.

STATE OF CONNECTICUT, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

R. S RADFORD
*DAMIEN M. SCHIFF
**Counsel of Record*
LUKE WAKE, *Of Counsel*
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: rsr@pacificlegal.org
E-mail: dms@pacificlegal.org
E-mail: lw@pacificlegal.org
Counsel for Amicus Curiae
Pacific Legal Foundation

QUESTIONS PRESENTED

The court of appeals held that States and private plaintiffs may maintain actions under federal common law alleging that defendants—in this case, five electric utilities—have created a "public nuisance" by contributing to global warming, and may seek injunctive relief capping defendants' carbon dioxide emissions at judicially determined levels. The questions presented are:

1. Whether States and private parties have standing to seek judicially fashioned emissions caps on five utilities for their alleged contribution to harms claimed to arise from global climate change caused by more than a century of emissions by billions of independent sources.

2. Whether a cause of action to cap carbon dioxide emissions can be implied under federal common law where no statute creates such a cause of action, and the Clean Air Act speaks directly to the same subject matter and assigns federal responsibility for regulating such emissions to the Environmental Protection Agency.

3. Whether claims seeking to cap defendants' carbon dioxide emissions at "reasonable" levels, based on a court's weighing of the potential risks of climate change against the socioeconomic utility of defendants' conduct, would be governed by "judicially discoverable and manageable standards" or could be resolved without "initial policy determination[s] of a kind clearly for nonjudicial discretion." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. CERTIORARI SHOULD BE GRANTED TO REVIEW THE SECOND CIRCUIT'S INTERPRETATION OF STANDING, WHICH IS INCONSISTENT WITH THE DECISIONS OF OTHER COURTS OF APPEALS 3

II. CERTIORARI SHOULD BE GRANTED TO REVIEW THE SECOND CIRCUIT'S CONCLUSION THAT THE RESPONDENTS' INJURIES ARE LIKELY TO BE REDRESSED AT LEAST IN PART BY CAPPING AND REDUCING THE PETITIONERS' EMISSIONS, WHICH RAISES AN ISSUE OF NATIONWIDE IMPORTANCE 6

III. THE SECOND CIRCUIT'S HOLDING THAT SELECTIVE PROSECUTION OF NUISANCE CLAIMS DOES NOT VIOLATE THE POLITICAL QUESTION DOCTRINE IS AN ISSUE OF NATIONWIDE IMPORTANCE 10

CONCLUSION 17

TABLE OF AUTHORITIES

Page

Cases

Baker v. Carr, 369 U.S. 186 (1962) 10

California v. GMC, No. C06-05755 MJJ, 2007 U.S. Dist. LEXIS 68547 (N.D. Cal. Sept. 17, 2007) 11

Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009), *vacated and rehearing* en banc *granted*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010) 9

Comer v. Murphy Oil USA, 607 F.3d 1049 (5th Cir. 2010) 2, 9, 11

Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149 (4th Cir. 2000) . . . 4

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 3, 6

Massachusetts v. EPA, 549 U.S. 497 (2007) 1, 7-8

Native Village of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal pending*, Doc. No. 09-17490 (9th Cir.) . . . 9

Native Village of Kivalina v. ExxonMobile Corp., No. 09-17490 (9th Cir.) 2, 9, 11

Natural Res. Def. Council v. Watkins, 954 F.2d 974 (4th Cir. 1992) 4

Pub. Interest Research Group v. Powell Duffryn Terminals, 913 F.2d 64 (3d Cir. 1990) 4

TABLE OF AUTHORITIES—Continued

Page

Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546 (5th Cir. 1996) 4

Vieth v. Jubelirer, 541 U.S. 267 (2004) 10-11

Rules

Sup. Ct. R. 37.2 1

Sup. Ct. R. 37.2(a) 1

Sup. Ct. R. 37.6 1

Miscellaneous

Atkinson, Rob, *Innovation Economics Can Fight Global Warming*, Bloomberg Businessweek, June 17, 2009, *available at* http://www.businessweek.com/innovate/content/ jun2009/id20090617_400202.htm (last visited Aug. 30, 2010) 13

Biello, David, *U.S. Commits to Greenhouse Gas Cuts Under Copenhagen Climate Accord*, Scientific American, Jan. 29, 2010, *available at* http://www.scientificamerican.com/article.cfm?id=us-commits-to-greenhouse-gas-cuts-under-copenhagen-accord (last visited Aug. 30, 2010) 15

Dauncey, Guy, *Stormy Weather: 101 Solutions to Global Climate Change* (New Society Publishers, 2001) 14

Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) 7

TABLE OF AUTHORITIES—Continued

Page

Johnson, Toni, *Economic Challenges for Climate Change Policy*, Council on Foreign Relations (July 7, 2009), *available at* http://www.cfr.org/publication/16009/economic_challenges_for_climate_change_policy.html (last visited Aug. 30, 2010) 13

Niskanen, William A., Testimony before the Committee on Energy and Natural Resources, United States Senate, *available at* http://www.cato.org/testimony/ct-wn093097.html (last visited Aug. 30, 2010) 13

Palmer, Doug, *China Must 'Pay' to Cut Greenhouse Gases*, Reuters, July 20, 2009, *Available at* http://www.reuters.com/article/idUSTRE 56K0IZ20090721 (last visited Aug. 30, 2010) 15

Pidot, Justin R., *Global Warming in the Courts: An Overview of Current Litigation and Common Legal Issues* (2006), *available at* http://www.law.georgetown.edu/gelpi/current_research/documents/GlobalWarmingLit_CourtsReport.pdf (last visited Aug. 30, 2010) 11-12

Taylor, Jerry, *Global Warming: The Anatomy of a Debate*, Cato Institute, Address to John Hopkins University Applied Physics Laboratory (Jan. 16, 1998), *available at* http://www.cato.org/speeches/sp-jt011698.html (last visited Aug. 30, 2010) 14-15

TABLE OF AUTHORITIES—Continued

Page

Tribe, Laurence H., et al., *Too Hot For Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* (Washington Legal Foundation, Working Paper No. 169, 2010), *available at* http://www.wlf.org/publishing/publication_detail.asp?id=2132 (last visited Aug. 30, 2010) 10-12

Victor, David G., *The Collapse of the Kyoto Protocol and the Struggle to Slow Global Warming, Council on Foreign Relations* (2001) 14-15

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation (PLF) submits this brief in support of the petition for writ of certiorari filed by American Electric Power Co., *et al.*[1]

PLF is the largest and most experienced nonprofit, public-interest law foundation of its kind in the United States, incorporated for the purpose of litigating in the public interest. For more than 35 years, PLF has litigated in support of the rights of individuals to make reasonable use of their private property free of unnecessarily intrusive government interference, and has advocated in favor of maintaining a reasonable balance between regulatory efforts to protect the environment and the other necessary and proper functions of government and of free society.

To further this interest, PLF established a Global Warming Project. The Project's purpose is to ensure that the crisis of global warming—regardless of the crisis' actual, imminent, or long-term effects to the physical environment and human populations—not be used as a pretext to violate individuals' property rights and other constitutionally protected liberties. As an example of the Project's work, PLF submitted an amicus brief in *Massachusetts v. Environmental Protection Agency (EPA)*, 549 U.S. 497 (2007), arguing

---

[1] In accordance with Rule 37.2(a), PLF provided ten days' notice to counsel of record of its intention to file this amicus brief. Counsel of record have consented to the filing of this brief. Letters evidencing this consent have been filed with the Clerk of the Court. In accordance with Rule 37 6, PLF states that no counsel for a party authored any portion of this brief and no counsel or party made a monetary contribution intended to fund the brief's preparation or submission

that the threat of global warming does not justify a departure from the normal rules of standing in the federal courts. PLF also has participated as amicus in global warming public nuisance cases in the Fifth and Ninth Circuit Courts of Appeals. *See Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010); *Native Village of Kivalina v. ExxonMobile Corp.*, No. 09-17490 (9th Cir.). PLF believes that this case raises important public interest questions about the country's response to global climate change, and the extent to which that response can be controlled or dictated by enterprising litigants through the judicial system.

SUMMARY OF ARGUMENT

Respondents State of Connecticut, *et al.*, have brought public nuisance tort claims against Petitioners American Electric Power Co., *et al.*, for harms allegedly caused by the Respondents' greenhouse gas emissions. A panel of the Second Circuit Court of Appeals upheld those claims against jurisdictional attack. *See* Petitioners' Appendix (Pet. App.) 17a-76a. This Court should grant certiorari to review the Second Circuit's decision, for the following reasons:

First, the Second Circuit's standing analysis diverges from the decisions of other circuit courts of appeals on the law of pollution abatement actions and what plaintiffs must show to establish their standing in such actions.

Second, the Second Circuit's decision goes to the heart of the current debate over the nation's appropriate response to global warming and necessarily raises an issue of nationwide importance, as this Court recognized in *Massachusetts v. EPA*.

Third, the Second Circuit's decision raises another issue of national significance: whether litigants may address the international problem of climate change by prosecuting nuisance claims against selectively chosen private parties. If permitted to continue, the Respondents' lawsuit will represent only the first of many global warming suits in which litigants will ask the courts to make policy decisions and political choices. Such decisions invade the province of the legislative and executive branches; therefore, this Court should determine the justiciability of the Respondents' claims so as to ensure that private litigants do not unjustly set national climate change policies, or otherwise interfere with the elected branches' ability to address the issue as they would deem most appropriate.

ARGUMENT

I

CERTIORARI SHOULD BE GRANTED TO REVIEW THE SECOND CIRCUIT'S INTERPRETATION OF STANDING, WHICH IS INCONSISTENT WITH THE DECISIONS OF OTHER COURTS OF APPEALS

To establish standing to sue in federal court, a plaintiff must show that his injury is fairly traceable to the allegedly wrongful action of the defendant. *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("[T]here must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant . . . .") (internal quotation marks omitted). The Second Circuit, relying upon a line of

cases under the Clean Water Act, reasoned that the Respondents' injuries are fairly traceable to the Petitioners' emissions because the latter "contribute to" the Respondents' injuries. Pet. App. 71a-72a. The Second Circuit significantly distorted this case law, thereby impermissibly lowering the bar of fair traceability.

All of the cases cited by the Second Circuit to support its standing analysis concern instances where the alleged polluter was worsening, to some degree, a discrete geographical area, *i.e.*, not the entire Earth. *See id.* (citing and discussing *Pub. Interest Research Group v. Powell Duffryn Terminals*, 913 F.2d 64 (3d Cir. 1990) (Clean Water Act challenge to pollution in Kill Van Kull, a regulable waterbody); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000) (en banc) (same as to a manmade lake and the Edisto River); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546 (5th Cir. 1996) (same as to Galveston Bay); *Natural Res. Def. Council v. Watkins*, 954 F.2d 974 (4th Cir. 1992) (same as to the Savannah River)). Because the defendants were allegedly polluting a geographic region of limited scope, these courts of appeals could entertain the benign presumption that such alleged pollution would worsen the plaintiffs' injuries (which were a function of the geographical area's polluted status).

The "contribution" cases do not, however, stand for the proposition that causation is irrelevant for fair traceability, as the Second Circuit apparently believed. Instead, they stand for the proposition that causation may be reasonably presumed where the plaintiff is injured by the polluted status of a discrete geographical area, and the defendant's actions worsen

that polluted status. These "contribution" cases have no application here because the twin bases for the presumption of causation—a discrete geographical area and a discrete set of potential polluters—are absent. Rather, here the geographical area is the entire Earth's atmosphere, and the set of potential polluters includes every emitter of greenhouse gases. Under such circumstances, it would be unreasonable to maintain the presumption of causation, and nothing in these "contribution" cases would support the Second Circuit's standing analysis.

The Second Circuit's decision is unsupported by the "contribution" cases for another reason. In these cases, there was a direct causal link and correlation between the defendants' polluting activities and the plaintiffs' injuries—the more pollution added, the greater the harm. But here there is no similar correlation. The addition of greenhouse gases to the atmosphere does not necessarily produce any harm to any of the Respondents. Rather, the alleged harm is a function of the change in climate, which itself is alleged to be a function, at least in part, of greenhouse gas emissions. Asserting that the Respondents have added greenhouse gases to the atmosphere cannot establish fair traceability under the "contribution" cases' logic because the Respondents' injuries are not a direct function of the quantity of greenhouse gases in the atmosphere, but rather of the *effects* of unknown quantities of such gases on climate-related phenomena. Were the causal requirement relaxed, then the respondents could establish fair traceability as against any human being, whose daily expiration of carbon dioxiode "contributes" to the total amount of greenhouse gases in the atmosphere. The Second Circuit's decision therefore advances a new and

unwarranted approach to public nuisance pollution cases that diverges from the law of other circuits and merits this Court's review.

II

CERTIORARI SHOULD BE GRANTED TO REVIEW THE SECOND CIRCUIT'S CONCLUSION THAT THE RESPONDENTS' INJURIES ARE LIKELY TO BE REDRESSED AT LEAST IN PART BY CAPPING AND REDUCING THE PETITIONERS' EMISSIONS, WHICH RAISES AN ISSUE OF NATIONWIDE IMPORTANCE

The Second Circuit concluded that the relief requested by the Respondents—a cap and gradual reduction in the Petitioners' emissions—would remedy, to at least some degree, their global-warming-related injuries. Pet. App. 75a-76a. In addition to fair traceability, standing doctrine requires that "it must be likely, as opposed to merely speculative, that the [plaintiff's] injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal quotation marks omitted). By holding, through a misreading of this Court's standing analysis in *Massachusetts v. EPA*, that the Respondents' injuries would likely be redressed by a cap-and-reduction emissions scheme, the Second Circuit raised an issue of nationwide importance.

As explained in the previous section, there is no direct correlation between greenhouse gas emissions and global-warming-related injuries. The mere emission of greenhouse gases does not injure the Respondents. Rather, the correlation between

emissions and the Respondents' injuries depends upon how greenhouse gases, in various quantities, affect weather and other climatological patterns that in turn negatively affect the Respondents' territories and private lands. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,524-26, 66,530-36 (Dec. 15, 2009) (EPA analysis that greenhouse gas emissions are reasonably anticipated to endanger public health and welfare based on the impact of climate change to, inter alia, air quality, weather events, food production, and sea level); *see also id.* at 66,524 ("[EPA] is not limited to only considering whether there are any direct health effects such as respiratory or toxic effects associated with exposure to greenhouse gases."). Although it is not speculative whether a cap and reduction order would reduce the Petitioners' emissions, it *is* entirely speculative whether such a cap and reduction would produce any measurable change in the quality or quantity of the Respondents' alleged global-warming-related injuries.

The Second Circuit's analysis cannot be reconciled with *Massachusetts*. In *Massachusetts*, the redressability issue centered on whether forcing EPA to make a decision on the Commonwealth's request that the agency regulate greenhouse gases under the Clean Air Act would remedy, to any extent, the Commonwealth's global-warming-related harms. *See* 549 U.S. at 525. The Court answered yes: although such a remedy would not reverse global warming, the Court nevertheless possessed "jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it." *Id.* The Court addressed the standing inquiry in the context of the legal action before it—a challenge to the failure to respond fully to a rulemaking request. In

circumstances such as those, it was a simple task to affirm the existence of that which is absent from the present case: the one-to-one correlation of emissions reduction to injury amelioration. The Commonwealth was procedurally injured by EPA's failure to regulate to reduce emissions; an order from the Court that could lead to such regulation would remedy the procedural injury. That conclusion was easy for the Court to adopt because the requirements of redressability are relaxed in a procedural standing case. *See id.* at 517-18 ("[A] litigant to whom Congress has accorded a procedural right to protect his concrete interests—here, the right to challenge agency action unlawfully withheld, § 7607(b)(1)—can assert that right without meeting all the normal standards for redressability and immediacy.") (internal quotation marks and citation omitted).

The Respondents here have no such benefit because they advance no procedural injury. The Second Circuit's reliance on *Massachusetts* for a contrary result, and its mistaking of emission reduction with a remedy for the Respondents, seriously distort the redressability component of standing doctrine.

For that reason, the Second Circuit's analysis necessarily raises an issue of nationwide significance. As this Court observed in *Massachusetts*, "the unusual importance of the underlying issue"—whether EPA could regulate greenhouse gas vehicle emissions under the Clean Air Act— "persuaded us to grant the writ," notwithstanding the petitioners' questionable standing and the absence of any circuit split. 549 U.S. at 505-06. *Massachusetts* thus recognized that the extraordinary significance of global-warming-related

issues makes cases raising such issues especially apt for resolution by the nation's highest court. Here, the Second Circuit's decision authorizing global warming public nuisance suits is the vanguard of similar tort suits against the country's largest energy companies. *See, e.g.*, *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *vacated and rehearing* en banc *granted*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010) (en banc); *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal pending*, Doc. No. 09-17490 (9th Cir.). Whether and to what extent greenhouse gas emissions can be limited by tort law is surely as important as whether EPA has the statutory authority to regulate vehicle greenhouse gas emissions, decided in *Massachusetts*. In the latter case, subsequent regulation would be based upon then-undetermined action by EPA, for which industry and the general public would have an opportunity to comment. But in the former case, no one—not Congress, not the general public, not other industry representatives—will have any opportunity to discuss or debate how a court should dictate the emissions reduction scheme for some of the largest energy companies in America. Whether such a scheme should be judicially imposed under the guise of public nuisance tort theory is an issue that merits this Court's review.

III

THE SECOND CIRCUIT'S HOLDING THAT SELECTIVE PROSECUTION OF NUISANCE CLAIMS DOES NOT VIOLATE THE POLITICAL QUESTION DOCTRINE IS AN ISSUE OF NATIONWIDE IMPORTANCE

Respondents' public nuisance suit seeks to hold a handful of selectively chosen defendants liable for their de minimis and undifferentiated contributions to the international problem of global climate change. The suit raises serious, and politically charged, policy questions as to what level of emissions are acceptable, how emissions should be reduced, and who should bear the costs of curbing global emissions. Laurence H. Tribe, et al., *Too Hot For Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* 13-20 (Washington Legal Foundation, Working Paper No. 169, 2010).[2] Certiorari should be granted to review the justiciability of Respondents' claims so that these policy questions will be decided by law makers, not the courts.

The political question doctrine provides that certain claims are nonjusticiable by their very nature because their resolution would require the weighing of political judgment. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004). A nonjusticiable political question is presented where there are no judicially discoverable and manageable standards for its resolution. *Baker v. Carr*, 369 U.S. 186, 217 (1962). As this Court has made clear, the judicial branch would invade the

---

[2] *Available at* http://www.wlf.org/publishing/publication_detail.asp?id=2132 (last visited Aug. 30, 2010)

province of the elected branches if it sought to answer such questions because their resolution demands the establishment of rules or the setting of policies. *Vieth*, 541 U.S. at 278. Since the judicial branch does not make the law, but merely adduces the law through practical reasoning and analysis, courts cannot entertain such questions. *See* Tribe, *supra*, at 13-20 (discussing *Vieth*'s pronouncement that courts lack power to decide questions absent established standards or rules).

In the present case, Respondents alleged that Petitioners have unreasonably contributed to the collective emissions of all humanity, which are allegedly causing or accelerating injuries attributed to climate change. This suit represents only the first of many more suits advancing traditional tort theories to hold selectively named defendants liable for their de minimis contribution to this collective and international problem. *See, e.g.*, *Native Village of Kivalina v. ExxonMobile Corp.*, No. 09-17490 (9th Cir.); *California v. GMC*, No. C06-05755 MJJ, 2007 U.S. Dist. LEXIS 68547 (N.D. Cal. Sept. 17, 2007). Indeed, litigants in yet another global warming tort case are currently seeking a writ of mandamus from this Court in *Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010). Environmental activists will continue to bring these suits against hand-picked defendants in order to force the courts to establish emission policies because Congress has yet to take action. Justin R. Pidot, *Global Warming in the Courts: An Overview of Current Litigation and Common Legal Issues* 1 (2006) ("[T]he current spate of global warming litigation is also the product of a failure by national political institutions to

come to grips with global warming.").[3] Yet it is not the role of the judiciary to exercise political judgment or to establish public policy.

These suits seek to force courts to determine what level of emissions private individuals or entities should be allowed. *See* Tribe, *supra*, at 13-20. There are no judicially discoverable and manageable standards for resolution of that question because there is no discrete line of causation between the alleged tort and the supposed injury. *Id.* at 15. Moreover, in selectively choosing a handful of defendants out of the entire world of greenhouse gas emitters, the litigants in these suits are asking the courts to determine who should be burdened with emission restrictions. Yet the distribution of legal burdens in the setting of such a policy is necessarily a political act within the province of the elected branches.

Respondents have undoubtedly raised issues of great importance to the nation and to the entire international community. Yet they are asking courts to set policies to control climate change even as the elected branches consider the propriety of various policy choices. *See* Pidot, *supra*, at 1 (discussing over a dozen suits advanced on global warming in the face of the Bush Administration's policy decisions). Even assuming that greenhouse gas emissions are contributing to, or accelerating, global climate change, there are diverse opinions as to the best way to address that problem.

---

[3] *Available at* http://www.law.georgetown.edu/gelpi/current_research/documents/GlobalWarmingLit_CourtsReport.pdf (last visited Aug. 30, 2010).

Many citizens, and elected representatives, believe that imposing restrictions on greenhouse gases would be injurious to our already faltering economy. *See* Toni Johnson, *Economic Challenges for Climate Change Policy*, Council on Foreign Relations (July 7, 2009) ("Finding an approach that manages to cut greenhouse gases without doing serious harm to the U.S. economy, particularly given the global economic downturn, remains a top concern.").[4] Some leading economists would suggest that we do nothing and allow the free market to develop solutions to the problem over time. William A. Niskanen, Testimony before the Committee on Energy and Natural Resources, United States Senate ("There are too many scientific, economic, and political issues yet to be resolved, however, to support an early commitment to control the emissions of greenhouse gases.").[5] Others would suggest that, rather than imposing restrictions on greenhouse gases, we should encourage the development of more efficient and environmentally friendly technologies through grants, tax-incentives, or educational initiatives. *See, e.g.*, Rob Atkinson, *Innovation Economics Can Fight Global Warming*, Bloomberg Businessweek, June 17, 2009 (arguing that innovation and public investments in technology are needed to address global warming).[6]

---

[4] *Available at* http //www cfr org/publication/16009/economic_challenges_for_climate_change_policy html (last visited Aug. 30, 2010)

[5] *Available at* http //www.cato org/testimony/ct-wn093097 html (last visited Aug 30, 2010).

[6] *Available at* http://www.businessweek.com/innovate/content/jun2009/id20090617_400202.htm (last visited Aug. 30, 2010).

While there are also many citizens, and elected representatives, who would support imposed restrictions on greenhouse gases, there are many ways to curb greenhouse gases and therefore many ways of allocating the burdens associated with that policy choice. *See* Guy Dauncey, *Stormy Weather: 101 Solutions to Global Climate Change* 71-80 (New Society Publishers, 2001) (discussing ten ways national governments can curb global emissions). Some support a national cap and trade system, while others advocate mandated emission standards. Yet to the extent that emission standards are imposed, there are political judgments to be made as to how stringent those standards should be, when they should apply, and whom they should bind.

These questions require the policy maker to consider the social and economic costs of the imposed regulations. Economists warn that these costs may hamper our economy, hindering business and raising costs for consumers. *See, e.g.*, David G. Victor, *The Collapse of the Kyoto Protocol and the Struggle to Slow Global Warming, Council on Foreign Relations* 56 (2001) ("For most industrial nations, meeting the Kyoto targets will be costly and will affect their economic competitiveness."). Of central concern in this political debate has been the propriety of imposing regulations which will raise energy costs for Americans, placing a particular hardship on the poor. Jerry Taylor, *Global Warming: The Anatomy of a Debate*, Cato Institute, Address to John Hopkins University Applied Physics Laboratory (Jan. 16, 1998) ("[I]ncreased energy costs are borne most directly by

the poor, who spend a greater portion of their income on energy than do the wealthy").[7]

Additionally, there are competing views as to how the United States should coordinate its efforts to curb greenhouse gases with other nations. Many citizens and elected representatives believe that international coordination is essential to any meaningful effort to reduce greenhouse gases and that the United States should not place socially and economically harmful restrictions on greenhouse gas emissions without an assurance that developing nations like China, India, and Brazil will impose similar restrictions. *See, e.g.*, Doug Palmer, *China Must 'Pay' to Cut Greenhouse Gases*, Reuters, July 20, 2009 (U.S. Commerce Secretary Gary Locke said, as the United States and other developed countries make costly commitments to address climate change, "developing countries like China must do the same").[8] As such, America's policy makers are continuing to engage world leaders as they work toward an agreeable solution to this collective problem. David Biello, *U.S. Commits to Greenhouse Gas Cuts Under Copenhagen Climate Accord*, Scientific American, Jan. 29, 2010 (discussing America's international commitments to curb greenhouse gas emissions).[9]

---

[7] *Available at* http://www cato.org/speeches/sp-jt011698 html (last visited Aug 30, 2010).

[8] *Available at* http //www.reuters.com/article/idUSTRE 56K0IZ20090721 (last visited Aug 30, 2010)

[9] *Available at* http://www.scientificamerican.com/article.cfm?id= us-commits-to-greenhouse-gas-cuts-under-copenhagen-accord (last visited Aug. 30, 2010)

The elected branches are, at this time, carefully weighing this panoply of options and considerations. It remains to be determined what—if anything—should be done to address the international problem of climate change. However, the decision below will force our courts to weigh these determinations at this juncture. Thus litigants, rather than elected representatives, may fashion our national policies on greenhouse gas emissions. This may likely frustrate the policies and goals of our elected lawmakers in violation of the political question doctrine. *See e.g.*, Dep't of Justice Amicus Br. in Supp. of Pet'rs, No. 10-174, at 22-32 (arguing that federal law common law claims should be displaced by EPA actions). Given the importance of the global warming issue, as well as the social and economic effects greenhouse gas regulations may have on our country, it is vital that this Court determine the justiciability of Respondents' claims.

CONCLUSION

The petition should be granted.

DATED: September, 2010.

Respectfully submitted,

R. S. RADFORD
*DAMIEN M. SCHIFF
*Counsel of Record
LUKE WAKE, *Of Counsel*
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: rsr@pacificlegal.org
E-mail: dms@pacificlegal.org
E-mail: lw@pacificlegal.org

Counsel for Amicus Curiae
Pacific Legal Foundation

AMICUS CURIAE BRIEF

110

No. 10-174

Supreme Court, U.S.
FILED
SEP 3 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY INC., *et al.*,
Petitioners,

v.

CONNECTICUT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR *AMICI CURIAE* AMERICAN FARM BUREAU FEDERATION AND NATIONAL MINING ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI

ELLEN STEEN
DANIELLE QUIST
AMERICAN FARM BUREAU FEDERATION
600 Maryland Avenue, S.W.
Suite 1000
Washington, D.C. 22024

KATIE SWEENEY
General Counsel
BENJAMIN BRANDES
Director of Air Quality
NATIONAL MINING ASSOCIATION
101 Constitution Avenue, N.W.
Suite 500 East
Washington, D.C. 20001

PETER GLASER
Counsel of Record
MARK E. NAGLE
MATTHEW W. DUKES
TROUTMAN SANDERS LLP
401 9th Street, N.W.
Suite 1000
Washington, D.C. 20004
(202) 274-2998
peter.glaser@troutmansanders.com

DOUGLAS A. HENDERSON
TROUTMAN SANDERS LLP
600 Peachtree Street, NE
Suite 5200
Atlanta, GA 30308-2216

Counsel for the American Farm Bureau Federation and National Mining Association

WILSON-EPES PRINTING CO., INC – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTERESTS OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. WHETHER ENTITIES THAT EMIT GREENHOUSE GASES MAY BE SUED IN TORT IS A QUESTION OF EXTRAORDINARY NATIONAL IMPORTANCE	5
A. Overview	5
B. Policy Considerations in Determining What Level of Greenhouse Gas Emissions Is Legal	12
1. Multiplicity of Emitters Worldwide	12
2. The Benefits of Using Fossil Fuels	18
3. Who Suffers if Fossil Fuel Usage Is Penalized?	22
CONCLUSION	26

TABLE OF AUTHORITIES

CASES	Page
American Chemistry Council, et al. v. Environmental Protection Agency et al., No. 10- 1167 (D.C. Cir. July 6, 2010)	8
California v. Gen. Motors Corp., No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), *appeal dismissed*, No. 07-16908 (9th Cir. June 24, 2009)	4, 10
Coalition for Responsible Regulation, et al. v. Environmental Protection Agency, No. 10-1073 (D.C. Cir. Apr. 2, 2010)	8
Coalition for Responsible Regulation, et al. v. Environmental Protection Agency, No. 10-1234 (D.C. Cir. Aug. 13, 2010)	8
Coalition for Responsible Regulation, Inc., et al. v. Environmental Protection Agency, No. 09-1322 (D.C. Cir. Dec. 23, 2009)	8
Coalition for Responsible Regulation, Inc., et al. v. Environmental Protection Agency, No. 10-1092 (D.C. Cir. May 7, 2010)	8
Comer v. Murphy Oil, USA, No. 05-436, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007), *rev'd* 585 F.3d 855 (5th Cir. 2009), *reh'g granted*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010)	4, 10
Connecticut v. AEP, 582 F. 3d 309 (2d Cir. 2009)	9, 10
Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922 (Sept. 8, 2003)	5

TABLE OF AUTHORITIES—Continued

Page

Georgia Coalition for Sound Environmental Policy, Inc. v. Environmental Protection Agency, No. 10-1200 (D.C. Cir. July 30, 2010) 8
Massachusetts v. EPA, 549 U.S. 497 (2007) 7
Native Vill of Kivalina v. Exxon-Mobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal pending*, No. 09-17490 (9th Cir. Nov. 5, 2009) 4, 10
Sierra Club v. Environmental Protection Agency, No. 09-1018 (D.C. Cir. Jan. 15, 2009) 8
Southeastern Legal Foundation, et al. v. Environmental Protection Agency, No. 10-1131 (D.C. Cir. June 3, 2010) 8
Southeastern Legal Foundation, Inc., et al. v. Environmental Protection Agency, No. 10-1083 (D.C. Cir. Apr. 15, 2010) 8
Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001) 18

STATUTES

42 U.S.C. § 7521(a) 7

LEGISLATIVE MATERIALS

154 CONG. REC. S5197 (daily ed. June 5, 2008) 6
154 CONG. REC. S5179 (daily ed. June 5, 2008) 7
155 CONG. REC. H7471 (June 26, 2009) 6
Hearings Before the Senate Committee on Energy and Natural Resources, 100th Cong., 2d Sess. 39 (1988) 6

TABLE OF AUTHORITIES—Continued

Page

Hearings Before the Subcomm. on Clean Air and Nuclear Regulation of the Senate Comm. on Environment and Public Works, 103d Cong., 2d Sess. (April 14, 1994) 5

Hearings Before the Senate Comm. on Energy and Natural Resources, 106th Cong. (March 25, 1999) 13

Senate Report 111-121, 111th Congress, 2d Sess. (Feb. 2, 2010) 6

MISCELLANEOUS

ACCESS TO ELECTRICITY AND WATER FOR DOMESTIC USE (UNESCO 2009), *available at* http://www.unesco.org/water/wwap/wwdr/indicators/ 21

Neil A. Armstrong, *The Engineered Century*, BRIDGE, Spring 2000, *available at* http:// www.nae.edu/Publications/TheBridge/Archives/V30-1TheVertiginousMarchofTechnology/TheEngineeredCentury.aspx 20

Central Intelligence Agency, THE WORLD FACTBOOK 2009 (2009), *available at* https:// www.cia.gov/library/publications/the-world-factbook/index.html 21

CRA International, ECONOMIC ANALYSIS OF THE LIEBERMAN-WARNER CLIMATE SECURITY ACT OF 2007 USING CRA'S NRA-NEEM MODEL (April 2008), *available at* http://www.nma.org/pdf/040808_crai_presentation.pdf 24

TABLE OF AUTHORITIES—Continued

Page

EIA International Energy Statistics, *available at* http://tonto.eia.doe.gov/cfapps/ipdbproject/IEDIndex3.cfm?tid=2&pid=2&aid=12 16

EIA, INTERNATIONAL ENERGY OUTLOOK (2004), *available at* http://tonto.eia.doe.gov/ftproot/forecasting/0484(2004).pdf..... 15

EIA, INTERNATIONAL ENERGY OUTLOOK (2008), *available at* http://www.eia.doe.gov/oiaf/archive/ieo08/pdf/0484(2008).pdf 15

EIA, INTERNATIONAL ENERGY OUTLOOK (2009), *available at* http://www.eia.doe.gov/oiaf/ieo/pdf/0484(2009).pdf..... 15, 16

Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) 7

EPA ANALYSIS OF THE LIEBERMAN-WARNER CLIMATE SECURITY ACT OF 2008, S. 2191 IN 110TH CONGRESS (March 14, 2008), *available at* http://www.epa.gov/climatechange/downloads/s2191_EPA_Analysis.pdf..... 17, 23

International Energy Agency, WORLD ENERGY OUTLOOK (2007), *available at* http://www.iea.org/textbase/nppdf/free/2007/weo_2007.pdf..... 19

TABLE OF AUTHORITIES—Continued

Page

IPCC Fourth Assessment Report: CLIMATE CHANGE 2007: WORKING GROUP III: MITIGATION OF CLIMATE CHANGE (Cambridge University Press 2007) 14

IPCC Third Assessment Report, CLIMATE CHANGE 2001: MITIGATION (Cambridge University Press 2001), *available at* http://www.ipcc.ch/publications_and_data/publications_and_data_reports.htm 13, 14

Key Judge Downplays Prospects for Successful Climate Damages Suits, Clean Air Report, Mar. 2, 2010, *available at* http://carboncontrolnews.com/2010030219610/Carbon-Control-Daily-News/News/key-judge-downplays-prospects-for-successful-climate-damages-suits/menu-id-202.html 11

Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010) 7

Management Information Services, Inc., POTENTIAL IMPACT OF THE EPA ENDANGERMENT FINDING ON LOW INCOME GROUPS AND MINORITIES (March 2010), *available at* http://www.affordablepoweralliance.org/Home.aspx 25

North Korea Is Dark, graphic, *available at* http://www.globalsecurity.org/military/world/dprk/dprk-dark.htm 21

Article, N.Y. TIMES, Sept. 6, 1936, p. E7 20

TABLE OF AUTHORITIES—Continued

Page

Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010). 7

Proposed Consent Decree, Clean Air Act Citizen Suit, 68 Fed. Reg. 52,922 (Sept. 8, 2003) 13

Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (April 2, 2010) 7

Sam H. Schurr, *Electricity in the American Economy, Agent of Technological Progress*, Greenwood Press (1990) 20

Daniel Schwekendieka and Sunyoung Pak, *Recent growth of children in the two Koreas: A meta-analysis*, 7 ECON. & HUMAN BIOLOGY 109 (2009) 21

World Bank Data, *available at* http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/SOUTHASIAEXT/INDIAEXTN/0,,menuPK:295589~pagePK:141159~piPK:141110~theSitePK:295584,00.html 19

World Bank Indicators, *available at* http://data.worldbank.org/country/united-states 19

IN THE

Supreme Court of the United States

No. 10-174

AMERICAN ELECTRIC POWER COMPANY INC., *et al.*,
Petitioners,

v.

CONNECTICUT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR *AMICI CURIAE* AMERICAN FARM BUREAU FEDERATION AND NATIONAL MINING ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI

INTERESTS OF *AMICI CURIAE*

This amicus brief is filed in support of the Petition for Certiorari in this proceeding.[1] Specifically, Amici are:

[1] All parties have consented to the filing of this brief. Their consents are on file with the Clerk of the Court. Amici state that no counsel for a party authored this brief in whole or in part and that no person or entity, other than Amici and its counsel, contributed monetarily to the preparation and submission of this brief.

- The American Farm Bureau Federation, the largest non-profit general farm organization in the United States, representing more than 6 million member families in all fifty states and Puerto Rico;
- The National Mining Association, a non-profit, incorporated national trade association representing all major producers of coal, metals, and minerals in the United States as well as numerous ancillary mining-related businesses.

The agricultural and mining sectors are particularly vulnerable to the type of greenhouse gas ("GHG") emission limitations that Plaintiffs seek to impose in their tort lawsuit, and not just because both sectors, like almost every other sector of the American economy, produce GHG emissions. The economics of agriculture are highly sensitive to the cost of fuel (gasoline and diesel) and fertilizer, both of which are produced in processes that release GHG emissions. Imposition of GHG limitations will therefore make fuel and fertilizer more expensive, threatening the viability of many family-owned farms. Mining economics are similarly highly sensitive to electricity costs, and electricity in the United States is primarily produced through the combustion of fossil fuels which inherently produces GHG emissions. Moreover, because coal usage will be especially targeted by the wave of climate change lawsuits that the Panel decision at issue here will unleash—for instance, each of the electric generation stations as to which Plaintiffs in the instant suit seek an injunction are fueled with coal—coal mining may decline significantly if electric generation becomes subject to judicially imposed GHG emissions limits.

SUMMARY OF ARGUMENT

The Court of Appeals' decision raises questions of extraordinary national importance and therefore should be reviewed by this Court. Contrary to the Court's finding, the Complaint raises a fundamental issue of American energy, economic, and environmental policy that is a non-justiciable "political question" that should be resolved by the People's elected representatives, not the Judiciary. These policy issues are inescapable because Plaintiffs' lawsuit asks a United States District Court judge to order Defendants, which are all major providers of electricity to the public, to reduce their GHG emissions to a level that the Court determines to be "reasonable." Lowering Defendants' GHG emission levels will require them to increase their rates to electric consumers, and those rate increases will in turn have both economic and health and welfare effects on society, as consumers, particularly lower-income consumers, will have less money to spend on food, healthcare and the other necessities of life. Balancing the benefits to the public from reducing Defendants' GHG emissions with the detriments to the public of higher electricity costs is a quintessentially legislative function that the Judiciary is not empowered to resolve.

Moreover, although the Court below insisted that its decision only concerns the appropriate emission levels of the specific Defendants, the decision has a far wider reach. GHGs are the inevitable byproduct of combusting fossil fuel to produce energy. Under the decision, any GHG emitter could bring an action in the Second Circuit against virtually any company in the United States that uses fossil fuel for energy, and seek judicially-imposed limits on that company's

emissions of GHGs and therefore its use of fossil fuel. Such an outcome is not fanciful speculation; the lawsuit here has already been followed by three other lawsuits in different Circuits, including one (the *Comer* case) brought against virtually every major fossil fuel producing and using company in America. *See Comer v. Murphy Oil, USA*, No. 05-436, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007), *rev'd* 585 F.3d 855 (5th Cir. 2009), *reh'g granted*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010); *California v. Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), *appeal dismissed*, No. 07-16908 (9th Cir. June 24, 2009); *Native Vill. of Kivilina v. Exxon-Mobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), appeal pending, No. 09-17490 (9th Cir. Nov. 5, 2009). Under the Second Circuit decision below, similar additional cases could find a home in district courts in the Second Circuit. Since eighty-five percent of American energy is produced from fossil fuels, the Second Circuit would become the arbiter of how America uses energy, weighing on a lawsuit-by-lawsuit basis the benefits and detriments to society of using fossil fuel and emitting GHGs as compared with more costly substitutes. It should go without saying, however, that the role of energy czar is not a proper one for the court system.

The briefs of the Defendants and other Amici provide an exhaustive discussion of the political question doctrine. Amici's brief will not duplicate that discussion but will instead provide a more thorough discussion of the type of broad policy factors that a court would need to consider in determining, as Plaintiffs seek in their Complaint here, a "reasonable" level of GHG emissions, and therefore fossil fuel usage, in any particular GHG tort action.

ARGUMENT

I. WHETHER ENTITIES THAT EMIT GREENHOUSE GASES MAY BE SUED IN TORT IS A QUESTION OF EXTRAORDINARY NATIONAL IMPORTANCE

A. Overview

The claim that human emissions of GHGs are changing the global climate has unquestionably become the most important issue at the intersection of American energy and environmental policy in decades and perhaps ever. No other issue engenders such extreme predictions of catastrophic global environmental damage as are made by those who advocate the necessity of limiting GHG emissions. At the same time, because significant cuts in GHG emissions would require substantial reductions in the use of fossil fuels such as oil, coal and natural gas even as the economy continues to grow, no other issue creates economic and social challenges of such magnitude. For instance, the Environmental Protection Agency ("EPA") has observed both that (1) climate change is "perhaps the biggest environmental threat to the planet," *Hearings Before the Subcomm. on Clean Air and Nuclear Regulation of the Senate Comm. on Environment and Public Works*, 103d Cong., 2d Sess. (April 14, 1994) (testimony of Robert Sussman, EPA Deputy Administrator), and (2) "[i]t is hard to imagine any issue in the environmental area having greater 'economic and political significance' than regulation of activities that might lead to global climate change," *Control of Emissions from New Highway Vehicles and Engines*, 68 Fed. Reg. 52,922, 52,928 (Sept. 8, 2003).

The possibility that human emissions of GHGs may change the climate for the worse has been an issue of public prominence since at least 1988, with widely reported Congressional testimony by NASA scientist James Hansen as to a potentially runaway greenhouse effect, *see Hearings Before the Senate Committee on Energy and Natural Resources*, 100th Cong., 2d Sess. 39 (1988), and the formation of the International Panel on Climate Change ("IPCC") that year. Since then, various congressional committees have held hundreds of public hearings on the matter, climate change legislation has been introduced in every Congress, and climate change policy has become a staple of public debate, including in at least the last four presidential campaigns. Last year, for the first time, a GHG cap-and-trade bill passed the House of Representatives. 155 CONG. REC. H7471 (June 26, 2009) (Waxman-Markey American Clean Energy and Security Act of 2009 (H.R. 2454)). Similar legislation was passed out of the Senate Environment and Public Works Committee on February 2, 2010, Senate Report 111-121, 111th Congress, 2d Sess. (Feb. 2, 2010) (reporting S. 1733, the Kerry-Boxer Clean Energy Jobs and American Power Act), but no cap-and-trade bill has been brought to the Senate floor this year.

The failure to enact cap-and-trade legislation so far is a direct consequence of the enormity and complexity of the issues at stake, as is reflected in the 2008 Senate floor debate on the Lieberman-Warner cap-and-trade bill. On the one hand, "strong and swift action to reduce greenhouse gas emissions is needed to prevent catastrophic effects of climate change." 154 CONG. REC. S5197 (daily ed. June 5, 2008) (statement of Sen. Boxer). On the other hand, "[t]his is a massive tax increase on the American people"

and "the killer for jobs in America." 154 CONG. REC. S5179 (daily ed. June 5, 2008) (statement of Sen. Inhofe).

The fact that cap-and-trade legislation has not been enacted, however, does not mean that Congress has not authorized GHG regulation in appropriate circumstances. To the contrary, this Court found in *Massachusetts v. EPA*, 549 U.S. 497 (2007) that GHGs meet the definition of "air pollutant" under the Clean Air Act ("CAA") and that the EPA could regulate GHGs if it made the predicate "endangerment finding." On December 7, 2009, on remand of *Massachusetts*, EPA found, under section 202(a) of the CAA, 42 U.S.C. § 7521(a), that GHGs emitted by new motor vehicles and new motor vehicle engines "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." *See Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act,* 74 Fed. Reg. 66,496 (Dec. 15, 2009). Based on that finding, EPA promulgated GHG emission limits for new automobiles and light-duty trucks beginning with model year 2012. *See Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards*, 75 Fed. Reg. 25,324 (May 7, 2010). EPA has also initiated regulation of a variety of new and modified stationary sources under two CAA permit programs, the Prevention of Significant Deterioration pre-construction permit program and the Title V operating permit program. *See Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs*, 75 Fed. Reg. 17,004, 17,019 (April 2, 2010); *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514 (June 3, 2010).

As might be expected, EPA's regulatory approach has proved highly contentious. By Amici's count, appeals of EPA's GHG regulatory actions in the United States Court of Appeals for the D.C. Circuit now involve, including parties and amici, 59 business associations, 21 businesses, 35 states, 15 congressmen, 10 environmental groups, 10 policy groups and 11 state agencies or officials.[2]

The Court of Appeals decision below thrusts the Judicial Branch into this long-running climate change policy fray. Indeed, the Court's decision threatens to make the Judiciary the arbiter of how the country should use energy and at what cost. The Defendants here do not emit GHGs in a vacuum—they do so because they combust fossil fuel in order to produce electricity and because that process—oxidizing carbon to produce energy—releases carbon

---

[2] *See Sierra Club v Environmental Protection Agency*, No 09-1018 (filed January 15, 2009), and consolidated cases, *Coalition for Responsible Regulation, Inc., et al v. Environmental Protection Agency*, No 09-1322 (filed December 23, 2009), and consolidated cases, *Coalition for Responsible Regulation, et al v Environmental Protection Agency*, No. 10-1073 (filed April 2, 2010), *Southeastern Legal Foundation, Inc , et al v. Environmental Protection Agency*, No 10-1083 (filed April 15, 2010), and consolidated cases, *Coalition for Responsible Regulation, Inc , et al v Environmental Protection Agency*, No 10-1092 (filed May 7, 2010), and consolidated cases, *Southeastern Legal Foundation, et al v Environmental Protection Agency*, No 10-1131 (filed June 3, 2010), and consolidated cases; *American Chemistry Council, et al v. Environmental Protection Agency et al.*, No. 10-1167 (filed July 6, 2010), and consolidated cases; *Georgia Coalition for Sound Environmental Policy, Inc v Environmental Protection Agency*, No, 10-1200 (filed July 30, 2010), and consolidated cases, *Coalition for Responsible Regulation, et al. v Environmental Protection Agency*, No. 10-1234 (filed August 13, 2010), and consolidated cases

dioxide. Plaintiffs' request for a permanent injunction requiring Defendants to lower their GHG emissions would therefore require the district court to order Defendants to use less fossil fuel in favor of more expensive substitutes or prohibitively expensive improvements in efficiency, assuming such improvements were technologically feasible. Such an order in turn would lead to higher rates to electric consumers, creating both detrimental economic and detrimental health and welfare consequences as consumers, particularly lower-income ones, would have less money to spend on the necessities of life. In resolving the issue of what level of GHG emissions is appropriate given the cost of reducing emissions, the Court would have no choice but to weigh and balance exactly the same type of economic and environmental policy considerations that have made determination of national GHG policy by the People's elected representatives so difficult.

The Panel's conclusion that the case merely involves a single nuisance action against specific defendants that does not require resolution of questions that are fundamentally political in nature, *Connecticut v. AEP*, 582 F. 3d 309, 325 (2d Cir. 2009), was based on reasoning with blinders on. It is true that the specific relief sought in the Complaint is a limitation on the GHG emissions of five electric utilities. But a court cannot determine whether the Defendants' energy choices here, and therefore their GHG emissions, constitute a nuisance without determining whether those energy choices and GHG emissions levels are "reasonable."[3] And what is a reasonable

---

[3] The Panel states that "Federal courts have applied well-settled tort rules to a variety of new and complex problems," 582 F.3d at 328, and notes that, "as a general matter, the Supreme

level of fossil fuel usage—as compared to more expensive substitutes—is a fundamentally political question requiring the weighing of the public policy interest in addressing concerns about climate change with the public policy interest in protecting electric consumers against rate increases.

More fundamentally, the Panel's view that all that is at stake here is "a decision by a single federal court," *id.* at 325, entirely misses the broad precedential effect that its decision will have. The Panel's decision allows anyone claiming damage from possible climate change, no matter where that Plaintiff is located, to sue any GHG emitter in the Second Circuit and to seek an injunction limiting emissions and even damages. Given the succeeding similar lawsuits that have already been filed against an even larger group of defendants, the prospect of such lawsuits is hardly speculative.[4] Indeed, it is hard to discern an intelligible principle in the Second Circuit decision as to which among the multitude of GHG-

---

Court and this Court have often turned to the Restatement (Second) of Torts for assistance in developing standards in a variety of tort cases," *id* at 327. As the Panel noted, the Restatement specifically requires the court in a nuisance claim to address the "reasonableness" of the conduct in question *Id* at 369

[4] *See Comer v. Murphy Oil, USA*, No 05-436, 2007 WL 6942285 (S D. Miss Aug 30, 2007), *rev'd* 585 F.3d 855 (5th Cir 2009), *reh'g granted*, 598 F 3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010), *California v Gen Motors Corp* , No. C06-05755, 2007 WL 2726871 (N D Cal. Sept 17, 2007), *appeal dismissed*, No. 07-16908 (9th Cir. June 24, 2009), *Native Vill of Kivalina v Exxon-Mobil Corp.*, 663 F Supp. 2d 863 (N.D Cal. 2009), appeal pending, No. 09-17490 (9th Cir Nov 5, 2009).

emitting companies in the United States could not be liable for the alleged nuisance.

If the Panel decision stands, District Courts in the Second Circuit will become the locus of a multitude of climate change tort lawsuits. Each lawsuit will put at issue the proper amount of fossil fuel usage by the particular defendant or defendants, and whether they should use more expensive substitutes, and if they do what the impact will be on their businesses, their customers and society at large. The courts, not the elected branches of government, would decide how we use energy in this country.

This is a daunting prospect. The U.S. economy runs on fossil fuels, and fossil fuel usage therefore cannot be significantly reduced without producing fundamental economic consequences. Judges, however, are neither empowered nor equipped to determine on a lawsuit-by-lawsuit basis the extent to which economic output should be reduced in order to accommodate reductions in fossil fuel usage. Indeed, the author of the Panel opinion conceded the political nature of the Panel's decision when he told a conference following the decision that Plaintiffs' "nuisance action by nuisance action" approach to forcing industry to reduce emissions reductions may "help in a political sense" by creating an "impetus" for legislative or regulatory action. *Key Judge Downplays Prospects for Successful Climate Damages Suits*, Clean Air Report, Mar. 2, 2010, http://carboncontrolnews.com/2010030219610/Carbon-Control-Daily-News/News/key-judge-downplays-prospects-for-successful-climate-damages-suits/menu-id-202.html.

Whether federal district court judges should become the arbiters of how the country uses energy is a question of extraordinary national importance. To

illustrate this point in more detail, Amici discuss below the important public policy issues that courts would have to confront if the Court of Appeals decision below stands and the Judiciary must determine "reasonable" levels of GHG emissions and therefore fossil fuel usage.

B. Policy Considerations in Determining What Level of GHG Emissions Is Reasonable

1. Multiplicity of Emitters Worldwide

In adjudicating the reasonableness of a particular defendant's GHG emissions in a climate change tort lawsuit, the court will be forced to examine those emissions in their global context. Because GHGs mix in the global atmosphere, a ton of GHGs emitted in, for instance, New York has the same effect on overall global atmospheric concentrations of GHGs—and therefore the climate effects of which Plaintiffs complain—as a ton emitted in China or India. Moreover, because fossil fuels are so fundamental to all societies, GHGs are emitted by an almost incomprehensively vast number of sources across the entire economic spectrum globally. As discussed in more detail below, the rest of the world emits far more GHGs than the United States, and that disparity is growing as developing nations continue to grow their economies. In this context, the court in any global warming tort lawsuit, in determining a "reasonable" level of GHG emissions, would have to consider that any remedy it could impose on any defendant or group of defendants—and even on all major GHG-emitting facilities in the United States—would not meaningfully affect global atmospheric GHG concentrations

and therefore would not meaningfully affect the global warming injury the plaintiff asserts.

As the IPCC, a source on which Plaintiffs rely in their Complaint, has noted, "[e]missions of GHGs are associated with an extraordinary array of human activities." IPCC Third Assessment Report, CLIMATE CHANGE 2001: MITIGATION 608 (Cambridge University Press 2001) ("IPCC 2001"), *available at* http://www.ipcc.ch/publications_and_data/publications_and_data_reports.htm. The United States Energy Information Administration ("EIA") reached the same conclusion: "there are a vast number of entities that emit carbon—homes, factories, vehicles, commercial facilities, and agricultural resources...." *Hearings Before the Senate Comm. on Energy and Natural Resources*, 106th Cong. (March 25, 1999) (testimony of Jay Hakes, EIA Administrator). According to EPA, "[v]irtually every sector of the U.S. economy is either directly or indirectly a source of GHG emissions." Proposed Consent Decree, Clean Air Act Citizen Suit, 68 Fed. Reg. 52,922, 52,928 (Sept. 8, 2003).

Because the use of fossil fuels is so fundamental to the U.S. and global economies, the IPCC has concluded that "[t]he global nature of the problem . . . implies that the full breadth of human social structures is encompassed." IPCC 2001 at 607. The IPCC noted:

> A combination of several features lends the climate problem its uniqueness. They include public good issues arising from the concentration of GHGs in the atmosphere that requires collective global action, the multiplicity of decision makers ranging from global down to the micro level of firms and individuals, and the heterogeneity of emissions and their consequences

> around the world. Moreover, the long-term nature of climate change originates from the fact that it is the concentration of GHGs that matters rather than their annual emissions and this feature raises the thorny issues of intergenerational transfers of wealth and environmental goods and bads. Next, human activities associated with climate change are widespread, which makes narrowly defined technological solutions impossible, and the interactions of climate policy with other broad socioeconomic policies are strong. Finally large uncertainties or in some areas even ignorance characterize many aspects of the problem and require a risk management approach to be adopted in all [decisionmaking frameworks] that deal with climate change.

Id. at 66. Given the complexity of the issue, the latest IPCC report recommends that all of the many sectors that produce GHGs must be addressed as part of a coordinated approach. According to the IPCC, "[n]o one sector or technology can address the entire mitigation challenge. This suggests that a diversified portfolio is required based on a variety of criteria. All the main sectors contribute to the total." IPCC Fourth Assessment Report: CLIMATE CHANGE 2007: WORKING GROUP III: MITIGATION OF CLIMATE CHANGE 621 (Cambridge University Press 2007). This includes energy supply, transport and its infrastructure, residential and commercial buildings, industry, agriculture, forestry and waste management. *Id.*, Chs. 4-10.

Not only are there many and diverse GHG emitters worldwide, emissions from foreign sources are increasing much more rapidly than domestic emissions,

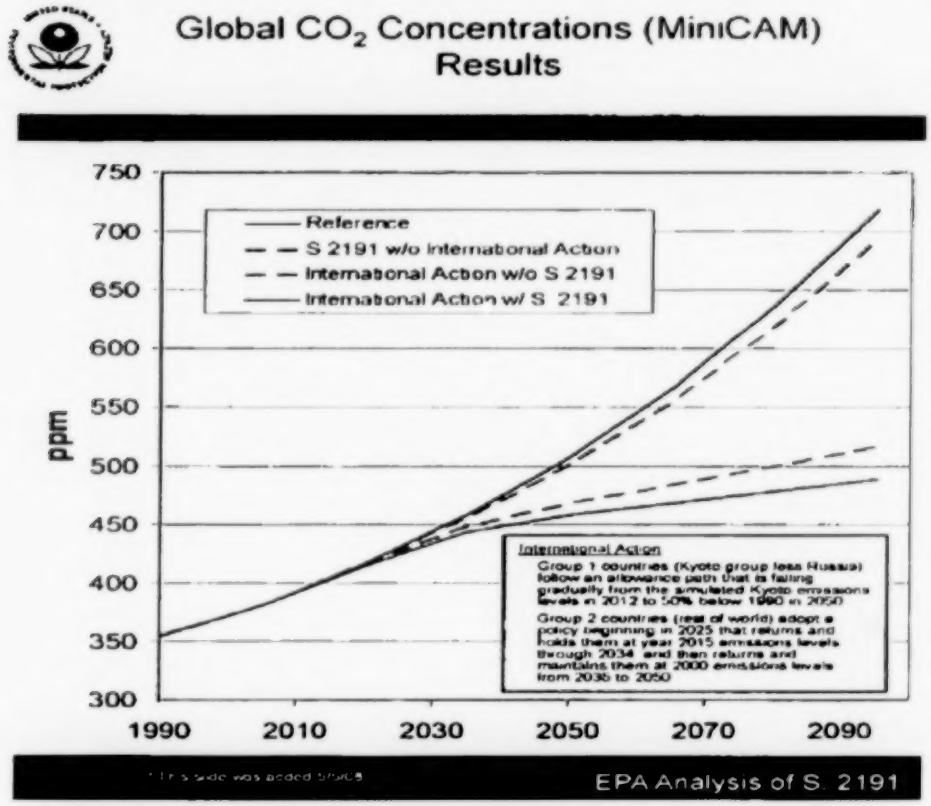
and that trend will accelerate in the future regardless of any action the United States may take. EIA, INTERNATIONAL ENERGY OUTLOOK 131 (2009), *available at* http://www.eia.doe.gov/oiaf/ieo/pdf/0484(2009).pdf. Recent data shows that the emissions from China alone, which is building a coal-fired electric generating station every week, have surpassed those of the United States, and China's energy usage continues to rise at an ever increasing pace. *Id.* Indeed, although the EIA in 2004 forecast that China's emissions would still be less than U.S. emissions even in 2025, in fact, China's emissions exceeded those of the U.S. by 2006. *See* EIA, INTERNATIONAL ENERGY OUTLOOK 172 (2004), *available at* http://tonto.eia.doe.gov/ftproot/forecasting/0484(2004).pdf and EIA, INTERNATIONAL ENERGY OUTLOOK 131 (2009), *available at* http://www.eia.doe.gov/oiaf/ieo/pdf/0484(2009).pdf. China's carbon dioxide emissions are forecast by the EIA to be about 12 billion metric tons by 2030 as compared with U S. emissions of 6.8 billion metric tons. EIA, INTERNATIONAL ENERGY OUTLOOK 196 (2009), *available at* http://www.eia.doe.gov/oiaf/ieo/pdf/0484(2009).pdf.

The trend toward greater international GHG emissions is likely to continue. Given global development, energy decisions made in the United States are increasingly less important to the world's GHG emissions profile. As the current century proceeds, generation of electricity is poised for staggering growth. The EIA predicts a 75% increase in the next two decades alone. EIA, INTERNATIONAL ENERGY OUTLOOK 507 (2008), *available at* http://www.eia.doe.gov/oiaf/archive/ieo08/pdf/0484(2008).pdf. The locus of that incremental growth reflects a major shift in the global situation. From 1980-2000, almost one-

fourth of the global increase in electric generation came from the United States. EIA International Energy Statistics, *available at* http://tonto.eia.doe.gov/cfapps/ipdbproject/IED Index3.cfm ?tid= 2&pid= 2&aid=12. Over the next 20 years, the U.S. will be a relatively minor player in an ever larger drama. According to the EIA, between 2006 and 2030, electricity generation in the U.S. will increase by 1,090 billion kWh, whereas electricity generation will increase by 12,710 billion kWh in the rest of the world. EIA, INTERNATIONAL ENERGY OUTLOOK 196 (2009), *available at* http://www.eia.doe.gov/oiaf/ieo/pdf/0484(2009).pdf.

It is no surprise therefore that unilateral action by the United States, as in the tort lawsuit that the Plaintiffs have brought here and that others will bring if the Panel decision stands, will not meaningfully affect atmospheric GHG concentrations. For instance, the United States Environmental Protection Agency produced an analysis last year of the effect on global GHG concentrations over a 100-year period if S. 2191, the Lieberman-Warner climate change legislation that was reported by the Senate Committee on Environment and Public Works in 2008, were enacted into law. The Lieberman-Warner bill did what Plaintiffs want the courts to do here—it set an amount of GHG emissions that fossil fuel industries could legally produce (in the bill this was called a "cap"). The analysis is reproduced below and shows that, without legally binding international action, U.S. efforts at reducing GHG emissions will

have almost no impact on overall GHG concentrations and the injury which Plaintiffs assert.[5]



[5] *See* EPA ANALYSIS OF THE LIEBERMAN-WARNER CLIMATE SECURITY ACT OF 2008, S 2191 IN 110TH CONGRESS (March 14, 2008) at 192, *available at* http //www epa gov/climatechange/downloads/s2191_EPA_Analysis pdf The upper solid line in the graph assumes the legislation is not enacted, the upper dotted line assumes that the legislation is enacted Both of these upper lines assume the rest of the world does not take action to significantly reduce its GHG emissions as compared with efforts they are already undertaking As can be seen, at the end of the 100-year period 1990-2010, the bill would result in only a six-year delay of the GHG levels predicted without the bill. The lower lines show emissions with international action, the lower dotted lined without enactment of the legislation and the lower solid line with enactment of the legislation As can be seen the rest of the world must reduce GHG emissions if overall atmospheric concentrations are to be meaningfully reduced.

In sum, given that GHGs are emitted by a very large and diverse number of sources globally, arriving at a "reasonable" amount of GHG emissions for the American fossil fuel industry involves highly difficult policy decisions. Given the difficult policy choices that such a decision entails, it is not surprising that the Lieberman-Warner bill consumed 252 pages of legislative text. But these policy choices belong with Congress, not a court.

2. The Benefits of Using Fossil Fuels

Another factor a court would need to consider in any particular climate change tort lawsuit is the benefits society derives from fossil fuels, benefits that will be jeopardized if the defendants do not engage in their allegedly unreasonable conduct of using fossil fuels to produce energy. Indeed, because the use of fossil fuels and the attendant GHG emissions are so closely tied with all facets of modern life, a finding that using fossil fuels and emitting GHGs constitute a nuisance is akin to saying that modern life constitutes a nuisance. That may be true in some sense, but the necessary rejoinder is: compared to what? Certainly not as compared with pre-industrial society with pre-industrial levels of atmospheric GHG concentrations. As Justice Breyer stated in his concurring opinion in *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 496 (2001) in the context of air pollution regulations designed to protect the public health, "[p]reindustrial society was not a very healthy society; hence a standard demanding the return of the Stone Age would not prove 'requisite to protect the public health.'"

Thus, although energy production results in GHG emissions, it also yields significant benefits for the

health and welfare of all Americans. The benefits to the United States in fossil fuels usage can be seen by comparing energy usage in the developed world with energy usage in the developing world. The disparity and its consequences are striking. The average consumer in the United States, for example, uses 13,652 kWh of power each year. The average Indian uses just 542 kWh. In the United States, virtually no household lacks access to electricity. World Bank Indicators, *available at* http://data.worldbank.org/country/united-states (2007 data). In India, more than 400 million people have no electricity, 600 million cook with wood or dung and more than 900 million have no refrigeration. International Energy Agency, WORLD ENERGY OUTLOOK 482 (2007), *available at* http://www.iea.org/textbase/nppdf/free/2007/weo_2007.pdf.

The human and economic consequences of these differences in access to electricity are stark indeed. In the United States, the per capita Gross National Income is $46,400. In India, it is $950. In the United States, a new baby can expect to live 78 years, in India only 63. In the United States, there is virtually no serious child malnourishment. In India, about half the children are malnourished and tens of millions are classified as "stunted." World Bank Data, *available at* http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/SOUTHASIAEXT/INDIAEXTN/0,,menuPK:295589~pagePK:141159~piPK:141110~theSitePK:295584,00.html.

Energy usage, and in particular electricity usage, is the *sine qua non* of modern society. The National Academy of Engineering has identified societal electrification as the "most significant engineering achievement" of the twentieth century—a century

that saw population growth of more than four billion people, the rise of the metropolis, dramatic improvements in diet and health, and the emergence of a vast system of electronic communication. *See* Neil A. Armstrong, *The Engineered Century*, BRIDGE, Spring 2000, at 18, *available at* http://www.nae.edu/Publications/TheBridge/Archives/V30-1TheVertiginousMarchofTechnology/TheEngineeredCentury.aspx. In 1930, *The New York Times* stated, "Nothing in modern life so raises the standard of living of high and low income groups as the use of electricity." N.Y. TIMES, Sept. 6, 1936, p. E7.

Energy is a key factor in economic development, transforming agrarian societies to modern industrial ones. This societal transformation driven by the accumulation of income and wealth eliminates many contagious diseases, reduces child mortality, and lengthens adult life expectancy. This virtuous cycle has been demonstrated over the past two centuries in dozens of countries around the world. The emergence from poverty begins as countries develop transportation networks using petroleum and electricity networks, often based upon coal. These systems are capable of achieving massive economies of scale that provide large amounts of energy at low cost. These abundant and reliable supplies of energy spur technological change, productivity growth and living standards. Sam H. Schurr, *Electricity in the American Economy, Agent of Technological Progress*, Greenwood Press, 1990.

It is no coincidence then that the world energy complex is built upon fossil fuels. Consumers prefer low-cost, reliable power, and producers who provide these services prosper. The fact that the U.S. economy currently derives 85 percent of its total energy

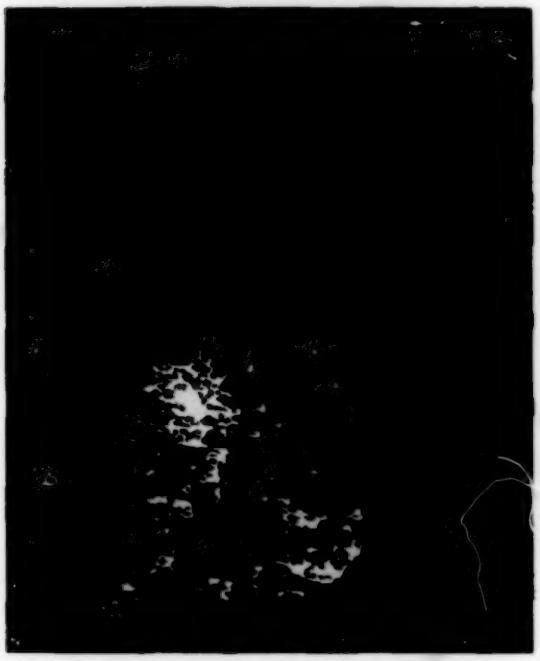
from coal, oil and natural gas is a testament to the competitive advantage of fossil fuels. These fuels have empowered modern industrial societies to raise living standards for billions of people.

The benefits of energy usage can be demonstrated graphically in the following satellite picture of the Korean peninsula at night. One part of the peninsula is a modern country and the other part is one of the most backward countries in the world: the difference is access to electricity and the energy from which the electricity is produced.[6]

---

[6] *See* http://www globalsecurity org/military/world/dprk/dprk-dark.htm. The statistics in the above graphic are taken from Daniel Schwekendieka and Sunyoung Pak, *Recent growth of children in the two Koreas A meta-analysis*, 7 ECON & HUMAN BIOLOGY 109 (2009), Central Intelligence Agency, THE WORLD FACTBOOK 2009 (2009), *available at* https //www cia.gov/ library/ publications/the-world-factbook/index.html and ACCESS TO ELECTRICITY AND WATER FOR DOMESTIC USE (UNESCO 2009), *available at* http://www unesco.org/water/wwap/wwdr/indicators/.

Electricity Makes
the Difference. Korea



South Korean preschool children average 3 inches taller and 7 pounds heavier than North Korean Children

The Infant Mortality Rate in North Korea is 12 times higher than South Korea

South Korea ranks 49th in GDP/capita North Korea Ranks 188th

Only 20% of North Koreans have access to electric power South Korean access approaches 100%

In sum, the benefits of using fossil fuels have been demonstrated by remarkable socioeconomic progress first in the United States and the developed world and currently in China, India and the rest of the developing world. Plaintiffs' view that fossil fuel usage is nevertheless "unreasonable" thus would require the court to weigh whether the benefits of fossil fuel usage are outweighed by the asserted detriments. That determination, however, is a quintessentially legislative task.

3. Who Suffers if Fossil Fuel Usage Is Penalized?

The necessary implication of Plaintiffs' assertion that Defendants unreasonably use fossil fuels and produce GHG emissions is that Defendants should use less fossil fuels in order to reduce their GHG emissions. That is why Plaintiffs seek an injunction

ordering Defendants to reduce their GHG emissions and therefore use less fossil fuel. But because significantly controlling GHG emissions would entail fundamental changes to our economy and the way we live, a variety of authorities have concluded that the cost of reducing GHG emissions would be massive. Thus, in any particular climate change tort lawsuit, the trier of fact would have to engage in a kind of cost-benefit analysis in order to determine whether the defendant's level of emissions was reasonable or whether the defendant should have emitted some other level of GHGs.

In order to give this issue some context, it is instructive to understand how substantial the cost burden is of reducing GHG emissions. For instance, in EPA's March 2008 analysis of the Lieberman-Warner cap-and-trade bill, annual GDP is modeled to be between 0.9 percent ($238 billion) and 3.8 percent ($983 billion) lower in 2030 and between 2.4 percent ($1,012 billion) and 6.9 percent ($2,856 billion) lower in 2050 than in the Reference Scenario. Consumption is modeled to be between 0.9 percent ($180 billion) and 1.4 percent ($233 billion) lower in 2030 and between 2.1 percent ($670 billion) and 3.3 percent ($843 billion) lower in 2050 than in the Reference Scenario. The average annual growth rate of consumption is ~0.08 percentage points lower than the reference case. In 2030 per household average annual consumption is ~$1,375 lower and gasoline prices increase ~$0.53 per gallon. In 2050 per household average annual consumption is ~$4,377 lower and gasoline prices increase ~$1.40 per gallon. *See* EPA ANALYSIS OF THE LIEBERMAN-WARNER CLIMATE SECURITY ACT OF 2008, S. 2191 IN 110TH CONGRESS (March 14, 2008), *available at* http://www.epa.gov/climatechange/downloads/ s2191_EPA_ Analysis.pdf.

Other studies have showed even higher costs, some much higher.[7]

Plaintiffs, of course, are not proposing judicial imposition of the Lieberman-Warner bill on society. But by suing major fossil fuel-using companies on a theory that they acted unreasonably in not lowering their GHG emissions profile, they are asserting that these companies should have used more expensive substitutes. The cost of those substitutes would have been passed on to consumers, and these costs would have been substantial because it is demonstrably not possible to achieve significant GHG emission reductions without incurring significant costs.

Moreover, these costs would fall disproportionately on the poor. According to a recent study, GHG regulation:

> ...will impact low income groups, the elderly, and minorities disproportionately, both because they have lower incomes to begin with, but also because they have to spend proportionately more of their incomes on energy, and rising energy costs inflict great harm on minority families. Lower-incomes families are forced to allocate larger shares of the family budget for energy expenditures, and minority families are signifi-

---

[7] *See, e g*, CRA International, ECONOMIC ANALYSIS OF THE LIEBERMAN-WARNER CLIMATE SECURITY ACT OF 2007 USING CRA'S NRA-NEEM MODEL (April 2008), *available at* http // www.nma org/pdf/040808_crai_ presentation pdf. (4 million jobs will be lost in 2015 alone, and growing on a year-by-year basis to more than 7 million jobs lost in 2050, overall cost of the bill to the average household of 2 6 persons will exceed $2,300 annually in 2015, which approximates the amount households now spend annually on healthcare; large year-over-year losses in GDP accumulating to $5.3 trillion (present value 2007$).

> cantly more likely to be found among the lower-income brackets.
>
> This disparity between racial groups means that rising energy costs have a disproportionately negative effect on the ability of minority families to acquire other necessities such as food, housing, childcare, or healthcare.

Management Information Services, Inc., POTENTIAL IMPACT OF THE EPA ENDANGERMENT FINDING ON LOW INCOME GROUPS AND MINORITIES (March 2010) at iv-v, *available at* http://www.affordablepoweralliance.org/Home.aspx.

Agriculture is also particularly vulnerable to attempts to restrict GHG emissions. Animal agriculture is a significant source of methane emissions. Nitrous oxide, another GHG, is also produced in animal agriculture operations. Most farms typically have both stationary and mobile engines that are a source of CO_2, and the economics of farming are highly sensitive to the cost of fuel and fertilizer, both of which would be affected by higher energy prices. As a result, restricting GHG emissions will cause an increase in food prices to the consumer and may drive many smaller farms out of business.

In sum, the reasonableness of the Defendants' conduct here can only be determined in the context of what the costs of alternative action would have been. But, again, weighing the costs of action or inaction on GHG emissions is a legislative function, not a judicial one.

CONCLUSION

Determining "reasonable" levels of GHG emissions is a fundamentally legislative task, one that is not appropriate for the Judicial Branch. The prospect that the Court of Appeals decision will result in unelected judges rendering energy policy judgments raises an issue of extraordinary national importance that this court should examine by granting the petition for certiorari.

Respectfully submitted,

ELLEN STEEN
DANIELLE QUIST
AMERICAN FARM BUREAU FEDERATION
600 Maryland Avenue, S W
Suite 1000
Washington, D.C. 22024

KATIE SWEENEY
General Counsel
BENJAMIN BRANDES
Director of Air Quality
NATIONAL MINING ASSOCIATION
101 Constitution Avenue, N W
Suite 500 East
Washington, D.C 20001

PETER GLASER
Counsel of Record
MARK E. NAGLE
MATTHEW W. DUKES
TROUTMAN SANDERS LLP
401 9th Street, N.W.
Suite 1000
Washington, D.C 20004
(202) 274-2998
peter.glaser@troutmansanders com

DOUGLAS A HENDERSON
TROUTMAN SANDERS LLP
600 Peachtree Street, NE
Suite 5200
Atlanta, GA 30308-2216

Counsel for the American Farm Bureau Federation and National Mining Association

September 3, 2010

JOINT APPENDIX

JAN 31 2011
OFFICE OF THE CLERK

No. 10-174

IN THE

Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY INC., *et al.*,
Petitioners,

v.

STATE OF CONNECTICUT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

PETER D. KEISLER*
CARTER G. PHILLIPS
DAVID T. BUENTE JR.
ROGER R. MARTELLA JR.
QUIN M. SORENSON
JAMES W. COLEMAN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
pkeisler@sidley.com
(202) 736-8000

Counsel for Petitioners

BARBARA D. UNDERWOOD*
SOLICITOR GENERAL
OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK
120 Broadway, 25th Flr.
New York, NY 10271
(212) 416-8020
barbara.underwood@ag.ny.gov

Counsel for Respondents Connecticut, California, Iowa, New Jersey, New York, Rhode Island, Vermont, Wisconsin, and City of New York

* Counsels of Record

[Additional Counsel Listed On Inside Pages]

January 31, 2011

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

PETITION FOR CERTIORARI FILED AUGUST 2, 2010

PETITION GRANTED DECEMBER 6, 2010

F. WILLIAM BROWNELL
NORMAN W. FICHTHORN
ALLISON D. WOOD
HUNTON & WILLIAMS LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 955-1500

SHAWN PATRICK REGAN
HUNTON & WILLIAMS LLP
200 Park Avenue
52nd Floor
New York, N.Y. 10166
(212) 309-1000

Counsel for Petitioner Southern Company

MARTIN H. REDISH
NORTHWESTERN UNIVERSITY SCHOOL OF LAW
375 East Chicago Avenue
Chicago, Illinois 60611
(312) 503-8545

Counsel for Petitioners

MATTHEW P. PAWA*
LAW OFFICE OF MATTHEW F. PAWA
1280 Centre Street
Suite 230
Newtown Centre, MA 02459
(617) 641-9550
mp@pawalaw.com

Counsel for Respondents Open Space Institute, Inc., Open Space Conservancy, Inc., and Audubon Society of New Hampshire

DONALD B. AYER
KEVIN P. HOLEWINSKI
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C.
20001
(202) 879-3939

THOMAS E. FENNELL
MICHAEL L. RICE
JONES DAY
2727 North Harwood St.
Dallas, Texas 75201
(214) 220-3939

Counsel for Petitioner
Xcel Energy Inc.

NEAL KUMAR KAYTAL*
ACTING SOLICITOR
GENERAL
DEPARTMENT OF JUSTICE
Room 5614
950 Pennsylvania Ave.,
N.W.
Washington, D.C. 20530-
0001
(202) 514-2217
SupremeCtBriefs@USDOJ.
gov

Counsel for Respondent
Tennessee Valley Authority

TABLE OF CONTENTS

	Page
United States District Court of the Southern District of New York, No. 1:04-cv-05669-LAP Relevant Docket Entries	1
United States District Court of the Southern District of New York, No. 1:04-cv-05670-LAP Relevant Docket Entries	13
United States Court of Appeals, Second Circuit, No. 05-5104-cv Relevant Docket Entries	27
United States Court of Appeals, Second Circuit, No. 05-5119-cv Relevant Docket Entries	42
Complaint, *Connecticut* v. *Am. Elec. Power Co.*, No. 1:04-cv-05669 (S.D.N.Y. July 21, 2004)	56
Complaint, *Connecticut* v. *Am. Elec. Power Co.*, No. 1:04-cv-05670 (S.D.N.Y. July 21, 2004)	117
Connecticut v. *Am. Elec. Power Co.*, Nos. 1:04-cv-05669 (LAP), 1:04-cv-05670 (LAP) (S.D.N.Y. Sept. 19, 2005) (judgment)	155
Connecticut v. *Am. Elec. Power Co.*, Nos. 05-5104-cv, 05-5119-cv (2d Cir. Mar. 16, 2010) (order staying mandate)	157

Connecticut v. *Am. Elec. Power Co.*, Nos. 05-5104-cv, 05-5119-cv (2d Cir. June 9, 2010) (order further staying mandate) 159

NOTICE

The following documents have been omitted from the printing of this Joint Appendix. They may be found in the Petitioners' Appendix to the 10-174 Petition For A Writ Of Certiorari at the following pages:

Connecticut v. *Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009) 1a

Connecticut v. *Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005) 171a

State of Conn., et al. v. *Am. Elec. Power Co., et al.*, No. 05-5104 (2d Cir. Mar. 5, 2010) (order denying rehearing and re-hearing en banc) 188a

Open Space Inst., et al. v. *Am. Elec. Power Co., et al.*, No. 05-5119 (2d Cir. Mar. 10, 2010) (order denying rehearing and re-hearing en banc) 190a

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(Foley Square)

CIVIL DOCKET FOR CASE #: 1:04-cv-05669-LAP
Date Filed: 07/21/2004

STATE OF CONNECTICUT *et al*

v.

AMERICAN ELECTRIC POWER COMPANY, INC. *et al*

RELEVANT DOCKET ENTRIES

DATE	#	DOCKET TEXT
07/21/2004	1	COMPLAINT against American Electric Power Company, Inc., American Electric Power Service Corporation, Cinergy Corporation, Tennessee Valley Authority, XCEL Energy, Inc.. (Filing Fee $150.00, Receipt Number 514891) Document filed by City of New York, People of the State of California, Southern Company, State of Connecticut, State of Iowa, State of New Jersey, State of New York, State of Rhode Island, State of Vermont, State of Wisconsin. (gf,) (Entered: 07/22/2004)

* * * *

DATE	#	DOCKET TEXT
08/19/2004	7	STIPULATION AND ORDER. The time within which all defendants may answer, move, or otherwise respond to the complaint, be, and the same hereby is, extended until and including 9/30/04. Defendants agree not to assert as a defense improper or insufficient service of process of the summons and complaint, but reserve all other defenses, including but not limited to those relating to personal jurisdiction and venue (Signed by Judge Loretta A. Preska on 8/19/04) (yv,) (Entered: 08/20/2004)
		* * * *
09/28/2004	28	ENDORSED LETTER addressed to Judge Preska from Shawn P. Regan dated 9/22/04 re: approval of the following briefing schedule: defendants' motions to be filed and served electronically on Thursday, 9/30/2004. Plaintiffs' opposition papers will be filed and served electronically on Friday, 11/19/2004. Defendants' reply papers will be filed and served electronically by Friday, 12/17/2004. The method of proceeding set out above is approved (Signed by Judge Loretta A. Preska on 9/27/04) (yv,) (Entered: 09/28/2004)

DATE	#	DOCKET TEXT
09/30/2004	29	MOTION to Dismiss for Lack of Jurisdiction. Document filed by American Electric Power Company, Inc. (McGuirk, Patrick) (Entered: 09/30/2004)
09/30/2004	30	MOTION to Dismiss for Lack of Jurisdiction. Document filed by Cinergy Corporation. (McGuirk, Patrick) (Entered: 09/30/2004)
09/30/2004	31	BRIEF re: 29 MOTION to Dismiss for Lack of Jurisdiction. Document filed by American Electric Power Company, Inc. (McGuirk, Patrick) (Entered: 09/30/2004)
09/30/2004	32	BRIEF re: 30 MOTION to Dismiss for Lack of Jurisdiction. Document filed by Cinergy Corporation. (McGuirk, Patrick) (Entered: 09/30/2004)
09/30/2004	33	MOTION to Dismiss. Document filed by Tennessee Valley Authority. Responses due by 11/19/2004 (Small, Edwin) (Entered: 09/30/2004)
09/30/2004	34	MEMORANDUM OF LAW in Support re: 33 MOTION to Dismiss. Document filed by Tennessee Valley Authority. (Small, Edwin) (Entered: 09/30/2004)
09/30/2004	35	MOTION to Dismiss *complaint for lack of subject matter jurisdiction, for lack of personal jurisdiction, and for an order pursuant to FRCP 12(b)(6) dismissing complaint for*

DATE	#	DOCKET TEXT
		failure to state a claim upon which relief can be granted. Document filed by XCEL Energy, Inc. (Broderick, Patrick) (Entered: 09/30/2004)
09/30/2004	36	MOTION to Dismiss. Document filed by Southern Company. Responses due by 11/19/2004 (Regan, Shawn) (Entered: 09/30/2004)
09/30/2004	37	MEMORANDUM OF LAW in Support re: 33 MOTION to Dismiss., 35 MOTION to Dismiss *complaint for lack of subject matter jurisdiction, for lack of personal jurisdiction, and for an order pursuant to FRCP 12(b)(6) dismissing complaint for failure to state a claim upon which relief can be granted.*, 36 MOTION to Dismiss., 30 MOTION to Dismiss for Lack of Jurisdiction. (*Personal Jurisdiction Brief*). Document filed by Cinergy Corporation, Southern Company, Tennessee Valley Authority, XCEL Energy, Inc. (Regan, Shawn) (Entered: 09/30/2004)
09/30/2004	38	DECLARATION of Shawn Patrick Regan in Support re: 36 MOTION to Dismiss. Document filed by Southern Company. (Attachments: # 1 Exhibit A to Declaration of Shawn Patrick Regan in Support of Defendants' Respective Motions to Dismiss # 2 Exhibit B to Declaration of Shawn Patrick Regan in Support

DATE	#	DOCKET TEXT
		of Defendants' Motions to Dismiss) (Regan, Shawn) (Entered: 09/30/2004)
09/30/2004	39	MOTION for Leave to File Amicus Curiae Memorandum in Support of Defendants' Motion to Dismiss. Document filed by Unions for Jobs and the Environment. (Harris, Joel) (Entered: 09/30/2004)
09/30/2004	40	MEMORANDUM OF LAW in Support re: 39 MOTION for Leave to File Amicus Curiae Memorandum in Support of Defendants' Motion to Dismiss. Document filed by Unions for Jobs and the Environment. (Attachments: # 1 Exhibit 1 – Amicus Curiae UJAE's Memorandum in Support of Defendants' Motion to Dismiss) (Harris, Joel) (Entered: 09/30/2004)
		* * * *
10/28/2004	44	MEMORANDUM OF LAW in Support *of Defendants' Motion to Dismiss filed by Amicus Curiae Unions for Jobs and the Environment*. Document filed by Unions for Jobs and the Environment. (Harris, Joel) (Entered: 10/28/2004)
		* * * *

DATE	#	DOCKET TEXT
11/19/2004	52	FIRST MEMORANDUM OF LAW in Opposition re: 35 MOTION to Dismiss *complaint for lack of subject matter jurisdiction, for lack of personal jurisdiction, and for an order pursuant to FRCP 12(b)(6) dismissing complaint for failure to state a claim upon which relief can be granted.*, 30 MOTION to Dismiss for Lack of Jurisdiction. *Plaintiffs Memorandum of Law in Opposition to the Motions of the Southern Company, Tennessee Valley Authority, Xcel Energy Inc. and Cinergy Corp. to Dismiss for Lack of Personal Jurisdiction;*. Document filed by State of New York. (Wynn, Simon) (Entered: 11/19/2004)
11/19/2004	53	FIRST MEMORANDUM OF LAW in Opposition re: 33 MOTION to Dismiss. *Plaintiffs Memorandum of Law in Opposition to the Motion of Tennessee Valley Authority to Dismiss on Federal Discretionary Function Grounds.* Document filed by State of New York. (Wynn, Simon) (Entered: 11/19/2004)
11/19/2004	54	FIRST MEMORANDUM OF LAW in Opposition re: 33 MOTION to Dismiss., 35 MOTION to Dismiss *complaint for lack of subject matter jurisdiction, for lack of personal jurisdiction, and for an order pursu-*

DATE	#	DOCKET TEXT
		ant to FRCP 12(b)(6) dismissing complaint for failure to state a claim upon which relief can be granted., 29 MOTION to Dismiss for Lack of Jurisdiction., 36 MOTION to Dismiss., 30 MOTION to Dismiss for Lack of Jurisdiction. *Plaintiffs Memorandum of Law in Opposition to Defendants Motions to Dismiss the Complaints for Lack of Subject Matter Jurisdiction and for Failure to State a Claim upon Which Relief Can Be Granted.* Document filed by State of New York. (Wynn, Simon) (Entered: 11/19/2004)
		* * * *
12/09/2004	55	REPLY MEMORANDUM OF LAW in Support re: 33 MOTION to Dismiss. Document filed by Tennessee Valley Authority. (Small, Edwin) (Entered: 12/09/2004)
12/17/2004	56	REPLY MEMORANDUM OF LAW in Support re: 29 MOTION to Dismiss for Lack of Jurisdiction., 30 MOTION to Dismiss for Lack of Jurisdiction. Document filed by Cinergy Corporation. (McGuirk, Patrick) (Entered: 12/17/2004)
12/17/2004	57	REPLY MEMORANDUM OF LAW in Support re: 36 MOTION to Dismiss. Document filed by Southern Company. (Regan, Shawn) (Entered: 12/17/2004)

DATE	#	DOCKET TEXT
		* * * *
01/12/2005	59	ENDORSEMENT, that plntfs' request for a Rule 26 conference is denied in light of the pendency of defts' motion to dismiss. . . . This is particularly true where, as here, the discovery is expected to be lengthy and complex. (Signed by Judge Loretta A. Preska on 1/12/05) (cd,) (Entered: 01/20/2005)
		* * * *
02/18/2005	60	MEMO ENDORSEMENT; Plaintiffs' request for a premotion conference to discuss a motion to consolidate is denied without prejudice to renewal upon resolution of the pending motions to dismiss. (Signed by Judge Loretta A. Preska on 1/31/05) (sac,) (Entered: 02/23/2005)
02/23/2005	61	RESPONSE in Opposition re: 33 MOTION to Dismiss., 35 MOTION to Dismiss *complaint for lack of subject matter jurisdiction, for lack of personal jurisdiction, and for an order pursuant to FRCP 12(b)(6) dismissing complaint for failure to state a claim upon which relief can be granted.*, 36 MOTION to Dismiss., 29 MOTION to Dismiss for Lack of Jurisdiction., 30 MOTION to Dismiss for Lack of Jurisdiction. Document filed by State of New

DATE	#	DOCKET TEXT
		York. (Attachments: # 1) (Wynn, Simon) (Entered: 02/23/2005)
02/28/2005	62	ENDORSED LETTER addressed to Judge Loretta A. Preska from Shawn Patrick Regan dated 2/23/05 re: requesting an extension until 3/4/05 to file the response brief. So ordered. (Signed by Judge Loretta A. Preska on 2/24/05) (kw,) (Entered: 03/02/2005)
03/04/2005	63	RESPONSE in Support re: 33 MOTION to Dismiss., 35 MOTION to Dismiss *complaint for lack of subject matter jurisdiction, for lack of personal jurisdiction, and for an order pursuant to FRCP 12(b)(6) dismissing complaint for failure to state a claim upon which relief can be granted.*, 36 MOTION to Dismiss., 30 MOTION to Dismiss for Lack of Jurisdiction. / *Response to Surreply*. Document filed by Southern Company, Tennessee Valley Authority, XCEL Energy, Inc., Cinergy Corporation. (Regan, Shawn) (Entered: 03/04/2005)
06/03/2005	64	ORDER. Counsel are directed to appear in Courtroom 12A, US Courthouse, 500 Pearl Street, New York, NY on 7/8/05 at 11:00 a.m. for oral argument on the motions to dismiss the actions (Signed by

DATE	#	DOCKET TEXT
		Judge Loretta A. Preska on 5/27/05) (yv,) (Entered: 06/06/2005)
		* * * *
08/03/2005	68	ORDER: oral arguments on motions to dismiss are rescheduled for 8/12/05 at 9:00 a.m. (Signed by Judge Loretta A. Preska on 8/3/05) (db,) (Entered: 08/04/2005)
		* * * *
08/17/2005	69	TRANSCRIPT of proceedings held on 8/12/05 before Judge Loretta A. Preska. (lma,) (Entered: 08/17/2005)
		* * * *
09/19/2005	71	MEMORANDUM AND OPINION # 92146, for the reasons set forth, the complaints in 04 cv 5669 (LAP) and 04 cv 5670 (LAP) are dismissed. The Clerk of the Court shall mark these actions closed and all pending motions (re: 33 MOTION to Dismiss filed by Tennessee Valley Authority; 35 MOTION to Dismiss *complaint for lack of subject matter jurisdiction, for lack of personal jurisdiction, and for an order pursuant to FRCP 12(b)(6) dismissing complaint for failure to state a claim upon which relief can be granted* filed by XCEL Energy, Inc.; 29 MOTION to Dismiss for Lack of Jurisdiction filed by American Electric Power Company, Inc.; 36 MOTION to Dis-

DATE	#	DOCKET TEXT
		miss filed by Southern Company; 30 MOTION to Dismiss for Lack of Jurisdiction filed by Cinergy Corporation; 70 MOTION for Todd Lewis Fulks to Withdraw as Attorney *for the Tennessee Valley Authority* filed by Tennessee Valley Authority) are denied as moot. (Signed by Judge Loretta A. Preska on 9/15/2005) (lan,) (Entered: 09/19/2005)
		* * * *
09/19/2005	72	CLERK'S JUDGMENT That for the reasons stated in the Court's Opinion and Order dated September 15, 2005, the complaints are dismissed; accordingly, these cases are closed and all pending motions denied as moot. (Signed by J. Michael McMahon, clerk on 9/19/05) (Attachments:, # 1 Notice of Right to Appeal) (ml,) (Entered: 09/19/2005)
09/20/2005	73	NOTICE OF APPEAL from 72 Clerk's Judgment, 71 Memorandum & Opinion. Document filed by State of Iowa, State of New Jersey, State of Rhode Island, State of Vermont, State of Wisconsin, City of New York, State of Connecticut, State of New York, People of the State of California. Filing fee $255.00, receipt number E 555960. (tp,) (Entered: 09/21/2005)

DATE	#	DOCKET TEXT
		* * * *
09/22/2005	74	AMENDED OPINION AND ORDER: #92146 for reasons further set forth in said Order, the complaints in 04cv5669 and 04cv5670 are dismissed. The Clerk of the Court shall mark these actions closed and all pending motions denied as moot. (Signed by Judge Loretta A. Preska on 9/16/05) (db,) Modified on 9/26/2005 (ns,). (Entered: 09/23/2005)
09/28/2005	75	AMENDED NOTICE OF APPEAL re: 73 Notice of Appeal, 72 Clerk's Judgment, 74 Memorandum & Opinion, 71 Memorandum & Opinion. Document filed by State of Iowa, State of New Jersey, State of Rhode Island, State of Vermont, State of Wisconsin, City of New York, State of Connecticut, State of New York, People of the State of California. (tp,) (Entered: 09/29/2005)
		* * * *

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(Foley Square)

CIVIL DOCKET FOR CASE #: 1:04-cv-05670-LAP
Date Filed: 07/21/2004

OPEN SPACE INSTITUTE, INC. *et al*

v.

AMERICAN ELECTRIC POWER COMPANY, INC. *et al*

RELEVANT DOCKET ENTRIES

DATE	#	DOCKET TEXT
07/21/2004	1	COMPLAINT against American Electric Power Company, Inc., American Electric Power Service Corporation, Cinergy Corporation, Southern Company, Tennessee Valley Authority, XCEL Energy, Inc. (Filing Fee $150.00, Receipt Number 514892) Document filed by Audubon Society of New Hampshire, Open Space Conservancy, Inc., Open Space Institute, Inc. (gf,) (Entered: 07/22/2004)
		* * * *
07/21/2004		CASE REFERRED TO Judge Loretta A. Preska as possibly related to 1:04-cv-5689. (gf,) (Entered: 07/22/2004)

DATE	#	DOCKET TEXT
		* * * *
08/11/2004		CASE ACCEPTED AS RELATED TO 1:04-cv-5669. Notice of Assignment to follow. (gf,) (Entered: 08/11/2004)
08/11/2004	6	NOTICE OF CASE ASSIGNMENT to Judge Loretta A. Preska. Judge Unassigned no longer assigned to the case. (gf,) (Entered: 08/11/2004)
		* * * *
08/13/2004	7	STIPULATION AND ORDER that the time within which all dfts may answer, move, or otherwise respond to the complaint and the same is extended until and including 9/30/04. (Signed by Judge Richard C. Casey on 8/11/04) (dle,) (Entered: 08/13/2004)
		* * * *
08/19/2004	8	STIPULATION AND ORDER. The time within which all defendants may answer, move, or otherwise respond to the complaint, be, and the same hereby is, extended until and including 9/30/04. Defendants agree not to assert as a defense improper or insufficient service of process of the summons and complaint, but reserve all other defenses, including but not limited to those relating to personal jurisdiction and venue (Signed by Judge Loretta A.

DATE	#	DOCKET TEXT
		Preska on 8/19/04) (yv,) (Entered: 08/20/2004)
		* * * *
09/28/2004	21	ENDORSED LETTER addressed to Judge Preska from Shawn P. Regan dated 9/22/04 re: request for approval of the following briefing schedule. Defendants' motions will be filed and served electronically on Thursday, 9/30/2004. Plaintiffs' opposition papers will be filed and served electronically on Friday, 11/19/2004. Defendants' reply papers will be filed and served electronically by 12/17/2004. The method of proceeding set out above is approved (Signed by Judge Loretta A. Preska on 9/27/04) (yv,) (Entered: 09/28/2004)
09/30/2004	22	MOTION to Dismiss for Lack of Jurisdiction. Document filed by American Electric Power Company, Inc. (McGuirk, Patrick) (Entered: 09/30/2004)
09/30/2004	23	MOTION to Dismiss for Lack of Jurisdiction. Document filed by Cinergy Corporation. (McGuirk, Patrick) (Entered: 09/30/2004)
09/30/2004	24	BRIEF re: 22 MOTION to Dismiss for Lack of Jurisdiction. Document filed by American Electric Power

DATE	#	DOCKET TEXT
		Company, Inc. (McGuirk, Patrick) (Entered: 09/30/2004)
09/30/2004	25	MOTION to Dismiss. Document filed by Southern Company. Responses due by 11/19/2004 (Regan, Shawn) (Entered: 09/30/2004)
09/30/2004	26	MOTION to Dismiss. Document filed by Tennessee Valley Authority. Responses due by 11/19/2004 (Small, Edwin) (Entered: 09/30/2004)
09/30/2004	27	MEMORANDUM OF LAW in Support re: 26 MOTION to Dismiss. Document filed by Tennessee Valley Authority. (Small, Edwin) (Entered: 09/30/2004)
09/30/2004	28	MOTION to Dismiss *complaint for lack of subject matter jurisdiction, for lack of personal jurisdiction, and for an order pursuant of FRCP 12(b)(6) dismissing complaint for failure to state a claim upon which relief can be granted.* Document filed by XCEL Energy, Inc. (Broderick, Patrick) (Entered: 09/30/2004)
09/30/2004	29	MEMORANDUM OF LAW in Support re: 26 MOTION to Dismiss., 28 MOTION to Dismiss *complaint for lack of subject matter jurisdiction, for lack of personal jurisdiction, and for an order pursuant of FRCP 12(b)(6) dismissing complaint for failure to state a claim upon which*

DATE	#	DOCKET TEXT
		relief can be granted., 22 MOTION to Dismiss for Lack of Jurisdiction., 23 MOTION to Dismiss for Lack of Jurisdiction., 25 MOTION to Dismiss. Document filed by American Electric Power Company, Inc., American Electric Power Service Corporation, Cinergy Corporation, Southern Company, Tennessee Valley Authority, XCEL Energy, Inc. (Broderick, Patrick) (Entered: 09/30/2004)
09/30/2004	30	DECLARATION of Shawn Patrick Regan in Support re: 25 MOTION to Dismiss. Document filed by Southern Company. (Attachments: # 1 Exhibit A to Declaration of Shawn Patrick Regan in Support of Defendants' Respective Motions to Dismiss # 2 Exhibit B to Declaration of Shawn Patrick Regan in Support of Defendants' Respective Motions to Dismiss) (Regan, Shawn) (Entered: 09/30/2004)
09/30/2004	31	MEMORANDUM OF LAW in Support re: 26 MOTION to Dismiss., 28 MOTION to Dismiss *complaint for lack of subject matter jurisdiction, for lack of personal jurisdiction, and for an order pursuant of FRCP 12(b)(6) dismissing complaint for failure to state a claim upon which relief can be granted.*, 23 MOTION

DATE	#	DOCKET TEXT
		to Dismiss for Lack of Jurisdiction., 25 MOTION to Dismiss. (*Personal Jurisdiction Brief*). Document filed by Cinergy Corporation, Southern Company, Tennessee Valley Authority, XCEL Energy, Inc. (Regan, Shawn) (Entered: 09/30/2004)
09/30/2004	32	MOTION for Leave to File Amicus Curiae Memorandum in Support of Defendants' Motion to Dismiss. Document filed by Unions for Jobs and the Environment. (Harris, Joel) (Entered: 09/30/2004)
09/30/2004	33	MEMORANDUM OF LAW in Support re: 32 MOTION for Leave to File Amicus Curiae Memorandum in Support of Defendants' Motion to Dismiss. Document filed by Unions for Jobs and the Environment. (Attachments: # 1 Exhibit 1 – Amicus Curiae UJAE's Memorandum in Support of Defendants' Motion to Dismiss) (Harris, Joel) (Entered: 09/30/2004)
		* * * *
11/19/2004	43	FIRST MEMORANDUM OF LAW in Opposition re: 25 MOTION to Dismiss. *Governmental Plaintiffs Memorandum of Law in Opposition to Defendants Motion to Dismiss Private Plaintiffs Action*. Document filed by State of New York et al. (Wynn, Simon) (Entered: 11/19/2004)

DATE	#	DOCKET TEXT
11/19/2004	44	MEMORANDUM OF LAW in Opposition re: 26 MOTION to Dismiss. *by TVA*. Document filed by Audubon Society of New Hampshire, Open Space Conservancy, Inc., Open Space Institute, Inc. (Pawa, Matthew) (Entered: 11/19/2004)
11/19/2004	45	MEMORANDUM OF LAW in Opposition re: 26 MOTION to Dismiss., 28 MOTION to Dismiss *complaint for lack of subject matter jurisdiction, for lack of personal jurisdiction, and for an order pursuant of FRCP 12(b)(6) dismissing complaint for failure to state a claim upon which relief can be granted.*, 22 MOTION to Dismiss for Lack of Jurisdiction., 23 MOTION to Dismiss for Lack of Jurisdiction., 25 MOTION to Dismiss. *Personal Jurisdiction*. Document filed by Audubon Society of New Hampshire, Open Space Conservancy, Inc., Open Space Institute, Inc. (Pawa, Matthew) (Entered: 11/19/2004)
11/19/2004	46	MEMORANDUM OF LAW in Opposition re: 26 MOTION to Dismiss., 28 MOTION to Dismiss *complaint for lack of subject matter jurisdiction, for lack of personal jurisdiction, and for an order pursuant of FRCP 12(b)(6) dismissing complaint for failure to state a claim upon*

DATE	#	DOCKET TEXT
		which relief can be granted., 22 MOTION to Dismiss for Lack of Jurisdiction., 23 MOTION to Dismiss for Lack of Jurisdiction., 25 MOTION to Dismiss. *Subj Matt Jur State Claim.* Document filed by Audubon Society of New Hampshire, Open Space Conservancy, Inc., Open Space Institute, Inc. (Pawa, Matthew) (Entered: 11/19/2004)
11/19/2004	47	MEMORANDUM OF LAW in Opposition re: 26 MOTION to Dismiss., 28 MOTION to Dismiss *complaint for lack of subject matter jurisdiction, for lack of personal jurisdiction, and for an order pursuant of FRCP 12(b)(6) dismissing complaint for failure to state a claim upon which relief can be granted.*, 22 MOTION to Dismiss for Lack of Jurisdiction., 23 MOTION to Dismiss for Lack of Jurisdiction., 25 MOTION to Dismiss. *Private Plaintiffs.* Document filed by Audubon Society of New Hampshire, Open Space Conservancy, Inc., Open Space Institute, Inc. (Pawa, Matthew) (Entered: 11/19/2004)
12/09/2004	48	REPLY MEMORANDUM OF LAW in Support re: 26 MOTION to Dismiss. Document filed by Tennessee Valley Authority. (Small, Edwin) (Entered: 12/09/2004)

DATE	#	DOCKET TEXT
		* * * *
12/17/2004	51	REPLY MEMORANDUM OF LAW in Support re: 28 MOTION to Dismiss *complaint for lack of subject matter jurisdiction, for lack of personal jurisdiction, and for an order pursuant of FRCP 12(b)(6) dismissing complaint for failure to state a claim upon which relief can be granted. REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTIONS TO DISMISS PRIVATE PLAINTIFFS' COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.* Document filed by American Electric Power Company, Inc., American Electric Power Service Corporation, Cinergy Corporation, Southern Company, Tennessee Valley Authority, XCEL Energy, Inc. (Broderick, Patrick) (Entered: 12/17/2004)
12/17/2004	52	REPLY MEMORANDUM OF LAW in Support re: 22 MOTION to Dismiss for Lack of Jurisdiction., 23 MOTION to Dismiss for Lack of Jurisdiction. Document filed by Cinergy Corporation. (McGuirk, Patrick) (Entered: 12/17/2004)

DATE	#	DOCKET TEXT
12/17/2004	53	REPLY MEMORANDUM OF LAW in Support re: 25 MOTION to Dismiss. Document filed by Southern Company. (Regan, Shawn) (Entered: 12/17/2004)
		* * * *
01/12/2005		ENDORSEMENT, that plntfs' request for a Rule 26 conference is denied in light of the pendency of defts' motion to dismiss. . . . This is particularly true where, as here, the discovery is expected to be lengthy and complex. (Signed by Judge Loretta A. Preska on 1/12/05) (cd,) (Entered: 01/20/2005) (orig. filed in 05cv5669 as document # 59) (Entered: 10/26/2005)
		* * * *
02/18/2005	70	MEMO ENDORSEMENT; Plaintiffs' request for a premotion conference to discuss a motion to consolidate is denied without prejudice to renewal upon resolution of the pending motions to dismiss. (Signed by Judge Loretta A. Preska on 1/31/05) (sac,) (Entered: 02/23/2005) (Entered: 10/26/2005)
02/23/2005	56	RESPONSE in Support re: 26 MOTION to Dismiss., 28 MOTION to Dismiss *complaint for lack of subject matter jurisdiction, for lack of personal jurisdiction, and for an order pursuant of FRCP 12(b)(6)*

DATE	#	DOCKET TEXT
		dismissing complaint for failure to state a claim upon which relief can be granted., 23 MOTION to Dismiss for Lack of Jurisdiction., 25 MOTION to Dismiss. *Surreply.* Document filed by Open Space Institiute, Inc., Open Space Conservancy, Inc., Audubon Society of New Hampshire. (Attachments: # 1 Exhibit Order Permitting Filing of Surreply) (Pawa, Matthew) (Entered: 02/23/2005)
02/28/2005		ENDORSED LETTER addressed to Judge Loretta A. Preska from Shawn Patrick Regan dated 2/23/05 re: requesting an extension until 3/4/05 to file the response brief. So ordered. (Original entry is docketed in 04 civ. 5669 as doc # 62). (Signed by Judge Loretta A. Preska on 2/24/05) (kw,) (Entered: 03/02/2005)
03/04/2005	57	RESPONSE in Support re: 26 MOTION to Dismiss., 28 MOTION to Dismiss *complaint for lack of subject matter jurisdiction, for lack of personal jurisdiction, and for an order pursuant of FRCP 12(b)(6) dismisssing complaint for failure to state a claim upon which relief can be granted.*, 23 MOTION to Dismiss for Lack of Jurisdiction., 25 MOTION to Dismiss. / *Response to Surreply.* Document filed by Southern Com-

DATE	#	DOCKET TEXT
		pany, Tennessee Valley Authority, XCEL Energy, Inc., Cinergy Corporation. (Regan, Shawn) (Entered: 03/04/2005)
06/03/2005	71	ORDER. Counsel are directed to appear in Courtroom 12A, US Courthouse, 500 Pearl Street, New York, NY on 7/8/05 at 11:00 a.m. for oral argument on the motions to dismiss the actions (Signed by Judge Loretta A. Preska on 5/27/05) (yv,) (Entered: 06/06/2005) (Entered: 10/26/2005)
		* * * *
08/03/2005	72	ORDER: oral arguments on motions to dismiss are rescheduled for 8/12/05 at 9:00 a.m. (Signed by Judge Loretta A. Preska on 8/3/05) (db,) (Entered: 08/04/2005) (Entered: 10/26/2005)
08/17/2005		TRANSCRIPT of proceedings held on 8/12/05 before Judge Loretta A. Preska. (lma,) (Entered: 08/17/2005) (orig. filed in 05cv5669 as document # 69) (Entered: 10/26/2005)
		* * * *
09/19/2005	64	MEMORANDUM AND OPINION # 92146, for the reasons set forth, the complaints in 04 cv 5669 (LAP) and 04 cv 5670 (LAP) are dismissed. The Clerk of the Court shall mark these actions closed and all pending

DATE	#	DOCKET TEXT
		motions (re: 26 MOTION to Dismiss filed by Tennessee Valley Authority; 28 MOTION to Dismiss *complaint for lack of subject matter jurisdiction, for lack of personal jurisdiction, and for an order pursuant of FRCP 12(b)(6) dismissing complaint for failure to state a claim upon which relief can be granted* filed by XCEL Energy, Inc.; 63 MOTION for Todd Lewis Fulks to Withdraw as Attorney *for the Tennessee Valley Authority* filed by Tennessee Valley Authority; 22 MOTION to Dismiss for Lack of Jurisdiction filed by American Electric Power Company, Inc.; 23 MOTION to Dismiss for Lack of Jurisdiction filed by Cinergy Corporation; 25 MOTION to Dismiss filed by Southern Company) are denied as moot. (Signed by Judge Loretta A. Preska on 9/15/2005) (lan,) (Entered: 09/19/2005)
		* * * *
09/19/2005	65	CLERK'S JUDGMENT That for the reasons stated in the Court's Opinion and Order dated September 15, 2005, the complaints are dismissed; accordingly, these cases are closed and all pending motions denied as moot. (Signed by J. Michael McMahon, clerk on 9/19/05) (Attachments:, # 1 Notice of Right to Appeal) (ml,) (Entered: 09/19/2005)

DATE	#	DOCKET TEXT
09/20/2005	66	NOTICE OF APPEAL from 64 Memorandum & Opinion, 65 Clerk's Judgment. Document filed by Open Space Institute, Inc., Open Space Conservancy, Inc., Audubon Society of New Hampshire. Filing fee $255.00, receipt number E 555985. (Attachments:, # 1)(tp,) (Entered: 09/21/2005)
		* * * *
09/22/2005	67	AMENDED OPINION AND ORDER: for reasons further set forth in said Order, the complaints in 04cv5669 and 04cv5670 are dismissed. The Clerk of the Court shall mark these actions closed and all pending motions denied as moot. Original document filed in 04cv5669 (LAP), document # 74. (Signed by Judge Loretta A. Preska on 9/16/05) (db,) (Entered: 09/23/2005)
09/28/2005	68	AMENDED NOTICE OF APPEAL re: 66 Notice of Appeal, 64 Memorandum & Opinion, 67 Memorandum & Opinion, 65 Clerk's Judgment,. Document filed by Open Space Institiute, Inc., Open Space Conservancy, Inc., Audubon Society of New Hampshire. (nd,) (Entered: 09/29/2005)
		* * * *

SECOND CIRCUIT COURT OF APPEALS

Court of Appeals Docket #: 05-5104-cv
Filed 9/22/05

STATE OF CONNECTICUT

v.

AMERICAN ELECTRIC POWER COMPANY, INC.

RELEVANT DOCKET ENTRIES

DATE	DESCRIPTION
9/22/05	Copy of notice of appeal and district court docket entries on behalf of APPELLANT State of Connecticut, filed. [Entry date Oct 11 2005] [SG]
	* * * *
10/24/05	Scheduling order #1 filed. Record on appeal due 11/23/2005. Appellants brief due 11/30/2005. Appellees brief due 12/30/2005. Ready week 2/6/2006. [SB] [Entry date Oct 27 2005] [SG]
10/24/05	Pre-Argument Notice and Order from Stanley A. Bass, Filed. Scheduled For: November 9, 2005 @ 3:30 pm. [Entry date Oct 27 2005] [SG]
	* * * *
11/9/05	First pre-argument conference held by SB. [Entry date Jan 18 2006] [DP]

11/10/05 Scheduling order # 2 filed. Record on appeal due 12/9/2005. Appellants brief due 12/16/2005. Ready week 3/13/2006. Appellees brief due 1/30/2006. [SB] [Entry date Nov 14 2005] [SG]

* * * *

11/22/05 Appellees, et al motion to consolidate appeals # 05-5104- & 05-5119-cv, filed with proof of service. [Entry date Nov 23 2005] [SG]

* * * *

11/28/05 Order FILED DENYING motion to consolidate appeals by Appellants City of New York, Appellee American Electric Power Company Inc., and Appellees American Electric Power Service Corporation, and Cinergy Corporation, endorsed on motion dated 11/22/2005. IT IS HEREBY ORDERED THAT the motion is DENIED However, it is recommended that 05-5104-cv and 05-5119-cv be heard in tandem. [SB] [Entry date Nov 30 2005] [SG]

* * * *

12/16/05 APPELLANTS brief FILED with proof of service. [Entry date Dec 19 2005] [SG]

12/16/05 APPELLANT joint appendix filed w/pfs. [Entry date Dec 19 2005] [SG]

* * * *

12/23/05 Movant Alaska-Inter-Tribal Council motion to file brief as amicus curiae filed

with proof of service. [Entry date Dec 28 2005] [SG]

12/23/05 Appellees motion for leave to file an identical double captioned oversized brief, filed with proof of service. [Entry date Jan 11 2006] [SG]

* * * *

1/6/06 Order FILED GRANTING motion leave to file oversized brief by Appellees endorsed on motion dated 12/23/2005. [AA] [Entry date Jan 11 2006] [SG]

1/6/06 Appellant City of New York in opposition to motion for leave to file an identical double captioned oversized brief, filed with proof of service. [Entry date Jan 11 2006] [SG]

* * * *

1/25/06 Order filed stating: IT IS HEREBY ORDERED the motion to vacate order granting leave to file oversized brief [Appellant's opposition treated as a motion to vacate appellees' reply] is GRANTED. Parties are to file brief relating to discrete appeal, not to both. Before: Hon. RR, CJ. J, By [AA] [Entry date Jan 25 2006] [SG]

* * * *

1/27/06 Scheduling order # 3 filed. Appellees brief due 2/20/2006, Ready week 4/3/2006. [SG] [Entry date Jan 27 2006] [SG]

* * * *

2/20/06 APPELLEE American Electric Power Company Inc., American Electric Power Service Corporation, Cinergy Corporation, brief filed with proof of service. [Entry date Feb 23 2006] [SG]

2/20/06 APPELLEE Cinergy Corporation and Xcel Energy, Inc., brief filed with proof of service. [Entry date Feb 23 2006] [SG]

2/21/06 APPELLEE Tennessee Valley Authority, brief filed with proof of service. [Entry date Feb 23 2006] [SG]

* * * *

3/1/06 Movant Law Professors motion file brief as amicus curiae filed with proof of service. [Entry date Mar 9 2006] [SG]

* * * *

3/2/06 Movants The Alliance of Automobile Manufacturers, The American Petroleum Institute, The Association of International Automobile Manufacturers motion to file brief as amicus curiae, filed with proof of service. [Entry date Mar 6 2006] [SG]

3/3/06 Order filed stating: IT IS HEREBY ORDERED that appellant's reply brief shall be filed on or before 3/16/2006. [AA] [Entry date Mar 6 2006] [SG]

* * * *

3/3/061 Movant Unions for Jobs and the Environment motion to file brief as amicus curiae, filed with proof of service. [Entry date Mar 9 2006] [SG]

* * * *

3/6/06 Movant U.S. Senator James M. Inhope and The Washington Legal Foundation motion file brief as amicus curiae filed with proof of service. [Entry date Mar 7 2006] [SG]

* * * *

3/9/06 Order FILED GRANTING motion leave to file oversized brief by Appellant People of the State of California, Appellee Southern Company, endorsed on motion dated 3/6/2006. IT IS HEREBY ORDERED that the motion to file 2 oversized briefs is GRANTED to the following extent: (1) up to 11,000 words in reply to appellees' 2 principal briefs, and (2) up to 7,000 words to reply to TVA's principal brief. Before: Hon. PWH, C.JJ By: (aa) [Entry date Mar 9 2006] [SG]

* * * *

3/16/06 APPELLANT People of the State of California, State of Connecticut, State of Iowa, State of New York, et al, reply brief filed with proof of service. [Entry date Mar 17 2006] [SG]

* * * *

4/11/06 Set for argument on 6/7/06. [Entry date Apr 11 2006] [AV]

* * * *

5/30/06	Order FILED GRANTING motion file brief as amicus curiae by Movant Alaska-Inter-Tribal Council, endorsed on motion dated 5/25/2006 [Entry date May 30 2006] [JC]
6/7/06	Case heard before MCLAUGHLIN, SOTOMAYOR, HALL, C.JJ CD DATE: 6/7/06 [Entry date Jun 7 2006] [RD]

* * * *

7/27/06	APPELLEE Tennessee Valley Authority, 28(J) letter received. [Entry date Jul 28 2006] [AM]
7/28/06	APPELLANT State of New York, 28(J) letter received. [Entry date Jul 31 2006] [AM]

* * * *

4/4/07	APPELLEE American Electric Power Company Inc., American Electric Power Service Corporation, Cinergy Corporation, 28(J) letter dated 04/04/07. Regarding the decision in Massachusetts v. EPA, No. 05-1120 (U.S. Apr. 2, 2007), which supports defendants' separation-of-power arguments, received. [Entry date Apr 5 2007] [DT]
4/10/07	APPELLANT State of New York, 28(J) letter received. [Entry date Apr 11 2007] [AM]
6/21/07	Order filed stating by letter brief of no more than ten (10) single-spaced pages, filed within ten (10) days of the date of this order, each party or set of parties who filed a principal brief in this appeal

shall inform the Court of its views of the impact of Massachusetts v. EPA, 127 S.Ct. 1438 (Apr. 2, 2007), on the issues presented to this Court in this appeal. In particular, but without limitation on any other relevant issues the parties may wish to address, the letter briefs should discuss what if any effect the Supreme Court's decision has on the analysis of the doctrine of preemption or whether appellants claims are displaced by Congressional legislation. (Present: JMCl, SS, PWH, by: LC) [Entry date Jun 21 2007] [AM]

* * * *

7/6/07 APPELLANT City of New York, People of the State of California, State of Connecticut, State of Iowa, ET AL, post argument letter brief filed. [Entry date Jul 10 2007] [AM]

7/6/07 APPELLEE American Electric Power Company Inc., American Electric Power Service Corporation, Cinergy Corporation, Southern Company, ET AL, post argument letter brief filed. [Entry date Jul 10 2007] [AM]

* * * *

9/26/07 APPELLEE American Electric Power Company Inc., American Electric Power Service Corporation, Cinergy Corporation, Southern Company, ET AL, 28(J) letter received. [Entry date Sep 28 2007] [NG]

10/1/07	Letter received from Daniel J. Chepaitsis, Esq. for Appellant State of New York in response to Appellees 28J letter. [Entry date Oct 2 2007] [AM]
10/17/07	APPELLEE Tennessee Valley Authority, 28(J) letter FILED. [Entry date Oct 18 2007] [LY]
10/30/07	Letter from Daniel Chepaitis dated 10/29/07 in response to 28(j) letter dated 10/17/07, received [Entry date Nov 9 2007] [NG]

* * * *

12/21/07	APPELLANT State of New York, 28(J) letter dated 12/19/07 received. [Entry date Dec 27 2007] [EM]
1/3/08	APPELLEE American Electric Power Company Inc., American Electric Power Service Corporation, Cinergy Corporation, Southern Company, ET AL, 28(J) letter FILED. [Entry date Jan 4 2008] [LY]
2/7/08	APPELLANT State of New York, 28(J) letter received. [Entry date Feb 7 2008] [AM]
2/11/08	APPELLEE Tennessee Valley Authority, 28(J) letter dated 2/8/08 received. [Entry date Feb 11 2008] [EM]
7/31/08	APPELLANT State of New York, 28(J) letter received. [Entry date Aug 7 2008] [YS]

8/15/08 Letter dated 8/15/08 received from Allison Wood, Esq. on behalf of Appellee Tennessee Valley Authority, in response to Appellants 28J letter. [Entry date Aug 18 2008] [AM]

* * * *

9/21/09 Judgment of the district court is VACATED and REMANDED by published signed opinion filed. (PWH) [Entry date Sep 21 2009] [DB]

9/21/09 Judgment filed. [Entry date Sep 21 2009] [DB]

* * * *

9/22/09 Order FILED DENYING motion file brief as amicus curiae by Amicus Curiae Law Professors, endorsed on motion dated 03/01/2006. "IT IS HEREBY ORDERED that the motion for leave to file an amicus curiae brief in support of the Appellees is DENIED as moot in light of judgment dated September 21, 2009." (JP) [Entry date Sep 22 2009] [AG]

9/22/09 Order FILED DENYING motion file brief as amicus curiae by Movant Alaska-Inter-Tribal Council, endorsed on motion dated 12/23/2005. "IT IS HEREBY ORDERED that the motion for leave to file an amicus curiae brief in support of the Appellants is DENIED as moot in light of judgment dated September 21, 2009." (JP) [Entry date Sep 22 2009] [AG]

9/22/09 Order FILED DENYING motion file brief as amicus curiae by Movant The Alliance of Automobile Manufacturers, Movant The American Petroleum Institute, Movant The Association of International Automobile Manufacturers, endorsed on motion dated 03/02/2006. "IT IS HEREBY ORDERED that the motion for leave to file an amicus curiae brief in support of the Appellees is DENIED as moot in light of judgment dated September 21, 2009." (JP) [Entry date Sep 22 2009] [AG]

9/22/09 Order FILED DENYING motion file brief as amicus curiae by Movant Unions for Jobs and the Environment, endorsed on motion dated 3/03/2006. "IT IS HEREBY ORDERED that the motion for leave to file an amicus curiae brief in support of the Appellees is DENIED as moot in light of judgment dated September 21, 2009." (JP) [Entry date Sep 22 2009] [AG]

9/22/09 Order FILED DENYING motion file brief as amicus curiae by Movant U.S. Senator James M. Inhope, Movant The Washington Legal Foundation, endorsed on motion dated 3/06/2006. "IT IS HEREBY ORDERED that the motion for leave to file an amicus curiae brief in support of the Appellees is DENIED as moot in light of judgment dated September 21, 2009." (JP) [Entry date Sep 22 2009] [AG]

* * * *

9/23/09 Appellee American Electric Power Company Inc., Appellee American Electric Power Service Corporation, Appellee Cinergy Corporation motion for extended time to file petition for rehearing/ rehearing en banc until 11/05/09 filed with proof of service. [Entry date Sep 24 2009] [AG]

9/24/09 Order FILED GRANTING motion extended time by Appellee American Electric Power Company Inc., Appellee American Electric Power Service Corporation, Appellee Cinergy Corporation, endorsed on motion dated 9/23/2009. "Upon the parties' request for an order clarifying the due date for the filing of petitions for rehearing or rehearing en banc, IT IS HEREBY ORDERED that such petitions, if any, must be filed on or before November 5, 2009." (Before: PWH, endorsed by: JF) [Entry date Sep 25 2009] [AG]

* * * *

10/8/09 Errata sheet re: p. 9650, l. 2; p. 9658, l. 15, p. 9661, l. 4; p. 9665, l. 18; p. 9679, l. 22; p. 9681, l. 21; p. 9683, l. 17; p. 9688, lines 9 & 23; p. 9690, lines 23 & 8 of n.14; p. 9703, l. 10; p. 9704, l. 24; p. 9713, lines 14 & 15; p. 9715, l. 22; p. 9717, l. 11 of n.28; p. 9719, l. 10; p. 9720, l. 10; p. 9724, l. 5 of n.30; p. 9727, l. 14; p. 9729, l. 9 of n.32; p. 9732, lines 15 & 16; p. 9756, l. 7 of n.39; p. 9757, lines 25 & 26; p. 9762, l. 14; p. 9763, l. 4; p. 9766, l. 19; p. 9769, l. 31; p. 9781, l. 33; and

p. 9785, l. 16, filed. [Entry date Oct 8 2009] [AG]

* * * *

10/14/09 Movant The Alliance of Automobile Manufacturers, Movant The American Petroleum Institute, Movant The Association of International Automobile Manufacturers motion for correction of statements made in Court's Opinion of September 21, 2009 concerning time-lines of amicus brief filed with proof of service. [Entry date Oct 14 2009] [AG]

* * * *

11/5/09 Appellee American Electric Power Company Inc., Appellee American Electric Power Service Corporation, Appellee Cinergy Corporation, et al Petition for rehearing and petition for rehearing en banc filed with proof of service. [Entry date Nov 6 2009] [AG]

* * * *

11/12/09 Movant The Association of International Automobile Manufacturers motion for leave to file amicus curiae brief in support of Appellees' petition for panel rehearing or rehearing en banc filed with proof of service. [Entry date Nov 13 2009] [AG]

* * * *

11/17/09 Order FILED GRANTING the motion for leave to file a brief as amicus curiae in support of the Appellees' Petition for Rehearing or Rehearing En Banc by

Movant The Association of International Automobile Manufacturers, endorsed on motion dated 11/12/2009. "IT IS HEREBY ORDERED that the motion by the Association of International Automobile Manufacturers for leave to file an amicus brief in support of Appellees' Petition for Rehearing or Rehearing En Banc is GRANTED." (Before: PWH, C.J.; For the Court: JF, Administrative Attorney.) [Entry date Nov 17 2009] [DB]

12/3/09 Errata sheet re: page 9659, line FN2 filed. [Entry date Dec 3 2009] [AG]

* * * *

12/4/09 Order filed stating: "The Alliance of Automobile Manufacturers, et al. ("the Alliance") have filed a motion asking the Court to amend footnote 2 of the opinion in these cases to acknowledge that the amicus brief which the Alliance filed was in fact timely. After considering argument from both the Alliance and the Plaintiffs, we GRANT the motion and amend the footnote by a separate order to correct any error the Court may have made in regard to the timing of the Alliance's amicus brief. We further note that the Alliance's arguments presented in their amicus brief have been fully and adequately presented in the Defendants' briefs and have already been given full consideration by the Court." (Before: PWH, endorsed by: JP) [Entry date Dec 4 2009] [AG]

* * * *

3/2/10 APPELLEE American Electric Power Company Inc., American Electric Power Service Corporation, Cinergy Corporation, 28(J) letter received. [Entry date Mar 4 2010] [RO]

* * * *

3/5/10 ORDER, Appellee American Electric Power Company Inc., Appellee American Electric Power Service Corporation, Appellee Cinergy Corporation petition for rehearing and rehearing en banc denied, FILED. [Entry date Mar 5 2010] [RO]

3/11/10 Appellee American Electric Power Company Inc., Appellee American Electric Power Service Corporation, Appellee Cinergy Corporation motion to stay the mandate filed with proof of service. [Entry date Mar 12 2010] [RO]

* * * *

3/16/10 ORDER, Appellee American Electric Power Company Inc., Appellee American Electric Power Service Corporation, Appellee Cinergy Corporation's, motion to stay the mandate granted, FILED. [Entry date Mar 16 2010] [CM]

* * * *

5/20/10 ORDER, that costs are to be taxed in the amount of $1,681.02 in favor of Appellant State of New York, FILED. [Entry date May 20 2010] [ML]

* * * *

6/2/10	MOTION, for extension of stay of mandate, on behalf of Appellees American Electric Power Company Inc., American Electric Power Service Corporation, Cinergy Corporation, FILED. [Entry date Jun 3 2010] [ML]
6/2/10	MOTION, for stay of the mandate, on behalf of Appellee Tennessee Valley, FILED. [Entry date Jun 3 2010] [ML]

* * * *

6/9/10	ORDER, granting motion for an order extending the stay of the mandate, by PWH, FILED. [Entry date Jun 9 2010] [ML]

* * * *

SECOND CIRCUIT COURT OF APPEALS

Court of Appeals Docket #: 05-5119-cv
Filed 9/22/05

OPEN SPACE INSTITUTE, INC.

v.

AMERICAN ELECTRIC POWER COMPANY, INC.

RELEVANT DOCKET ENTRIES

DATE	DESCRIPTION
9/22/05	Copy of notice of appeal and district court docket entries on behalf of APPELLANT Audubon Society of New Hampshire, Open Space Conservancy, Inc., Open Space Institute, Inc., filed. [Entry date Oct 13 2005] [EA]
	* * * *
10/24/05	Scheduling order # 1 filed. Record on appeal due 11/23/2005. Appellants brief due 11/30/2005. Appellees brief due 12/30/2005. Ready week 2/6/2006. (SB) [Entry date Oct 25 2005] [EA]
	* * * *
11/14/05	Scheduling order # 2 filed. Record on appeal due 12/9/2005. Appellants brief due 12/16/2005. Appellees brief due 1/30/2006. Ready week 3/13/2006. (SB) [Entry date Nov 14 2005] [NG]
	* * * *

11/22/05	Appellees, et al motion to consolidate appeals # 05-5104- & 05-5119-cv, filed with proof of service. [Entry date Nov 23 2005] [SG]
11/28/05	Order FILED DENYING motion to consolidate appeals by Appellants City of New York, Appellee American Electric Power Company Inc., and Appellees American Electric Power Service Corporation, and Cinergy Corporation, endorsed on motion dated 11/22/2005. IT IS HEREBY ORDERED THAT the motion is DENIED However, it is recommended that 05-5104-cv and 05-5119-cv be heard in tandem. [SB] [Entry date Nov 30 2005] [SG]
12/15/05	APPELLANT Audubon Society of New Hampshire, Open Space Conservancy, Inc., Open Space Institute, Inc., brief FILED with proof of service. [Entry date Dec 23 2005] [EA]
12/15/05	APPELLANT Audubon Society of New Hampshire, Open Space Conservancy, Inc., Open Space Institute, Inc., joint appendix filed w/pfs. [Entry date Dec 23 2005] [EA]
12/15/05	APPELLANT Audubon Society of New Hampshire, Open Space Conservancy, Inc., Open Space Institute, Inc., special appendix filed(w/pfs) [Entry date Dec 29 2005] [EA]

* * * *

12/23/05 Movant Alaska Inter-Tribal Council, Movant Akiak Native Community motion file brief as amicus curiae filed with proof of service. [Entry date Dec 28 2005] [EA]

12/23/05 Appellee American Electric Power Company Inc., Appellee American Electric Power Service Corporation, Appellee Cinergy Corporation, Southern Company, Xcel Energy, Inc. motion leave to file oversized brief (To file an Identical, double-captioned oversized brief) filed with proof of service. [Entry date Dec 28 2005] [EA]

* * * *

1/6/06 Appellant Open Space Conservancy, Inc., opposition to motion for leave to file oversized brief filed with proof of service. [Entry date Jan 9 2006] [AM]

1/6/06 Order FILED GRANTING motion leave to file oversized brief by Appellee American Electric Power Company Inc., Appellee American Electric Power Service Corporation, Appellee Cinergy Corporation, Movant Alaska Inter-Tribal Council, Movant Akiak Native Community, endorsed on motion dated 12/23/2005. Before: Hon. Reena Raggi, Circuit Judge. IT IS HEREBY ORDERED that the motion for leave to file a joint oversized brief (22,000 words) is GRANTED. (AH) [Entry date Jan 17 2006] [EA]

1/10/06 Appellee American Electric Power Company Inc., Appellee American Electric Power Service Corporation, Appellee Cinergy Corporation, Southern Co., Xcel Energy, et al (reply memorandum) response to opposition filed with proof of service. [Entry date Jan 11 2006] [EA]

1/25/06 Order filed stating: Before: Hon. Reena Raggi, Circuit Judge IT IS HEREBY ORDERED the motion to vacate order granting leave to file oversized brief (Appellant's opposition treated as a motion to vacate appellees' reply) is GRANTED. Parties are to file brief relating to discrete appeal, not to both. (AH) [Entry date Jan 27 2006] [EA]

1/27/06 Scheduling order # 3 filed. Appellees brief due 2/20/2006. Ready week 4/3/2006. [Entry date Jan 27 2006] [EA]

* * * *

2/20/06 APPELLEE American Electric Power Company Inc., American Electric Power Service Corporation, Southern Company, brief filed with proof of service. [Entry date Feb 21 2006] [JR]

2/20/06 APPELLEE Cinergy Corporation, Xcel Energy, Inc., brief filed with proof of service. [Entry date Feb 21 2006] [JR]

* * * *

2/21/06 APPELLEE Tennessee Valley Authority, brief filed with proof of service. (Anti-Certification form in the brief) [Entry date Feb 23 2006] [JR]

* * * *

3/1/06 MOVANT Douglas Kmiec, John Yoo, Robert Bork, Ronald Cass, ET AL, brief received. (pending motion to file) [Entry date Mar 2 2006] [EA]

* * * *

3/2/06 MOVANT Alliance for Automobile Manufacturers, brief received. (pending motion to file) [Entry date Mar 7 2006] [EA]

3/2/06 Movant Alliance for Automobile Manufacturers motion file brief as amicus curiae filed with proof of service. [Entry date Mar 7 2006] [EA]

3/3/06 Movant Union for Jobs and the Environment motion file brief as amicus curiae filed with proof of service. [Entry date Mar 7 2006] [EA]

* * * *

3/9/06 Order FILED GRANTING motion leave to file oversized brief by Appellant Open Space Institute, Inc., Appellant Open Space Conservancy, Inc., Appellant Audubon Society of New Hampshire, endorsed on motion dated 3/3/2006. Before: Hon. Peter W. Hall, Circuit Judge. IT IS HEREBY ORDERED that the motion to file oversized brief of up to 11,000 words in reply to appellee's briefs, and to file a separate reply to TVA's brief is GRANTED. (TWY) [Entry date Mar 9 2006] [EA]

* * * *

4/11/06	Set for argument on 6/7/06. [Entry date Apr 11 2006] [AV]
	* * * *
5/30/06	AMICUS CURIAE Akiak Native Community, Alaska Inter-Tribal Council, brief filed with proof of service. [Entry date Aug 25 2006] [AV]
	* * * *
6/7/06	Case heard before MCLAUGHLIN, SOTOMAYOR, HALL, C.JJ CD DATE: 6/7/06 [Entry date Jun 7 2006] [RD]
	* * * *
4/5/07	APPELLEE American Electric Power Company Inc., American Electric Power Service Corporation, Cinergy Corporation, 28(J) letter received. [Entry date Apr 6 2007] [AM]
6/21/07	Present: Hon. Joseph M. McLaughlin, Hon. Sonia Sotomayor, Hon. Peter W. Hall, Circuit Judge. It is hereby ORDERED:
	By letter brief of no more than ten (10) single-spaced pages, filed within ten (10) days of the date of this order, each party or set of parties who filed a principal brief in this appeal shall inform the Court of its views of the impact of Massachusetts v. EPA, 127 S.Ct. 1438 (Apr. 2, 2007), on the issues presented to this Court in this appeal. In particular, but without limitation on any other relevant issues the parties may wish to address, the letter briefs should discuss

what if any effect the Supreme Court's decision has on the analysis of the doctrine of preemption or whether appellants' claims are displaced by Congressional legislation. (LC) [Entry date Jun 21 2007] [EA]

* * * *

9/13/07 APPELLANT Audubon Society of New Hampshire, Open Space Conservancy, Inc., Open Space Institute, Inc., 28(J) letter dated 9/13/07 from Mitchell S. Bernard, Esq. received. [Entry date Sep 17 2007] [EA]

* * * *

9/26/07 APPELLEE American Electric Power Company Inc., American Electric Power Service Corporation, Cinergy Corporation, Southern Company, ET AL, 28(J) letter dated 9/25/07 from Joseph R. Guerra, Esq., received. [Entry date Sep 27 2007] [EA]

10/17/07 APPELLEE Tennessee Valley Authority, 28(J) letter dated 10/16/07 from Edwin W. Small, Esq., received. [Entry date Oct 18 2007] [EA]

12/19/07 APPELLANT Audubon Society of New Hampshire, Open Space Conservancy, Inc., Open Space Institute, Inc., 28(J) letter received. [Entry date Dec 20 2007] [EM]

1/3/08	APPELLEE American Electric Power Company Inc., American Electric Power Service Corporation, Cinergy Corporation, Southern Company, ET AL, 28(J) letter dated 1/2/08 received. [Entry date Jan 4 2008] [EM]
2/6/08	APPELLANT Audubon Society of New Hampshire, Open Space Conservancy, Inc., Open Space Institute, Inc., 28(J) letter received. [Entry date Feb 6 2008] [EM]
2/11/08	APPELLEE Tennessee Valley Authority, 28(J) letter dated 2/8/08 received. [Entry date Feb 11 2008] [EM]
7/23/08	APPELLANT Audubon Society of New Hampshire, Open Space Conservancy, Inc., Open Space Institute, Inc., 28(J) letter received. [Entry date Jul 23 2008] [EM]
8/18/08	Letter dated 8/18/08 received from Allison Wood, Esq. on behalf of Appellee Tennessee Valley Authority, in response to Appellants 28J letter. [Entry date Aug 18 2008] [AM]
1/14/09	Letter received from Matthew Pawa, Esq., on behalf of the Appellants Open Space Institute, et al, inquiring as to the status of the appeal which was heard on 6/7/06. [Entry date Jan 15 2009] [EM]

* * * *

9/21/09	Judgment of the district court is VACATED and REMANDED by published signed opinion filed. (PWH) [Entry date Sep 21 2009] [DB]

9/21/09 Judgment filed. [Entry date Sep 21 2009] [DB]

* * * *

9/23/09 Order FILED DENYING motion file brief as amicus curiae by Movant Union for Jobs and the Environment, endorsed on motion dated 3/3/06. "IT IS HEREBY ORDERED that the motion for leave to file an amicus curiae brief in support of the Appellees is DENIED as moot in light of the judgment dated September 21, 2009." For the Court, by JP, Motions Staff Attorney. [Entry date Sep 23 2009] [EM]

9/23/09 Order FILED DENYING motion file brief as amicus curiae by Movant Alliance for Automobile Manufacturers, endorsed on motion dated 3/2/05. ""IT IS HEREBY ORDERED that the motion for leave to file an amicus curiae brief in support of the Appellees is DENIED as moot in light of the judgment dated September 21, 2009." For the Court, by JP, Motions Staff Attorney." [Entry date Sep 23 2009] [EM]

9/23/09 Order FILED DENYING motion file brief as amicus curiae by Movant Robert Bork, Movant Steven Calabresi, Movant Ronald Cass, Movant Viet Dinh, Movant Douglas Kmiec, Movant Ronald Rotunda, Movant John Yoo, endorsed on motion dated 3/2/06. ""IT IS HEREBY ORDERED that the motion for leave to file an amicus curiae brief in support of

the Appellees is DENIED as moot in light of the judgment dated September 21, 2009." For the Court, by JP, Motions Staff Attorney." [Entry date Sep 23 2009] [EM]

9/23/09 Order FILED DENYING motion file brief as amicus curiae by Amicus Curiae Alaska Inter-Tribal Council, Amicus Curiae Akiak Native Community, endorsed on motion dated 12/23/05. ""IT IS HEREBY ORDERED that the motion for leave to file an amicus curiae brief in support of the Appellants is DENIED as moot in light of the judgment dated September 21, 2009." For the Court, by JP, Motions Staff Attorney." [Entry date Sep 23 2009] [EM]

* * * *

9/24/09 Appellee American Electric Power Company Inc., Appellee American Electric Power Service Corporation, Appellee Cinergy Corporation motion for an order setting November 5, 2009 as the dealine for a petition for rehearing, filed with proof of service. [Entry date Sep 24 2009] [EM]

* * * *

9/25/09 "Upon the parties' request for an order clarifying the due date for the filing of petitions for rehearing or rehearing en banc, IT IS HEREBY ORDERED that such petitions, if any, must be filed on or before November 5, 2009." (Before: PWH,

Circuit Judge. Endorsed by: JF, Admin. Atty.) [Entry date Sep 25 2009] [HT]

10/7/09 APPELLANT Audubon Society of New Hampshire, Open Space Conservancy, Inc., Open Space Institute, Inc., itemized and verified bill of costs received, w/pfs. Problem—out of time. [Entry date Oct 7 2009] [EM]

* * * *

10/8/09 Errata sheet re: p. 9650, l. 2; p. 9658, l. 15, p. 9661, l. 4; p. 9665, l. 18; p. 9679, l. 22; p. 9681, l. 21; p. 9683, l. 17; p. 9688, lines 9 & 23; p. 9690, lines 23 & 8 of n.14; p. 9703, l. 10; p. 9704, l. 24; p. 9713, lines 14 & 15; p. 9715, l. 22; p. 9717, l. 11 of n.28; p. 9719, l. 10; p. 9720, l. 10; p. 9724, l. 5 of n.30; p. 9727, l. 14; p. 9729, l. 9 of n.32; p. 9732, lines 15 & 16; p. 9756, l. 7 of n.39; p. 9757, lines 25 & 26; p. 9762, l. 14; p. 9763, l. 4; p. 9766, l. 19; p. 9769, l. 31; p. 9781, l. 33; and p. 9785, l. 16, filed. [Entry date Oct 8 2009] [AG]

* * * *

10/26/09 Order FILED GRANTING motion file late by Appellant Open Space Institute, Inc., Appellant Open Space Conservancy, Inc., Appellant Audubon Society of New Hampshire, endorsed on motion dated 10/13/2009. "IT IS HEREBY ORDERED that the motion by Open Space Institute et al for leave to have the late-submitted Bill of Costs deemed filed is GRANTED." Before PWH, CJ.

For the Court, by JP, Motions Staff Attorney. [Entry date Oct 26 2009] [EM]

11/5/09 Appellee American Electric Power Company Inc., Appellee American Electric Power Service Corporation, Appellee Cinergy Corporation Petition for rehearing and petition for rehearing en banc, filed with proof of service. [Entry date Nov 6 2009] [EM]

* * * *

12/3/09 Errata sheet re: page 9659, line FN2 filed. [Entry date Dec 3 2009] [AG]

* * * *

12/4/09 Order FILED GRANTING motion amend document by Movant Alliance for Automobile Manufacturers. "The Alliance of Automobile Manufacturers, et al. ("the Alliance") have filed a motion asking the Court to amend footnote 2 of the opinion in these cases to acknowledge that the amicus brief which the Alliance filed was in fact timely. After considering arguments from both the Alliance and the Plaintiffs, we GRANT the motion and amend the footnote by separate order to correct any error the Court may have made in regard to the timing of the Alliance's amicus brief. We further note that the Alliance's arguments presented in their amicus brief have been fully and adequately presented in the the Defendants' briefs and have already been given full consideration by the Court." Before PWH, CJ.

For the Court, by JP, Motions Staff Attorney. [Entry date Dec 4 2009] [EM]

* * * *

3/2/10 APPELLEE American Electric Power Company Inc., American Electric Power Service Corporation, Cinergy Corporation, 28(J) letter FILED. [Entry date Mar 3 2010] [YS]

* * * *

3/10/10 ORDER, denying Petition for rehearing and Petition for rehearing en banc, FILED. [Entry date Mar 10 2010] [AS]

3/11/10 Appellee American Electric Power Company Inc., Appellee American Electric Power Service Corporation, Appellee Cinergy Corporation motion to stay the mandate filed with proof of service. [Entry date Mar 12 2010] [RO]

* * * *

3/16/10 ORDER, Appellee American Electric Power Company Inc., Appellee American Electric Power Service Corporation, Appellee Cinergy Corporation's, motion stay the mandate granted, FILED. [Entry date Mar 16 2010] [CM]

3/26/10 Judgment MANDATE ISSUED. CLOSED [Entry date Mar 26 2010] [RO]

3/29/10 ORDER FILED recalling mandate. [Entry date Mar 29 2010] [RO]

6/2/10 Appellee American Electric Power Company Inc., Appellee American Electric Power Service Corporation, Appellee Cinergy Corporation motion for extension of time to stay the mandate filed with proof of service. [Entry date Jun 4 2010] [YS]

6/2/10 Appellee American Electric Power Company Inc., Appellee American Electric Power Service Corporation, Appellee Cinergy Corporation motion for extension of time to stay the mandate filed with proof of service. [Entry date Jun 4 2010] [YS]

* * * *

6/9/10 ORDER, appellee's motion to extend the stay of the mandate is granted. Appellees are reminded to advise the Clerk of Court when the Petition for Writ of Certiorari has been filed, FILED. (Before Hon. PWH., Cjj) [Entry date Jun 9 2010] [YS]

6/9/10 ORDER, appellee's motion to extend the stay of the mandate is granted. Appellees are reminded to advise the Clerk of Court when the Petition for Writ of Certiorari has been filed, FILED. (Before Hon. PWH., Cjj) [Entry date Jun 9 2010] [YS]

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civ. Action No:
ECF Case

STATE OF CONNECTICUT
STATE OF NEW YORK
PEOPLE OF THE STATE OF CALIFORNIA EX REL.
ATTORNEY GENERAL BILL LOCKYER
STATE OF IOWA
STATE OF NEW JERSEY
STATE OF RHODE ISLAND
STATE OF VERMONT
STATE OF WISCONSIN
CITY OF NEW YORK
Plaintiffs,

v.

AMERICAN ELECTRIC POWER COMPANY, INC.
AMERICAN ELECTRIC POWER SERVICE CORPORATION
THE SOUTHERN COMPANY
TENNESSEE VALLEY AUTHORITY
XCEL ENERGY INC.
CINERGY CORPORATION
Defendants.

COMPLAINT

NATURE OF THE ACTION

1. The States of Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, Wisconsin and the City of New York bring this action

against defendant electric power corporations under federal common law and, in the alternative, state law, to seek abatement of defendants' ongoing contributions to a public nuisance. Defendants' power plants emit large quantities of carbon dioxide and are contributing to an elevated level of carbon dioxide in the atmosphere. Carbon dioxide is the primary "greenhouse gas." Greenhouse gases trap atmospheric heat and thus cause global warming. There is a clear scientific consensus that global warming has begun, is altering the natural world, and that global warming will accelerate over coming decades unless action is taken to reduce emissions of carbon dioxide. This Complaint seeks an order requiring defendants to reduce their emissions of carbon dioxide, thereby abating their contribution to global warming, a public nuisance.

2. Defendants, by their annual emissions of approximately 650 million tons of carbon dioxide, are substantial contributors to elevated levels of carbon dioxide and global warming. Defendants are the five largest emitters of carbon dioxide in the United States and are among the largest in the world. Defendants' emissions constitute approximately one quarter of the U.S. electric power sector's carbon dioxide emissions and approximately ten percent of all carbon dioxide emissions from human activities in the United States.

3. Global warming already has begun to alter the climate of the United States. The threatened injuries to the plaintiffs and their citizens and residents from continued global warming include increased heat deaths due to intensified and prolonged heat waves; increased ground-level smog with concomitant increases in respiratory problems like asthma;

beach erosion, inundation of coastal land, and salinization of water supplies from accelerated sea level rise; reduction of the mountain snow pack in California that provides a critical source of water for the State; lowered Great Lakes water levels, which impairs commercial shipping, recreational harbors and marinas, and hydropower generation; more droughts and floods, resulting in property damage and hazard to human safety; and widespread loss of species and biodiversity, including the disappearance of hardwood forests from the northern United States.

4. The risks of injury to the plaintiffs and their citizens and residents from global warming increase with the speed and magnitude of global warming. The speed and magnitude of global warming is primarily dependent, in turn, upon the level of carbon dioxide emissions. Thus, reducing carbon dioxide emissions reduces the risks of injury to the plaintiffs and their citizens and residents from global warming.

5. Defendants have available to them practical, feasible and economically viable options for reducing carbon dioxide emissions without significantly increasing the cost of electricity to their customers. These options include changing fuels, improving efficiency, increasing generation from zero- or low-carbon energy sources such as wind, solar, and gasified coal with emissions capture, co-firing wood or other biomass in coal plants, employing demand-side management techniques, altering the dispatch order of their plants, and other measures.

6. Plaintiffs seek judicial relief under the federal common law of public nuisance or, in the alternative, under state law of public nuisance. Plaintiffs seek an order (i) holding each of the defendants jointly and severally liable for contributing to an ongoing public

nuisance, global warming, and (ii) enjoining each of the defendants to abate its contribution to the nuisance by capping its emissions of carbon dioxide and then reducing those emissions by a specified percentage each year for at least a decade.

PARTIES

Plaintiffs

7. Plaintiff State of Connecticut is a sovereign State of the United States of America. It brings this cause of action on its own behalf to protect state property and as *parens patriae* on behalf of its citizens and residents to protect their health and well-being and to protect natural resources held in trust by the State. The Commissioner of the Department of Environmental Protection for the State of Connecticut, acting pursuant to Conn. Gen. Stat. §22a-5 and consistent with Conn. Gen. Stat. §22a-1, authorizes the Attorney General to bring this action.

8. Plaintiff State of New York is a sovereign State of the United States of America. It brings this cause of action on its own behalf to protect state property and as *parens patriae* on behalf of its citizens and residents to protect their health and well-being and to protect natural resources held in trust by the State. The Attorney General of New York is authorized to prosecute this action pursuant to Article 63 of the New York Executive Law.

9. Plaintiff People of the State of California, by and through Bill Lockyer, Attorney General of the State of California, bring this action to protect state property and as *parens patriae* on behalf of its citizens and residents to protect their health and well-being and to protect natural resources held in trust by the State. The Attorney General of California may

maintain an action for equitable relief in the name of the People of the State of California against any person for the protection of the natural resources of the state from pollution, impairment, or destruction. Cal. Gov't Code § 12607.

10. Plaintiff State of Iowa is a sovereign State of the United States of America. It brings this cause of action on its own behalf to protect state property and as *parens patriae* on behalf of its citizens and residents to protect their health and well-being and to protect natural resources held in trust by the State. The Attorney General of Iowa is authorized by statute to prosecute this action on behalf of the State of Iowa. Iowa Code § 13.2(2).

11. Plaintiff State of New Jersey is a sovereign State of the United States of America. It brings this action on its own behalf to protect state property and as *parens patriae* on behalf of its citizens and residents to protect their health and well-being and to protect natural resources held in trust by the State.

12. Plaintiff State of Rhode Island is a sovereign State of the United States of America. It brings this cause of action on its own behalf to protect state property and as *parens patriae* on behalf of its citizens and residents to protect their health and well-being and to protect natural resources held in trust by the State. The Attorney General may commence and prosecute an action in the name of the State to enjoin a public nuisance pursuant to its constitutional, statutory and common law authority.

13. Plaintiff State of Vermont is a sovereign State of the United States of America. It brings this cause of action on its own behalf to protect state property and as *parens patriae* on behalf of its citizens and

residents to protect their health and well-being and to protect natural resources held in trust by the State.

14. Plaintiff State of Wisconsin is a sovereign State of the United States of America. The Attorney General of the State of Wisconsin brings this cause of action on behalf of and in the name of the State of Wisconsin to protect state property and on behalf of its citizens and residents to protect their health and well-being and to protect natural resources held in trust by the State. The Attorney General of Wisconsin may commence and prosecute an action in the name of the State to enjoin a public nuisance and may maintain an action to abate a public nuisance under Wis. Stat. §§ 823.01, 823.02.

15. Plaintiff City of New York is a municipal corporation duly organized and existing under the laws of the State of New York. The City is responsible for protecting the health and well-being of its citizens and residents and protecting the natural resources of the City.

Defendants

16. Defendant American Electric Power Company, Inc. ("AEP") is a New York corporation with its principal place of business located in Columbus, Ohio. AEP is a registered public utility holding company that owns all outstanding common stock of its domestic electric utility subsidiaries, as well as all outstanding common stock of defendant American Electric Power Service Corporation ("AEP Service"). AEP's fossil fuel-fired electric generating facilities are located in Arkansas, Indiana, Kentucky, Louisiana, Michigan, Ohio, Oklahoma, Tennessee, Texas, Virginia and West Virginia.

17. Defendant AEP Service is a New York corporation with its principal place of business in Columbus, Ohio. AEP Service is a wholly-owned subsidiary of AEP that, upon information and belief, provides management and professional services on behalf of AEP to, among others, the electric utility subsidiaries of AEP, including accounting, administrative, information systems, environmental, engineering, financial, legal, maintenance and other services.

18. AEP and AEP Service, through their employees and/or agents, manage, direct, conduct and/or control operations relating to emissions of carbon dioxide from fossil fuel-fired electric generating facilities owned and/or operated by AEP's subsidiaries. Such management, direction, conduct and/or control is exercised through a variety of means, including through implementation by AEP and AEP Service employees and/or agents of policies, procedures, and programs relating to global warming generally, to carbon dioxide emissions specifically, to dispatch of plants with varying carbon dioxide emissions per unit of energy, and/or to fuels utilized at each plant.

19. Such management, direction, conduct and/or control is evidenced by, for example, AEP's various agreements and pledges to exercise control over the carbon dioxide emissions from facilities owned and/or operated by its subsidiaries, including AEP's participation in the Chicago Climate Exchange; AEP's submission of annual reports to the U.S. Department of Energy (DOE) reporting the amount of carbon dioxide emissions avoided or sequestered from facilities owned and/or operated by its subsidiaries; and AEP's agreement in 2004 to conduct an analysis of its ability to comply with proposed national regulation of carbon dioxide emissions that would require re-

ductions in such emissions from plants owned and/or operated by its subsidiaries.

20. As a result of their management, direction, conduct and/or control of operations relating to emissions of carbon dioxide from facilities owned and/or operated by AEP's subsidiaries, defendants AEP and AEP Service are responsible for the emission of approximately 226 million tons of carbon dioxide annually.

21. Defendant The Southern Company ("Southern") is a Delaware corporation with its principal place of business located in Atlanta, Georgia. Southern is a registered public utility holding company that owns all outstanding common stock of its domestic electric utility subsidiaries, Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Savannah Electric and Power Company, with fossil fuel-fired electric generating facilities located in Alabama, Florida, Georgia, and Mississippi.

22. Southern, through its employees and/or agents, manages, directs, conducts and/or controls operations relating to the emissions of carbon dioxide at fossil fuel-fired electric generating facilities owned and/or operated by its subsidiaries. Such management, direction, conduct and/or control is exercised through a variety of means, including through implementation by Southern's employees and/or agents of policies, procedures, and programs relating to global warming generally, to carbon dioxide emissions specifically, to dispatch of plants with varying carbon dioxide emissions per unit of energy, and/or to fuels utilized at each plant.

23. Such management, direction, conduct and/or control is evidenced by, for example, Southern's

agreement in April, 2004 to conduct an analysis of the financial impact of proposed emissions reduction scenarios, including how Southern would respond to new regulations aimed at mitigating global warming; Southern's submission of annual reports to DOE reporting the amount of carbon dioxide emissions avoided or sequestered from facilities owned and/or operated by its subsidiaries; Southern's admission in its 2003 Environmental Progress Report that it emits large amounts of carbon dioxide, which it recognized as "a greenhouse gas"; and Southern's admission in the same report that "there are concerns" about its emissions of carbon dioxide because of the impact those emissions may be having on global climate.

24. As a result of its management, direction, conduct and/or control of operations relating to emissions of carbon dioxide from facilities owned and/or operated by its subsidiaries, defendant Southern is responsible for the emission of approximately 171 million tons of carbon dioxide annually.

25. Defendant Tennessee Valley Authority ("TVA") is a federal corporation with its principal place of business located in Knoxville, Tennessee.

26. TVA directly owns and operates fossil fuel-fired electric generating facilities located in Alabama, Kentucky, Mississippi, and Tennessee, which together emit approximately 110 million tons of carbon dioxide annually.

27. Defendant Xcel Energy Inc. ("Xcel") is a Minnesota corporation with its principal place of business located in Minneapolis, Minnesota. Xcel is a registered public utility holding company that owns all outstanding common stock of four major power generation subsidiaries, Northern States Power Com-

pany (Wisconsin), Northern States Power Company (Minnesota), Public Service Company of Colorado, and Southwestern Public Service Co., with fossil fuel-fired electric generating facilities located in Colorado, Minnesota, New Mexico, South Dakota, Texas, and Wisconsin.

28. Xcel, through its employees and/or agents, manages, directs, conducts and/or controls operations relating to the emissions of carbon dioxide at fossil fuel-fired electric generating facilities owned and/or operated by its subsidiaries. Such management, direction, conduct and/or control is exercised through a variety of means, including through implementation by Xcel's employees and/or agents of policies, procedures, and programs relating to global warming generally, to carbon dioxide emissions specifically, to dispatch of plants with varying carbon dioxide emissions per unit of energy, and/or to fuels utilized at each plant.

29. Such management, direction, conduct and/or control is evidenced by, for example, Xcel's various pledges to exercise control over the carbon dioxide emissions from facilities owned and/or operated by its subsidiaries; and Xcel's submission of annual reports to DOE reporting the amount of carbon dioxide emissions avoided or sequestered from facilities owned and/or operated by its subsidiaries.

30. As a result of such management, direction, conduct and/or control of operations relating to emissions of carbon dioxide from facilities owned and/or operated by its subsidiaries, defendant Xcel is responsible for the emission of approximately 75 million tons of carbon dioxide annually.

31. Defendant Cinergy Corporation ("Cinergy") is a Delaware corporation with its principal place of

business located in Cincinnati, Ohio. Cinergy is a registered public utility holding company that owns all outstanding common stock of two major power generation subsidiaries, The Cincinnati Gas & Electric Company and PSI Energy, Inc., with fossil fuel-fired electric generating facilities located in Indiana, Kentucky, and Ohio.

32. Cinergy, through its employees and/or agents, manages, directs, conducts and/or controls operations relating to the emissions of carbon dioxide at fossil fuel-fired electric generating facilities owned and/or operated by its subsidiaries. Such management, direction, conduct and/or control is exercised through a variety of means, including through implementation by Cinergy's employees and/or agents of policies, procedures, and programs relating to global warming generally, to carbon dioxide emissions specifically, to dispatch of plants with varying carbon dioxide emissions per unit of energy, and/or to fuels utilized at each plant.

33. Such management, direction, conduct and/or control is evidenced by, for example, various agreements and pledges Cinergy has made to exercise control over the carbon dioxide emissions from facilities owned and/or operated by its subsidiaries; Cinergy's admission of the need to mitigate some of the risk to Cinergy associated with global warming; Cinergy's submission of annual reports to DOE reporting the amount of carbon dioxide emissions avoided or sequestered from facilities owned and/or operated by its subsidiaries; and Cinergy's agreement in February, 2004 to conduct an analysis of financial impacts to Cinergy from potential future legal limits on its carbon dioxide emissions.

34. As a result of such management, direction, conduct and/or control of operations relating to emissions of carbon dioxide from facilities owned and/or operated by its subsidiaries, defendant Cinergy is responsible for the emission of approximately 70 million tons of carbon dioxide annually.

JURISDICTION AND VENUE

Subject Matter Jurisdiction

35. Subject matter jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331 in that plaintiffs make claims against all defendants under federal common law. Subject matter jurisdiction is also proper in this Court pursuant to 28 U.S.C. §§ 1331 and 1337 in that plaintiffs make claims against TVA, a corporation created by a federal statute regulating commerce.

36. Subject matter jurisdiction over the state-law claims against all defendants is proper pursuant to 28 U.S.C. § 1367. Subject matter jurisdiction over the state-law claims against TVA is also proper pursuant to 28 U.S.C. §§ 1331 and 1337.

Venue

37. Venue is proper in this court pursuant to 28 U.S.C. § 1391(b)(1) as all defendants "reside" in this judicial district as that term is defined in 28 U.S.C. § 1391(c) and other law. Venue is also proper under 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claim occurred in this judicial district and/or a substantial part of the property that is the subject of the action is situated in this judicial district. In the alternative, venue is proper pursuant to 28 U.S.C. § 1391(b)(3) because there is no district in which the action may

otherwise be brought and at least one defendant may be found in this judicial district.

Personal Jurisdiction

All Defendants

38. By contributing to the public nuisance complained of herein, all defendants have committed tortious acts without the State of New York causing injury to persons or property within the State of New York.

39. All defendants expect or should reasonably expect their acts complained of herein to have consequences in the State of New York. Such consequences include increasing the concentration of carbon dioxide as well as the injuries and threatened injuries from global warming complained of herein.

40. All defendants derive substantial revenue from interstate or international commerce. Defendants' revenues are largely, if not wholly, interstate in nature in that the operations from which their revenues are derived are located in multiple states. In 2003, AEP reported revenues of $14.5 billion, AEP Service reported income of $1.1 billion, Southern reported revenues of $11.28 billion, TVA reported operating revenues of $6.95 billion, Xcel reported total operating revenues of $7.9 billion, and Cinergy reported operating revenues of $4.4 billion.

41. Some or all of each defendant's electric generating facilities that are the subject of this Complaint supply electric power to the Eastern Interconnection, which is one of three major power grids in the continental United States. The Eastern Interconnection includes New York State. Any electricity entering this grid becomes part of a vast pool of

energy that constantly moves in interstate commerce. Energy flowing onto the grid energizes the entire grid, and consumers draw undifferentiated energy from the grid. Any activity on the interstate grid affects the rest of the grid. So, for example, within the Eastern Interconnection, electricity is produced the instant it is used and flows over virtually all transmission lines from generators to loads.

42. The interconnected nature of this interstate system is demonstrated by the blackout of August 14, 2003, which occurred in New York and other regions as a result of events occurring in Ohio and other places within the grid. As stated in the April, 2004 report of the U.S.-Canadian Power System Outage Task Force: "On August 14, the flow of power through the ECAR region as a whole (lower Michigan, Indiana, Ohio, Kentucky, West Virginia, and western Pennsylvania) was heavy as a result of transfers of power from the south (Tennessee, etc.) and west (Wisconsin, Minnesota, Illinois, Missouri, etc.) to the north (Ohio, Michigan, and Ontario) and east (New York, Pennsylvania)."

43. Upon information and belief, through the Eastern Interconnection, defendants buy power from and/or sell power into New York State. For example, AEP Service, as agent for AEP, has contracted to sell power directly or indirectly to New York entities. Southern Company Services, Inc. ("SCS"), a subsidiary of Southern, has contracted, as an agent of Southern, to sell power directly or indirectly to New York entities and/or consumers. Defendant TVA has contracted to buy power from New York entities. Cinergy Services, as agent for Cinergy, has contracted to sell power to New York entities. Defendant Cinergy, through its agents, The Cincinnati Gas &

Electric Company and Cinergy Capital & Trading, Inc., has contracted to buy power from New York entities.

44. Defendants AEP, AEP Service, Southern, Xcel and Cinergy are members of the Edison Electric Institute ("EEI"), an electric power industry trade association with offices in Washington, D.C. EEI's U.S. members serve roughly 90 percent of the ultimate customers in the shareholder-owned segment of the industry and nearly 70 percent of all electric utility ultimate customers in the nation, and generate nearly 70 percent of the electricity produced in the United States.

45. AEP, Southern, Xcel and Cinergy play a significant role within EEI. The current chairman of EEI is the Chairman and CEO of Xcel. The first-vice chairman is the president and CEO of AEP and the second vice-chairman is the president and CEO of Cinergy. The immediate past chairman of EEI is the president and CEO of Southern; and the immediate past first vice-chairman is the president and CEO of Xcel.

46. EEI acts as agent for AEP, AEP Service, Southern, Xcel, Cinergy and its other members on issues relating to global warming and, in this capacity, does business in New York State on their behalf. EEI also acts as agent for its members and for TVA in Power Partners, a joint government-industry program relating to global warming and the carbon dioxide emissions from EEI members and TVA. Senior EEI officials annually address meetings of the New York Society of Security Analysts in New York City. For example, in 2003 a senior EEI official addressed this group in New York City on the topic of global warming, the role of EEI's member companies

with respect to their emissions of the greenhouse gases that cause global warming, and the members' acknowledged need to move "toward eventually reversing the growth in greenhouse gas emissions." EEI issued a press release from New York in connection with this event. In 1998, the president of EEI made a presentation to the New York Society of Security Analysts in New York City that addressed the issue of global warming. In 2002, EEI launched a print advertising campaign in the *New York Times* and other publications to reassure investors regarding the financial strength of its member companies.

47. Upon information and belief, the purpose of the 2003 meeting and the 1998 presentation by EEI's president was to inform investors in New York's capital markets about the financial impact on EEI member companies of potential actions to control carbon dioxide emissions.

Individual Defendants

AEP and AEP Service

48. Defendants AEP and AEP Service are New York corporations and have designated the New York Secretary of State as their agent for service of process.

Southern

49. Southern owns all of the outstanding common stock of SCS. SCS is an Alabama corporation that is registered to do business in the State of New York and has been so registered since 1949. New York is one of only seven states in which SCS is registered to do business.

50. Upon information and belief, SCS routinely acts as an agent for Southern in New York. SCS renders services in New York on behalf of Southern

that go beyond mere solicitation and are sufficiently important to Southern that Southern itself would perform equivalent services if no agent were available. SCS does all the business that Southern would do in New York were Southern here by its own officials. SCS is also a mere department of Southern.

51. SCS provides general and design engineering, purchasing, accounting, statistical analysis, financial, tax, information resources, marketing, auditing, insurance, pension administration, human resources, systems and procedures, and various other services relating to business, operations, and power pool transactions to Southern and, on behalf of Southern, to Southern's operating subsidiaries. SCS also acts as a central dispatcher of power for Southern and, on behalf of Southern, for Southern's operating subsidiaries. SCS coordinates power allocation on behalf of Southern to provide to the operating companies on a continuous basis the power requirements of their respective service areas.

52. As part of the services it provides as an agent or mere department of Southern, SCS represents the interests of Southern and, on behalf of Southern, Southern's operating subsidiaries, before various agencies, boards, commissions and courts. SCS has acted as Southern's agent in proceedings before the Federal Energy Regulatory Commission ("FERC"). SCS also has submitted comments to the North American Energy Standards Board on behalf of Southern. SCS has routinely acted, on behalf of Southern, as the agent for Southern's operating subsidiaries in proceedings before FERC. SCS has also acted, on behalf of Southern, as the agent for Southern's operating subsidiaries in the Enron bankruptcy

proceedings in the United States Bankruptcy Court for the Southern District of New York.

53. SCS's role as Southern's agent and mere department is further illustrated by the relationship between the two companies. SCS and Southern share the same business address. Officers of SCS and Southern easily move between the two companies. For example, Southern's former chief executive officer previously served as chief executive officer of SCS, and Southern's current chief financial officer was formerly an SCS officer. SCS is heavily, if not completely, financially dependent upon Southern. Southern has guaranteed unsecured notes on behalf of SCS valued at $40 million; has guaranteed a Washington, D.C. office lease on behalf of SCS valued at $10 million; and has guaranteed surety bonds on behalf of SCS valued at $1.35 million.

54. From approximately April, 1993 until approximately September, 2000, defendant Southern owned all of the outstanding stock of Mirant Corporation ("Mirant") (formerly Southern Energy, Inc.). From approximately September, 2000 until on or about April, 2001, Southern owned approximately 80 percent of Mirant's stock. From approximately 1999 and continuing to the date of this complaint, Mirant has owned and operated, through Mirant Americas Energy Marketing, L.P. (formerly Southern Company Energy Marketing, L.P.), electric generating facilities located in New York State. Both Mirant Americas Energy Marketing, L.P. and Southern Company Energy Marketing, L.P. are registered to do business in New York.

55. Upon information and belief, during the period from Mirant's purchase of New York electric generating facilities in 1999 until April, 2001, Mirant (and

Mirant Americas Energy Marketing, L.P.) owned and/or operated those facilities as an agent or mere department of Southern. During some or all of the aforementioned period, a representative of Southern participated in regular meetings of the System Operations Advisory Committee of the New York Independent System Operator ("NYISO"), which were held in New York. Moreover, as part of Southern's April, 2001 spin-off of its Mirant subsidiary to the holders of Southern's common stock, Southern agreed to continue providing financial, accounting, engineering, and other services to Mirant.

56. Southern is a member of the Clean Air Markets Group ("CAMG"). CAMG acts as an agent in New York State for its members, which consist of electric power corporations. CAMG recently initiated litigation on behalf of its members against New York State officials in the United States District Court for the Northern District of New York challenging New York's Air Pollution Mitigation Law. The challenged law limited pollution from CAMG member facilities that produce electric power through the combustion of fossil fuels.

57. Upon information and belief, Southern does business in New York through the participation of its officers and employees at industry meetings and seminars held in New York. For example, Southern's President and Chief Executive Officer addressed the Morgan Stanley Dean Witter Global Electricity and Energy Conference in New York City on or about March 14, 2001.

58. Southern has retained a New York advertising agency, and has run television advertisements in New York State to establish its brand-name image.

TVA

59. Defendant TVA announced in May, 2004 that it had entered an agreement with two regional transmission organizations to pursue the development of a multi-regional approach with respect to power transmission, operations and transactions. According to the announcement by TVA and the two transmission organizations, the agreement is intended to provide "broad, seamless, non-discriminatory transmission service and energy markets across a large portion of the Eastern Interconnection."

60. Defendant TVA regularly does business in New York by, among other things, holding its annual financial analyst and investor meetings in New York City and through the participation of its officers and employees at industry meetings and seminars held in New York. TVA regularly retains the services of New York-based investment banks to underwrite bond offerings on the New York Stock Exchange.

Xcel

61. Defendant Xcel formerly owned NRG Energy, Inc. ("NRG"). While a subsidiary of Xcel, NRG, through its operating subsidiaries, owned and operated electric generating facilities in New York State.

62. Upon information and belief, during the period of its ownership by Xcel, NRG (and its operating subsidiaries) owned and/or operated New York electric generating facilities as an agent or mere department of Xcel. NRG rendered services in New York on behalf of Xcel that went beyond mere solicitation and were sufficiently important to Xcel that Xcel itself would perform equivalent services if no agent were available. NRG did all the business that Xcel would

do in New York were Xcel here by its own officials. NRG was also a mere department of Xcel.

63. In 2002, NRG began experiencing severe financial difficulties and Xcel provided approximately $500 million to NRG in an effort to stave off NRG's bankruptcy. On or about May 14, 2003, NRG filed a voluntary petition for relief under Chapter 11 of the U.S. Bankruptcy Code. In or about December 2003, NRG emerged from bankruptcy pursuant to a court-approved reorganization plan. Pursuant to the reorganization plan Xcel paid approximately $752 million to NRG's creditors.

64. Xcel buys natural gas on the New York Mercantile Exchange ("NYMEX") in New York City.

65. Upon information and belief, Xcel transacts business in New York through the participation of its officers and employees at industry meetings and seminars held in New York. For example, on June 16, 2004, Xcel's Chairman and Chief Executive Officer and its Vice President and Chief Financial Officer spoke to the investment community at the Deutsche Bank Electric Power Conference held in New York City. In addition, on or about April 3, 2001, Xcel executives made a presentation to New York financial analysts concerning Xcel's financial position.

66. Xcel's wholly owned subsidiary Northern States Power Company ("Northern States") is listed on the June 3, 2004 list compiled by the NYISO of companies authorized to buy and sell electric power in New York State. Upon information and belief, Northern States acts as Xcel's agent in New York for purposes of buying and/or selling electricity. Upon information and belief, Northern States renders services in New York on behalf of Xcel that go beyond mere

solicitation and are sufficiently important to Xcel that Xcel itself would perform equivalent services if no agent were available. Northern States does all the business that Xcel would do in New York were Xcel here by its own officials. Northern States is also a mere department of Xcel.

Cinergy

67. Defendant Cinergy owns Cinergy Services, Inc. ("CSI"), a Delaware corporation. CSI is registered to do business in the State of New York. CSI has been registered to do business in New York since 1998. New York is one of only six states in which CSI is registered to do business.

68. Upon information and belief, CSI renders services in New York on behalf of Cinergy that go beyond mere solicitation and are sufficiently important to Cinergy that Cinergy itself would perform equivalent services if no agent were available. CSI does all the business that Cinergy would do in New York were Cinergy here by its own officials. CSI is also a mere department of Cinergy.

69. CSI provides, on behalf of Cinergy, various services including centralized dispatch of Cinergy's operating subsidiaries, coordination of power purchases and sales, central planning for new generation, coordinated compliance with environmental regulations, and coordinated transmission services and planning.

70. As part of the services it provides as an agent or mere department of Cinergy, CSI represents the interests of Cinergy and, on behalf of Cinergy, Cinergy's operating subsidiaries before various agencies, boards, commissions and courts. CSI has, on behalf of Cinergy, submitted written comments to the

Securities and Exchange Commission concerning proposed rulemaking, and has testified before Congress on Cinergy's behalf concerning proposed revisions to the Clean Air Act. CSI has routinely acted, on behalf of Cinergy, as the agent for Cinergy's operating subsidiaries in proceedings before FERC. CSI also has acted, on behalf of Cinergy, as the agent for Cinergy's operating subsidiaries in the Enron bankruptcy proceedings in the United States Bankruptcy Court for the Southern District of New York.

71. CSI is listed on the June 3, 2004 list compiled by the NYISO of companies authorized to buy and sell electric power in New York State, and has participated in the NYISO's Management and Business committees.

72. CSI is a member of the Northeast Power Coordinating Council, which has as its purpose to promote the reliable and efficient operation of the interconnected bulk power systems in Northeastern North America.

73. CSI's role as Cinergy's agent and mere department is further illustrated by the relationship between the two companies. CSI and Cinergy share the same business address. The Chairman and Chief Executive Officer of Cinergy is listed as CSI's Chairman and Chief Executive Officer with the New York Secretary of State. Upon information and belief, officers and directors of Cinergy and CSI easily move between the two companies. Upon information and belief, CSI is heavily, if not completely, financially dependent upon Cinergy.

74. Cinergy also owns Cinergy Capital and Trading, Inc. ("CCTI"), an Indiana corporation. CCTI is registered to do business in the State of New York.

CCTI has been registered to do business in New York since 1998.

75. CCTI is listed on the June 3, 2004 customer list compiled by the NYISO, and has participated in the NYISO's Management and Business committees.

76. Upon information and belief, CSI and CCTI act as Cinergy's agents in New York for the purpose of buying and/or selling electricity, and for other business transaction purposes.

77. Cinergy trades electricity futures on the NYMEX in New York City through its agent, Cinergy Marketing & Trading, L.P., ("CMT"), a NYMEX member firm. In order to become a member firm, foreign corporations such as CMT, a Delaware limited partnership, must submit documents that demonstrate that it is qualified to do business in New York, has authorized service of process upon the New York Secretary of State, or has designated a New York agent for service of process.

78. Cinergy also participates in NYMEX trading through The Cincinnati Gas & Electric Company, a wholly-owned subsidiary of Cinergy that, upon information and belief, acts as Cinergy's agent in New York.

FACTUAL ALLEGATIONS

Global Warming

79. There is a clear scientific consensus that global warming has begun and that most of the current global warming is caused by emissions of greenhouse gases, primarily carbon dioxide from fossil fuel combustion. This consensus has been expressed in official reports from United States and international scientific bodies.

80. For example, the Intergovernmental Panel on Climate Change ("IPCC") concluded in its most recent assessment report, issued in 2001, that "most of the observed warming over the last 50 years is likely to have been due to the increase in greenhouse gas concentrations." "Likely" is an IPCC term of art meaning that there is a confidence level of 66-90%. The IPCC is a collaborative scientific effort among the nations of the world to assess the scientific and technical information relevant to global warming and provide advice on global warming to all 170 nations, including the United States, that are parties to the United Nations Framework Convention on Climate Change. The IPCC 2001 report is a standard scientific reference on global warming.

81. According to a 2001 report of the U.S. National Academy of Sciences ("NAS"), "IPCC's conclusion that most of the observed warming of the last 50 years is likely to have been due to the increase in greenhouse gas concentrations accurately reflects the current thinking of the scientific community on this issue." According to a 2003 statement issued by the American Geophysical Union, "[s]cientific evidence strongly indicates that natural influences cannot explain the rapid increase in global near-surface temperatures observed during the second half of the 20th century."

82. The Earth's average surface temperature has increased by about one degree Fahrenheit in the last 100 years. Globally, the 1990s was the hottest decade, and 1998 was the hottest year since thermometer records began in 1861. The years 2002 and 2003 were tied for the second warmest years.

83. Signs of global warming already have emerged. Arctic sea ice has shrunk by 386,000 square miles in the summer over the last 20 years and, if emissions

are not curtailed, there will be no arctic sea ice at all in summertime later in this century. Other signs include thawing of permafrost, a later freezing and earlier break-up of ice on rivers and lakes, and the retreat of mountain glaciers throughout the world. Glacier National Park already has lost two thirds of the more than 150 glaciers it had in the nineteenth century. Unrestrained global warming is projected to melt all of the remaining glaciers in Glacier National Park in approximately 30 years.

84. Global warming is also resulting in poleward and altitudinal shifts of plant and animal ranges, and the decline of some animal and plant populations in many locations throughout the world. Increased ocean water temperature has caused a dramatic increase in bleaching of coral reefs. The warming of ocean water causes coral reefs to bleach and, ultimately, die. A further increase in global average temperature of two degrees Fahrenheit will lead to severe effects on coral reefs worldwide.

85. Carbon dioxide is by far the most significant greenhouse gas emitted by human activity.

86. Energy from the sun heats the Earth, which re-radiates the energy into the Earth's atmosphere. Carbon dioxide and other greenhouse gases trap heat in the Earth's atmosphere that otherwise would escape into space.

87. Carbon dioxide emissions persist in the atmosphere for several centuries and thus have a lasting effect on climate. The combustion of fossil fuels adds large quantities of carbon (in the form of carbon dioxide) to the atmosphere that otherwise would remain sequestered deep in the Earth. Processes on the land and in the oceans that remove carbon dioxide

from the atmosphere are unable to keep pace with these emissions. As a result, the natural carbon cycle is out of balance and carbon dioxide levels in the atmosphere are increasing as each year's emissions are added to those that came before.

88. Carbon dioxide levels in the atmosphere have increased 34 percent since the industrial revolution in the 18th century and more than one third of the increase has occurred since 1980. As stated by IPCC, the current level of carbon dioxide in the atmosphere is higher than at any time in the last 420,000 years and is likely higher than at any time in the last 20 million years.

89. The substantial increase in recent decades in carbon dioxide emissions, the increasing level of atmospheric carbon dioxide and the planet's corresponding increase in average temperature are illustrated in the United States Global Change Research Program ("USGCRP") graphs attached hereto as Exhibit 1.

90. As the planet warms, the oceans become less efficient at removing carbon dioxide from the atmosphere, thus causing even more carbon dioxide to accumulate in the atmosphere. Similarly, when, as a result of global warming, the planet has fewer areas covered with snow, sea ice or glacial ice, the planet reflects less energy from the sun back into space as formerly white snowy or icy areas are transformed into darker areas, which absorb more solar heat. Thus, global warming is expected to accelerate as concentrations of greenhouse gases, and in particular of carbon dioxide, increase.

91. In the absence of reductions of carbon dioxide emissions, global warming will accelerate. Global av-

erage surface air temperature is projected to warm 2.5 to 10.4 degrees Fahrenheit from 1990 levels by 2100, depending upon the level of greenhouse gas emissions and the response of the planet to the increasing buildup of greenhouse gases. By comparison, at the depths of the last ice age 20,000 years ago the average global temperature of the Earth was only seven to eleven degrees Fahrenheit cooler than today.

92. The sharp increases in atmospheric carbon dioxide and average global temperature projected for future decades are illustrated in the IPCC graphs attached hereto as Exhibits 2 and 3.

93. As stated by IPCC, the projected rate of global warming for the 21st century "is much larger than the observed changes during the 20th century and is very likely to be without precedent during at least the last 10,000 years . . . ."

94. An increase in the planet's average temperature anywhere in the projected range of 2.5 to 10.4 degrees Fahrenheit will constitute an extraordinary shift in world climate that is unprecedented in thousands of years of human civilization. A temperature increase anywhere in the projected range will have harmful consequences worldwide and for the plaintiffs and their citizens and residents.

95. The consequences of the low-end scientific projection of a 2.5 degree Fahrenheit increase in global average temperature in the next 100 years will include: increased heat deaths; an increase in ground-level smog and hence increased suffering from asthma and other respiratory diseases; disruption of water supplies in the Western United States and other places dependent upon snowpack for water supply; an intensification of the hydrologic cycle

meaning more and greater floods and an increased likelihood of drought; reduction in water levels in the Great Lakes; disruption and permanent damage to forests and ecosystems; and an acceleration of sea level rise that will cause increased beach erosion, inundation of low-lying coastal property, greater damage to property and hazard to human safety from larger coastal storm surges, and inundation of salt marshes and tidal wetlands that are vital breeding grounds for fish and shellfish.

96. The high-end scientific projection of a 10.4 degree Fahrenheit increase in global average temperature in the next 100 years would greatly magnify all of these consequences. The loss of life, harm to health, property damage and environmental harm from such an increase would be exceedingly large and damaging by any measure.

97. The level and rate of global warming over the next several decades and beyond depends upon the level of greenhouse gas emissions and in particular upon the level of carbon dioxide emissions from the combustion of fossil fuels. Thus, the harmful consequences of global warming can be avoided or mitigated by reducing such emissions.

Defendants Are Major Emitters of Carbon Dioxide

98. Defendants are five electric power corporations (and one of their subsidiaries) that together emit approximately 650 million tons of carbon dioxide each year from the combustion of fossil fuels. Defendants are the five largest emitters of carbon dioxide in the United States. Defendants' emissions constitute approximately one quarter of the U.S. electric power sector's carbon dioxide emissions and approximately ten percent of all anthropogenic carbon dioxide emissions in the United States.

99. The emissions of carbon dioxide from the combustion of fossil fuels accounts for over 80 percent of all U.S. greenhouse gas emissions from human activity (measured on the basis of carbon dioxide equivalent to account for the gases' differing heat-trapping abilities).

100. Electric power plants that burn fossil fuels are the largest source of carbon dioxide emissions in the United States. Such plants in the U.S. emit approximately 2.6 billion tons of carbon dioxide each year. These emissions constitute approximately forty percent of all carbon dioxide emitted by human activities in the United States and approximately ten percent of worldwide carbon dioxide emissions from human activities.

101. Carbon dioxide emissions from the U.S. electric power sector increased by more than 24 percent from 1990 to 2001 compared to a 16 percent increase in carbon dioxide emissions for the economy as a whole. Carbon dioxide emissions from the electric power sector are projected by the U.S. Department of Energy to increase by an additional 41 percent by the year 2025 if no action is taken to restrain such emissions. This increase will raise the electric power sector's annual emissions to approximately 3.5 billion tons. This rate of increase is significantly faster than the projected growth rate of emissions from the economy as a whole over the same period.

102. Defendants and their predecessors in interest have emitted large amounts of carbon dioxide from the combustion of fossil fuels for many years. For example, AEP has been in continuous operation since 1906, when it incorporated in New York State under the name American Gas and Electric Company. Southern has been in continuous operation since its

incorporation in 1945. Southern acquired its major power-generating subsidiaries in 1949, which have been in continuous operation since the period 1906-1930. TVA incorporated in 1933 and has been producing electric power through fossil fuel combustion since the 1940s. Xcel has been in continuous operation since its incorporation in 1909. Cinergy, incorporated in 1993, owns all the outstanding common stock of The Cincinnati Gas & Electric Co., which has been in continuous operation since its incorporation in 1837. Because the planet's natural systems take hundreds of years to absorb carbon dioxide, defendants' past and present emissions will remain in the atmosphere for many decades, or even centuries, into the future.

Injuries to the Plaintiffs and Their Citizens and Residents From Global Warming

103. Global warming already has begun to change the climate in the United States.

104. Since 1900, the average temperature in the western United States, including California, has risen 2 to 5 degrees Fahrenheit. In California, winter average temperature in the Sierra Nevada rose by almost 4 degrees Fahrenheit during the second half of the 20th century. In the New York City Metropolitan area, the temperature has warmed nearly 2 degrees Fahrenheit from 1901 to 2001. The average annual temperature of the upstate New York and New England region increased 0.74 degrees Fahrenheit from 1895 to 1999 and the average winter temperature increased by 1.8 degrees. In the last century, the average temperature in New Brunswick, New Jersey, has increased approximately 2 degrees Fahrenheit. Over the 20th century, the northern

portion of the Midwest, including the upper Great Lakes, has warmed by almost 4 degrees Fahrenheit.

105. Between 1953 and 1994, annual average snowfall in parts of New England decreased by nearly 15 percent. Between 1953 and 1998, the duration of snow cover on the ground in these states decreased by an average of seven days. Lakes in the Northeast are experiencing spring thaws four to six days earlier than 100 years ago. The length of the snow season in California decreased by about 16 days from 1951 to 1996. Lakes in the Midwest, including Wisconsin, have experienced later fall freezes and earlier spring thaws over the last 100 years, particularly in recent decades. On Lake Mendota in Wisconsin, the average duration of ice cover has decreased from about four months in the mid-1800s to about three months by the late 1990s; in the winter of 2001-02, ice cover on Lake Mendota lasted only 21 days.

106. Unrestrained emissions of greenhouse gases and in particular of carbon dioxide will cause temperatures in the plaintiffs' jurisdictions to increase significantly over the next 100 years. The U.S. Environmental Protection Agency ("US EPA") projects an increase in temperature in the plaintiffs' jurisdictions of about four to five degrees Fahrenheit by the year 2100. USGCRP projects an increase in average minimum temperature in upstate New York and New England of 5.6 to 9.5 degrees Fahrenheit and an increase in average maximum temperature of 3.6 to 9 degrees Fahrenheit by the year 2100. USGCRP projects New York City average temperature by the 2050s will increase 3.3 to 5.6 degrees Fahrenheit in the winter and 2.7 to 7.6 degrees Fahrenheit in the summer. USGCRP projects an

increase in average temperature for California of 2 to 9 degrees Fahrenheit by the year 2100. USGCRP projects an increase in average temperature for the Midwest of 5 to 10 degrees Fahrenheit over the next 100 years.

107. An increase of temperature in the next 100 years anywhere in the global range projected by IPCC 2001 or the regional ranges projected by US EPA and USGCRP will have substantial adverse impacts upon people, environment and property in the plaintiffs' jurisdictions and will require the plaintiffs to expend billions of dollars to respond to the impacts.

(i) Injuries to Public Health

108. Global warming will harm public health in the plaintiffs' jurisdictions.

109. Heat is a major public health threat. The loss of human life due to hot spells in summer exceeds that caused by all other weather events in the United States combined, including lightning, rainstorms/ floods, hurricanes, and tornadoes.

110. Global warming is expected to cause intensified and prolonged summertime heat waves in the plaintiffs' jurisdictions, resulting in increases in heat deaths, heat illnesses, and heat-related hospitalizations. For example, U.S. EPA reports that a 1 degree Fahrenheit warming could more than double heat-related deaths in New York City, from 300 to 700 per year, that a 3 degree Fahrenheit warming could almost double heat-related deaths in Los Angeles, from about 70 to 125 per year, and that a 2 to 3 degree Fahrenheit warming could quintuple heat deaths in Newark, New Jersey from 25 to 125 per year. The elderly and poor will be at highest risk.

111. The production of summertime smog increases at higher temperatures, meaning that increasing summertime temperatures from global warming will increase smog levels. Increased smog will cause increased incidence of, and susceptibility to, respiratory illnesses including asthma, pneumonia and bronchitis.

(ii) Injuries to Coastal Resources

112. Plaintiffs California, Connecticut, State of New York, New Jersey, Rhode Island and New York City (hereinafter "coastal plaintiffs") have significant coastlines. New York has approximately 2,625 miles of coastline, including barrier islands, coastal wetlands, and complex bays, particularly on Long Island. California has approximately 3,427 miles of coastline. Connecticut has approximately 618 miles of coastline. New Jersey has approximately 1,792 miles of coastline. Rhode Island has approximately 420 miles of coastline. New York City has approximately 578 miles of coastline.

113. Global warming will cause accelerated sea-level rise, primarily via thermal expansion of seawater and the addition of freshwater by melting of glaciers and ice sheets. As a result of global warming, sea levels will increase along the coasts of the coastal plaintiffs in the next 100 years, possibly by three feet or more. Sea-level rise resulting from global warming will continue for at least hundreds of years, even after carbon dioxide levels in the atmosphere are stabilized.

114. Accelerated sea-level rise from global warming will inundate low-lying property, especially during coastal storms, in the coastal plaintiffs' jurisdictions. Storm surges from coastal storms will be

superimposed upon a higher sea level due to global warming and thus cause more frequent flooding and flooding of much greater areas. The increased flooding will cause billions of dollars of damage to property, including state-owned, city-owned and other public property as well as residential, commercial and industrial property, and will pose a greater hazard to human safety in each of the coastal plaintiffs' jurisdictions. Accelerated sea level rise from global warming will cause New York City to experience more frequently a storm of such magnitude that its occurrence now can be expected only once every 100 years (a "100-year storm"). The return period of the 100-year storm could be reduced to forty-three years by the 2020s, nineteen years by the 2050s and four years by the 2080s. Coastal infrastructure in New York City, including airports, subway stations, tunnels, tunnel vent shafts, storm sewers, wastewater treatment plants, and bridges are located at low elevations and will experience more frequent and severe flooding from global warming-induced sea level rise, causing hundreds of billions of dollars in damages and wreaking havoc on the daily life of the City. In the San Francisco Bay, a sea level rise of only 6 inches would change the frequency of the 100-year storm to that of a 10-year storm.

115. In addition to storm-surge flooding, some low-lying property (including state-owned and other public property as well as private property) in each of the coastal plaintiffs' jurisdictions will be permanently inundated by the additional sea level rise caused by unrestrained global warming. Even a two-foot sea level rise would inundate approximately 5,000 square miles of dry land in the continental United States, including land in each of the coastal

plaintiffs' jurisdictions, unless protective structures such as dikes and bulkheads are constructed. The costs of erecting such coastal armament will fall heavily upon the coastal plaintiffs.

116. Accelerated sea-level rise from unrestrained global warming also threatens to inundate or salinize marshes and tidelands that are vital breeding grounds for numerous species of fish and shellfish in the coastal plaintiffs' jurisdictions. Approximately 5,000 square miles of wetlands in the United States would be inundated by a two foot sea-level rise, including wetlands in each of the coastal plaintiffs. Inundation or salinization of marshes would destroy habitat for commercial and game species as well as migratory birds and other wildlife. Ecosystems at risk include barrier beach island refuges such as the Jamaica Bay National Wildlife Refuge in New York City, the Great South Bay on Long Island, and the Sedge Islands Wildlife Refuge Management Area in Island Beach State Park in New Jersey. The San Francisco Bay is the largest estuary on the west coast of the United States; its tidal marshes are threatened with inundation due to accelerated sea level rise from global warming.

117. Accelerated sea-level rise due to unrestrained global warming also will greatly accelerate beach erosion along the coasts of the coastal plaintiffs. For open sandy beaches, each foot of sea-level rise causes, on average, 100 to 150 feet of beach loss through erosion. Vulnerable beaches include property owned by the coastal plaintiffs, such as Robert Moses State Park, Jones Beach State Park and Montauk Point State Park on Long Island; Andrew Molera State Park and Asilomar State Beach in California; and Sherwood Island State Park and Silver Sands State

Park in Connecticut; Newport, Matunuck and Misquamicut State Beaches in Rhode Island; and Rockaway Beach in New York City. Accelerated beach erosion due to unrestrained global warming also will damage public and private property, including homes and other structures and buildings; property damage could reach into the hundreds of millions of dollars per year in the coastal plaintiff's jurisdictions. Beaches also provide an important source of summer tourism, which benefits the economies of the coastal plaintiffs. The erosion of beaches thus impairs a resource that supports the coastal plaintiff's economies.

(iii) Injuries to Water Supplies

118. Elevated sea-levels due to unrestrained global warming also will cause saltwater intrusion into groundwater aquifers or other water supplies in each of the coastal plaintiffs' jurisdictions. For example, a sea-level rise in the range projected as a result of unrestrained global warming would increase salinity in the San Francisco Bay and the Sacramento-San Joachin Delta and thus contaminate a water source used by 20 million Californians, compromise the ability of the State Water Project to meet its obligations, and impair a water source upon which numerous Delta species depend.

119. In California, the mountain snowpack is the single largest freshwater source, critical to sustaining water to the State's 34 million residents during the half of each year when there is minimal precipitation. Global warming will severely reduce the size of the snowpack because more precipitation will fall as rain instead of snow. Melting of the snowpack will occur earlier and proceed more rapidly. Diminished summer runoff from mountain snow will cause water

shortages and disruptions to the interrelated water systems and hydroelectric plants on which the State's residents rely. Flooding will increase in California as a result of the earlier melting. This process of reduced mountain snowpack, earlier melting and associated flooding, and reduced summer streamflows already has begun.

120. Global warming will result in more intense precipitation events. A warmer atmosphere heats the oceans (leading to greater evaporation), and holds more moisture than a cool one. When the extra water condenses, it more frequently falls to Earth as larger downpours. Global warming thus will cause increased flooding and runoff in the plaintiffs' jurisdictions. The increased flooding and runoff will increase the risk of contamination of water supplies with fertilizer, sewage, waterborne pathogens that cause diseases such as cryptosporidiosis and giardiasis, and with other pollutants collected by the runoff and flood waters as they flow into reservoirs. Floods also cause damage to public and private property, increase soil erosion, and are a hazard to human safety and cause a loss of life.

(iv) Injuries to the Great Lakes

121. Global warming threatens plaintiffs New York State and Wisconsin with substantial injuries by lowering the levels of the Great Lakes and disrupting their ecology with warmer temperatures. The Great Lakes and the interlake water flows are a critical source of drinking water, a major source of hydroelectric power, an important commercial shipping channel, an important recreational resource and home to a diversity of fish, plants and animals. Wisconsin has approximately 495 miles of shoreline along Lake Michigan and approximately 325 miles of

shoreline along Lake Superior. New York State has approximately 331 miles of shoreline along Lake Ontario and approximately 77 miles of shoreline along Lake Erie.

122. Global warming is very likely to lower the water levels of the Great Lakes and reduce interlake flow, since increasing temperatures will cause water losses by evaporation that are likely to exceed any increase in supply from additional precipitation due to global warming. A recent analysis of several global warming scenarios by the International Joint Commission, an independent U.S.-Canadian organization established by the Boundary Waters Treaty of 1909, projects reductions in average lake levels over the years 2040 to 2069 of 10 to 44 inches for Lake Michigan, 4 to 14 inches for Lake Superior, and 6 to 32 inches for Lake Erie, compared to the 1961-1990 average; for Lake Ontario the analysis focuses on net total water supply and average outflow, both of which it finds will decrease by up to 25 percent.

123. Reduction in Great Lakes water levels is severely damaging to commercial shipping, which is an important component of the New York State and Wisconsin economies. Each loss of one inch in draft in the Great Lakes shipping channels causes the 1,000 foot-long vessels used for interlake transportation to lose 270 tons of cargo capacity and causes the 740 foot-long ocean-going vessels that are sized for the St. Lawrence Seaway to lose 100 tons of cargo capacity. Wisconsin has major ports along Lakes Michigan and Superior, including the Port of Milwaukee, Port Washington, the Port of Green Bay, and the Port of Ashland. New York State has major ports along Lakes Ontario and Erie, including the Port of Oswego, the Port of Rochester, and the Port of

Buffalo. Reduced commercial shipping would cause harm to the Wisconsin and New York State economies.

124. Reduced lake levels due to global warming will necessitate costly dredging of harbors and channels in order to mitigate commercial shipping losses. Moreover, toxic dredge material must be disposed of in one of the special landfills constructed for Great Lakes dredge sediment, yet these landfills already are nearing capacity. The increased costs of dredging would be only partially mitigated by any increase in shipping made possible by the longer ice-free season that global warming will entail.

125. A drop in Great Lakes levels and river flows necessitates reducing hydropower production at facilities dependent upon the flow of water through the Great Lakes system. Affected hydropower plants include the Robert Moses Niagara Power Plant and the Lewiston Pump-Generating Plant, both owned by New York State and dependent upon flow through the Niagara River between Lakes Erie and Ontario.

126. A drop in Great Lakes levels from global warming will reduce access to marinas and docks for recreational boaters, require thousands of municipal water intakes and wells to be moved or extended, and damage wetlands that are important for fish and other wildlife.

127. Global warming will also increase the duration of summer stratification—the period of time when the warm upper layer of lake water is separated from the lower, cool layer. During stratification, the lower layer of water is deprived of oxygen from the surface. Stratification occurs as the surface water warms through summer and ends when the surface water

cools in the fall and sinks down into the lower layer, thus mixing oxygen-rich water into the lower lake. An increase in the duration of summer stratification will greatly increase the risk of the lower water layer in the Great Lakes completely using up the available oxygen and becoming a dead zone. Persistent dead zones cause massive fish kills, damage fisheries, cause toxic algal blooms and foul drinking water supplies.

(v) Injuries to Agriculture in Iowa and Wisconsin

128. The economies of Iowa and Wisconsin and the livelihood of their citizens and residents are highly dependent on agriculture. There are over 90,000 farms in Iowa, and over 70,000 in Wisconsin. Nearly every city and town in Iowa and Wisconsin has businesses dependent upon agriculture and has citizens and residents engaged in agriculture. Iowa and Wisconsin are leaders in corn, soybean and livestock production.

129. Global warming presents a significant threat to agriculture in Iowa and Wisconsin by increasing temperatures and altering precipitation in the growing season.

130. Global warming will increase the frequency and duration of summertime heat waves in Iowa and Wisconsin. In addition to the increased threat to the health of their citizens and residents from heat waves, an increase in the occurrence of days with temperature greater than approximately 93 degrees Fahrenheit in Iowa and Wisconsin will increase stress to crops, thereby reducing crop yields. Warmer summer temperatures will also cause appetite suppression in livestock, thereby reducing weight gain, milk production, and economic benefit to farmers.

Warmer summer temperatures will also increase production costs for confinement animal feeding operations due to the increased need for air conditioning.

131. Global warming will increase the frequency of intense summertime rainfall events. Increased frequency of intense summertime precipitation will result in increased risks of flooding of farm fields, streams, and rivers in Iowa and Wisconsin. Increased flooding will cause crop loss, soil loss, property damage, and increased insurance claims.

(vi) Injuries to Ecosystems, Forests, Fisheries and Wildlife

132. Global warming will disrupt ecosystems in the plaintiffs' jurisdictions. Different species with varying levels of temperature tolerance and varying abilities to change their range will migrate with the changing temperature at different paces. The result will be a substantial disruption of ecosystems, because species in an ecosystem are interdependent. Some species will become extinct as a result of global warming. One recent study projects that 15-37 percent of species in studied areas will be committed to extinction by 2050 in a mid-range global warming scenario, with the level of extinctions dependent upon the level of warming.

133. The hardwood forests that give Vermont, Connecticut, New York, New Jersey, Rhode Island and Wisconsin their fall colors and that give Vermont and several other plaintiff States their maple sugar industry are threatened by global warming. Several species of hardwood trees that typify forests in the northeast and in Wisconsin, including maples, birches and beeches, are at the southern extent of their range in these regions and will be unable to

survive the temperature increases projected to occur as a consequence of a large warming that could occur in this century.

134. The Adirondack Park in New York is the largest forested area east of the Mississippi, consisting of 6 million acres, of which 2.6 million acres are state-owned forest preserve. This State Park represents one of the most significant hardwood ecosystems in the world, but its hardwood forests are threatened by global warming.

135. If global warming occurs too rapidly, the transition from a hardwood forest to another type of forest will not be a smooth transition but rather will be characterized by a rapid decline in the current forest before another type of forest is able to become established.

136. Due to the interconnected nature of ecosystems, the loss or decline of tree species will cause the loss or decline of other species, including birds, mammals and insects that are interdependent with the tree species and with each other and thus cause an overall decline of hardwood forest ecosystems across the northern United States.

137. Global warming also threatens the health of trees and forests in the plaintiffs' jurisdictions through smog formation. Ground-level smog, which, as noted above is correlated with temperature, interferes with the ability of plants to produce and store food, making them more susceptible to disease, insects, other pollutants, and harsh weather.

138. Global warming will cause Connecticut, New Jersey, New York, Rhode Island, Vermont and Wisconsin to suffer a significant loss of suitable habitat for trout species such as brown, brook, and

rainbow. Populations of these cold-water species will decline as a result of warmer water temperatures.

139. California supports the southernmost populations of some chinook salmon, coho salmon and steelhead trout species, which require cold water. The warmer stream temperatures from global warming pose a risk to their continued survival. In addition, the reduced late-season snowmelt in California will reduce flow in numerous streams and rivers during spawning season for California salmon, including several endangered or threatened runs of salmon. Increased flooding early in the season from premature snowmelt will scour streambeds of salmon eggs. Salmon are the source of more than $17 billion in revenue in California.

140. Wisconsin has more than 15,000 inland lakes. As with the Great Lakes, the period of summer stratification for inland lakes will increase due to global warming, thereby reducing oxygen in the lower lake levels and posing a threat to lake health and fisheries.

(vii) Wildfires in California

141. California is susceptible to wildfire. More than half of the most damaging fires in the U.S. over the past 170 years have occurred in California, and the state leads the nation in wildfire-related economic losses. Wildfires cause property damage to public and private property in the state, are a hazard to human safety, and contribute to landslides, flooding, erosion and water quality impairment. Global warming will substantially increase the damage in California from wildfires by, *inter alia*, increasing the number of escaped wildfires, increasing the area burned by wildfires and shortening the return period

of wildfires. The increase in wildfires will increase property damage to both public (including state-owned) and private property, increase the costs of fighting fires, increase the risk of injuries and loss of life, and increase the damage from landslides, flooding, erosion and sedimentation of streams that accompany wildfires.

(viii) Economic Interests

142. The impacts of global warming on property, ecology and public health in the plaintiffs' jurisdictions will all result in economic harm to the plaintiffs. Injury to property, such as erosion of beaches located on state-owned property, will carry direct economic costs, such as the costs of sand replenishment and diminished value. Damage from flooding in major metropolitan areas from increased storm surges could reach into the billions of dollars. Protection of public and private property, such as construction of sea walls, also will carry direct economic costs. Harms to public health will impair productivity and thus harm the plaintiffs' economies. Ecological harms, such as the loss of the northeastern hardwood forests or fisheries, will harm the logging, maple sugaring and tourism industries in the plaintiff States and cause an associated loss of tax revenue to the States.

(ix) Increased Risks of Abrupt and Catastrophic Change in Climate Due to Global Warming

143. Global warming poses risks of sudden and catastrophic injuries to the plaintiffs and their citizens and residents.

144. The Earth's climate can undergo an abrupt and dramatic change when a "radiative forcing agent" causes the Earth's climate to reach a tipping

point. Emissions of carbon dioxide from fossil fuel combustion constitute such a radiative forcing agent because of the heat-trapping effect of carbon dioxide. Therefore, as stated by the National Academy of Sciences, the unrestrained and ever-increasing emissions of greenhouse gases from fossil fuel combustion increases the risk of an abrupt and catastrophic change in the Earth's climate when a certain, unknown, tipping point of radiative forcing is reached. An abrupt change in the Earth's climate can transpire in a period as short as ten years. Defendants' emission of millions of tons of carbon dioxide each year contribute to this risk of an abrupt change in climate due to global warming.

145. The rapidity of an abrupt climate shift would greatly magnify all of the injuries to the plaintiffs, their citizens and residents, and their environment by greatly shortening the time period for humans and ecosystems to adapt and respond to the changing climate.

(x) Injury to States' Interests in Ecological Integrity

146. The foregoing threatened injuries to the plaintiff States are more than a collection of disparate harms. Together they constitute a threat of a fundamental transformation. The risk of wholesale change in climate and complete ecological disruption in the plaintiffs' jurisdictions constitutes an assault on their sovereign and quasi-sovereign interests. The states have an interest independent of and behind the titles of their citizens and in all the earth and air within their domains. By altering the plaintiff states' natural climate, global warming injures interests that are fundamental to the rights of these sovereigns, namely, their interest in the integrity of an

ecological system that supports their natural heritage and upon which all of their natural resources and much of their economies depend.

Reducing Defendants' Carbon Dioxide Emissions Reduces Risks of Injury

147. Reducing carbon dioxide emissions is necessary to avert or reduce the risk of the injuries described above. The primary factor in determining the rate and magnitude of future warming is the level of greenhouse gas concentrations in the atmosphere, which in turn is driven by the rate of emissions of greenhouse gases and, in particular, of carbon dioxide. The greater the emissions, the greater and faster the temperature change will be, with greater resulting injuries. The lower the level of emissions, the smaller and slower the total temperature change will be, with lesser injuries.

148. Reductions in the carbon dioxide emissions of the defendants will contribute to a reduction in the risk and threat of injury to the plaintiffs and their citizens and residents from global warming. For example, by reducing emissions by approximately three percent annually over the next decade, the defendants would achieve their share of the carbon dioxide emission reductions necessary to significantly slow the rate and magnitude of warming.

149. Reductions in carbon dioxide emissions from the electric power sector are among the most cost-effective reductions that can be made within the United States economy. Reductions from these defendants—the largest carbon dioxide emitters in the United States and among the largest in the world—will contribute to a larger reduction in risk than reductions of the same proportion by other emitters.

150. There are significant costs of delaying action to reduce carbon dioxide emissions. The longer the delay until significant reductions are made, the larger, steeper and more expensive the later cuts in emissions will need to be in order to maintain any particular level of carbon dioxide in the atmosphere. Delay also commits future generations to higher levels of carbon dioxide in the atmosphere and hence greater global warming and increased associated impacts.

151. Moreover, delay may lead to defendants' building or refurbishing generating facilities without inclusion or consideration of carbon dioxide reduction technologies, thereby making it more difficult to reduce carbon dioxide emissions in the future.

CLAIMS FOR RELIEF

First Claim for Relief—Federal Common Law of Public Nuisance

152. Paragraphs 1 through 151 are incorporated herein by reference.

153. Defendants are carrying on activities that are causing injury and a significant threat of injury to the plaintiffs. Defendants, by their emissions of carbon dioxide from the combustion of fossil fuels at electric generating facilities, are knowingly, intentionally or negligently creating, maintaining or contributing to a public nuisance—global warming—injurious to the plaintiffs and their citizens and residents.

154. Defendants' emissions of carbon dioxide, by contributing to global warming, constitute a substantial and unreasonable interference with public rights in the plaintiffs' jurisdictions, including, *inter alia*,

the right to public comfort and safety, the right to protection of vital natural resources and public property, and the right to use, enjoy, and preserve the aesthetic and ecological values of the natural world.

155. Carbon dioxide emissions and global warming are inherently interstate in nature. Defendants' emissions of carbon dioxide, from any state where their electric generation operations may be located, rapidly mix in the atmosphere and cause an increase in the atmospheric concentration of carbon dioxide worldwide. The warming that results from the increased carbon dioxide concentration to which defendants contribute is a global process and causes impacts in each of the plaintiffs' jurisdictions.

156. Defendants could generate the same amount of electricity while emitting significantly less carbon dioxide by employing readily available processes and technologies.

157. Defendants know or should know that their emissions of carbon dioxide contribute to global warming and to the resulting injuries and threatened injuries to the plaintiffs, their citizens and residents, and their environment.

158. Defendants' carbon dioxide emissions are a direct and proximate contributing cause of global warming and of the injuries and threatened injuries to the plaintiffs, their citizens and residents, and their environment, from global warming.

159. Defendants, individually and collectively, are substantial contributors to global warming and to the injuries and threatened injuries claimed herein.

160. The injuries and threatened injuries from global warming are indivisible injuries.

161. The injuries from global warming claimed herein are imminent.

162. The injuries from global warming claimed herein are irreparable and monetary damages are inadequate to remedy the injuries.

163. Defendants' emissions of carbon dioxide, if unabated, will continue to contribute to global warming to the detriment of the plaintiffs, their environment, and the health, safety and welfare of their citizens and residents.

164. Defendants are jointly and severally liable under the federal common law of public nuisance.

Second Claim for Relief—State-Law Public Nuisance

165. Paragraphs 1 through 164 are incorporated herein by reference.

166. In the alternative, defendants are liable under the statutory and/or common law of public nuisance of each of the States where their fossil-fuel fired electric generating facilities are located.

167. *Plants located in Alabama.* Defendants Southern and TVA have engaged and continue to engage in intentional and/or negligent conduct that unreasonably operates to hurt or inconvenience an indefinite number of persons, or that unreasonably interferes with the public's right to physical comfort and enjoyment of property, and that causes hurt, inconvenience or damage to others, and are therefore liable under the statutory and common law of public nuisance of the State of Alabama.

168. *Plants located in Arkansas.* Defendants AEP and AEP Service have engaged and continue to engage in intentional and/or negligent conduct that unreasonably interferes with the use and enjoyment

of the lands of others and/or violates public rights held in common by the community as a whole, and are therefore liable under the common law of public nuisance of the State of Arkansas.

169. *Plants located in Colorado.* Defendant Xcel has engaged and continues to engage in intentional and/or negligent acts or omissions that injuriously affect the safety or health of the public or work a substantial annoyance, inconvenience, or injury to the public, and is therefore liable under the common law of public nuisance of the State of Colorado.

170. *Plants located in Florida.* Defendant Southern has engaged and continues to engage in intentional and/or negligent acts or omissions that annoy, injure, or endanger the comfort, health, repose or safety of an entire community or a considerable number of persons, and is therefore liable under the common law of public nuisance of the State of Florida.

171. *Plants located in Georgia.* Defendant Southern has engaged and continues to engage in intentional and/or negligent conduct that causes hurt, inconvenience or damage to all persons who come within the sphere of its operations, and is therefore liable under the statutory and common law of public nuisance of the State of Georgia.

172. *Plants located in Indiana.* Defendants AEP, AEP Service and Cinergy have engaged and continue to engage in intentional and/or negligent conduct that unreasonably interferes with the public's comfortable enjoyment of life or property, is injurious to health and/or obstructs the free use of property so as to interfere with the comfortable enjoyment of life or property, and are therefore liable under the statutory

and common law of public nuisance of the State of Indiana.

173. *Plants located in Kentucky.* Defendants AEP, AEP Service, TVA and Cinergy have engaged and continue to engage in intentional and/or negligent conduct that unreasonably creates a condition that is prejudicial to the health, comfort, safety, or property of the citizens at large, and are therefore liable under the common law of public nuisance of the Commonwealth of Kentucky.

174. *Plants located in Louisiana.* Defendants AEP and AEP Service have engaged and continue to engage in intentional and/or negligent conduct that unreasonably causes damage to or substantially interferes with the enjoyment of another's property, and are therefore liable under the civil law of public nuisance of the State of Louisiana.

175. *Plants located in Michigan.* Defendants AEP and AEP Service have engaged and continue to engage in intentional and/or negligent conduct that unreasonably interferes with rights common to the general public, and are therefore liable under the common law of public nuisance of the State of Michigan.

176. *Plants located in Minnesota.* Defendant Xcel has engaged and continues to engage in intentional and/or negligent conduct that is unreasonable and is injurious to health, or indecent or offensive to the senses, or obstructs the free use of property, and that generally affects the public, and is therefore liable under the statutory and common law of public nuisance of the State of Minnesota.

177. *Plants located in Mississippi.* Defendants Southern and TVA have engaged and continue to

engage in intentional and/or negligent conduct that unreasonably interferes with rights common to the general public, and are therefore liable under the common law of public nuisance of the State of Mississippi.

178. *Plants located in New Mexico.* Defendant Xcel has engaged and continues to engage in intentional and/or negligent conduct that unreasonably interferes with rights common to the general public, and is therefore liable under the common law of public nuisance of the State of New Mexico.

179. *Plants located in Ohio.* Defendants AEP, AEP Service and Cinergy have engaged and continue to engage in intentional and/or negligent conduct that unreasonably interferes with rights common to the general public, and are therefore liable under the common law of public nuisance of the State of Ohio.

180. *Plants located in Oklahoma.* Defendants AEP and AEP Service have engaged and continue to engage in intentional and/or negligent conduct that unreasonably annoys, injures, or endangers the comfort, repose, health or safety of an entire community or a considerable number of persons, and have failed to perform a duty thereby causing a condition that annoys, injures, or endangers the comfort, repose, health or safety of others, and are therefore liable under the statutory and common law of public nuisance of the State of Oklahoma.

181. *Plants located in South Dakota.* Defendant Xcel has engaged and continues to engage in intentional and/or negligent acts or omissions that annoy, injure, or endanger the comfort, repose, health, or safety of an entire community or a considerable number of persons, and is therefore liable under the

statutory and common law of public nuisance of the State of South Dakota.

182. *Plants located in Tennessee.* Defendants AEP, AEP Service, and TVA have engaged and continue to engage in intentional and/or negligent conduct that unreasonably interferes with the public's use and enjoyment of public places or with other common public rights, and are therefore liable under the common law of public nuisance of the State of Tennessee.

183. *Plants located in Texas.* Defendants AEP, AEP Service, and Xcel have engaged and continue to engage in intentional and/or negligent conduct that unreasonably interferes with rights common to the general public and are therefore liable under the common law of public nuisance of the State of Texas.

184. *Plants located in Virginia.* Defendants AEP and AEP Service have engaged and continue to engage in intentional and/or negligent conduct that injures an indefinite number of people by creating a condition that is dangerous to the public or that interferes with a public right, and are therefore liable under the common law of public nuisance of the Commonwealth of Virginia.

185. *Plants located in West Virginia.* Defendants AEP and AEP Service have engaged and continue to engage in intentional and/or negligent conduct that hurts or inconveniences an indefinite number of persons, and are therefore liable under the common law of public nuisance of the State of West Virginia.

186. *Plants located in Wisconsin.* Defendant Xcel has engaged and continues to engage in intentional and/or negligent conduct that does and will continue to substantially or unduly interfere with the use of public places and private property, with the activities

of an entire community, and with the exercise of public rights enjoyed by the citizens of Wisconsin, and is therefore liable under the common law of public nuisance of the State of Wisconsin.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that judgment be entered against defendants as follows:

a. Holding each defendant jointly and severally liable for creating, contributing to, and/or maintaining a public nuisance;

b. Permanently enjoining each defendant to abate its contribution to the nuisance by requiring it to cap its carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade; and

c. Granting such other relief as this Court deems just and proper.

Dated: July 21, 2004

FOR THE STATE OF CONNECTICUT
RICHARD BLUMENTHAL
Attorney General
By: /S/
KIMBERLY MASSICOTTE
(KM7666)
MATTHEW LEVINE
Assistant Attorneys General
P.O. Box 120
55 Elm Street
Hartford, CT 06141-0120
(860) 808-5250

FOR THE STATE OF NEW YORK
ELIOT SPITZER
Attorney General
By: /S/
PETER LEHNER (PL2290)
J. JARED SNYDER (JS1541)
SIMON WYNN (SW0807)
Assistant Attorneys General
Environmental Protection Bureau
120 Broadway
New York, NY 10271
(212) 416-8450

FOR PEOPLE OF THE STATE OF
CALIFORNIA
BILL LOCKYER
Attorney General
By: /S/
KEN ALEX
WILLIAM BRIEGER
Deputy Attorneys General
1300 I Street
Sacramento, CA 95814
(916) 324-2512

FOR THE STATE OF IOWA
THOMAS J. MILLER
Attorney General
TAM ORMISTON
Deputy Attorney General
By: /S/
DAVID R. SHERIDAN
Assistant Attorney General
Environmental Law Division
Lucas State Office Bldg.
321 E. 12th Street, Room 018

Des Moines, IA 50319
(515) 281-5351

FOR THE STATE OF NEW JERSEY
PETER C. HARVEY
Attorney General of New Jersey
By: /S/
LISA J. MORELLI
JOHN R. RENELLA
Deputy Attorneys General
PO Box 093
Hughes Justice Complex
Trenton, NJ 08625
(609) 984-5612

FOR THE STATE OF RHODE ISLAND
PATRICK C. LYNCH
Attorney General
By: /S/
MICHAEL RUBIN
Assistant Attorney General
TRICIA K. JEDELE
Special Assistant Attorney General
Department of the Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400

FOR THE STATE OF VERMONT
WILLIAM H. SORRELL
Attorney General
By: /S/
S. MARK SCIARROTTA (MS 1771)
ERICK TITRUD
Assistant Attorneys General
109 State Street
Montpelier, VT 05609-1001
(802) 828-3186

FOR THE STATE OF WISCONSIN
PEG LAUTENSCHLAGER
Attorney General
By: /S/
THOMAS J. DAWSON
Assistant Attorney General
Director - Environmental Protection Unit
Wisconsin Department of Justice
17 West Main Street
Madison, WI 53707-7857
(608) 266-8987

FOR THE CITY OF NEW YORK
MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
By: /S/
SUSAN M. KATH (SK4547)
SCOTT PASTERNACK (SP3293)
Assistant Corporation Counsels
New York City Law Department
100 Church Street, Room 6-145
New York, NY 10007
(212) 676-8517

EXHIBIT 1

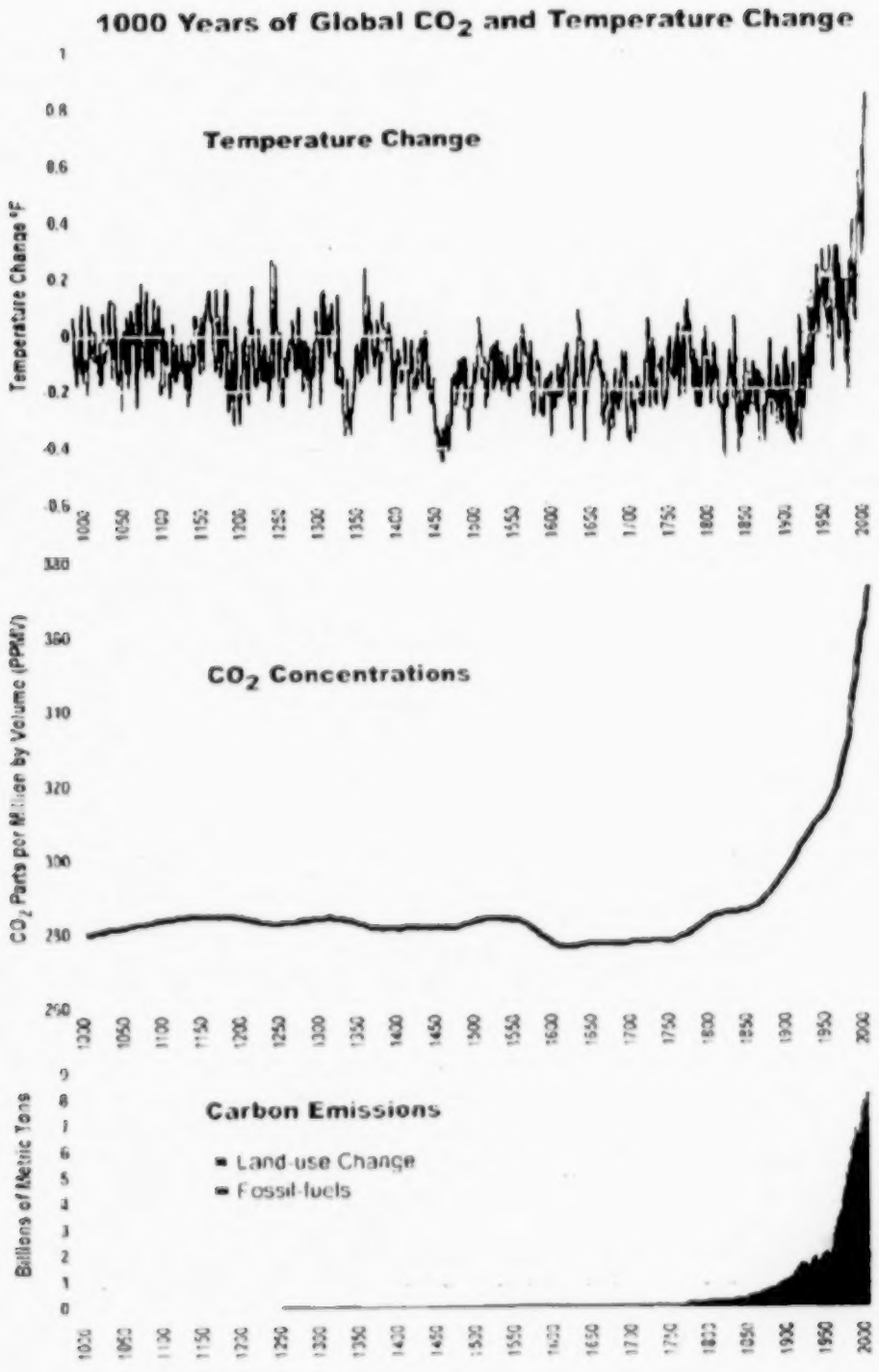

1000 Years of Global CO_2 and Temperature Change
Temperature Change
Temperature Change °F
CO_2 Concentrations
CO_2 Parts per Million by Volume (PPMV)
Carbon Emissions
Billions of Metric Tons
Land-use Change
Fossil-fuels

EXHIBIT 2

Post and future CO_2 atmospheric concentrations

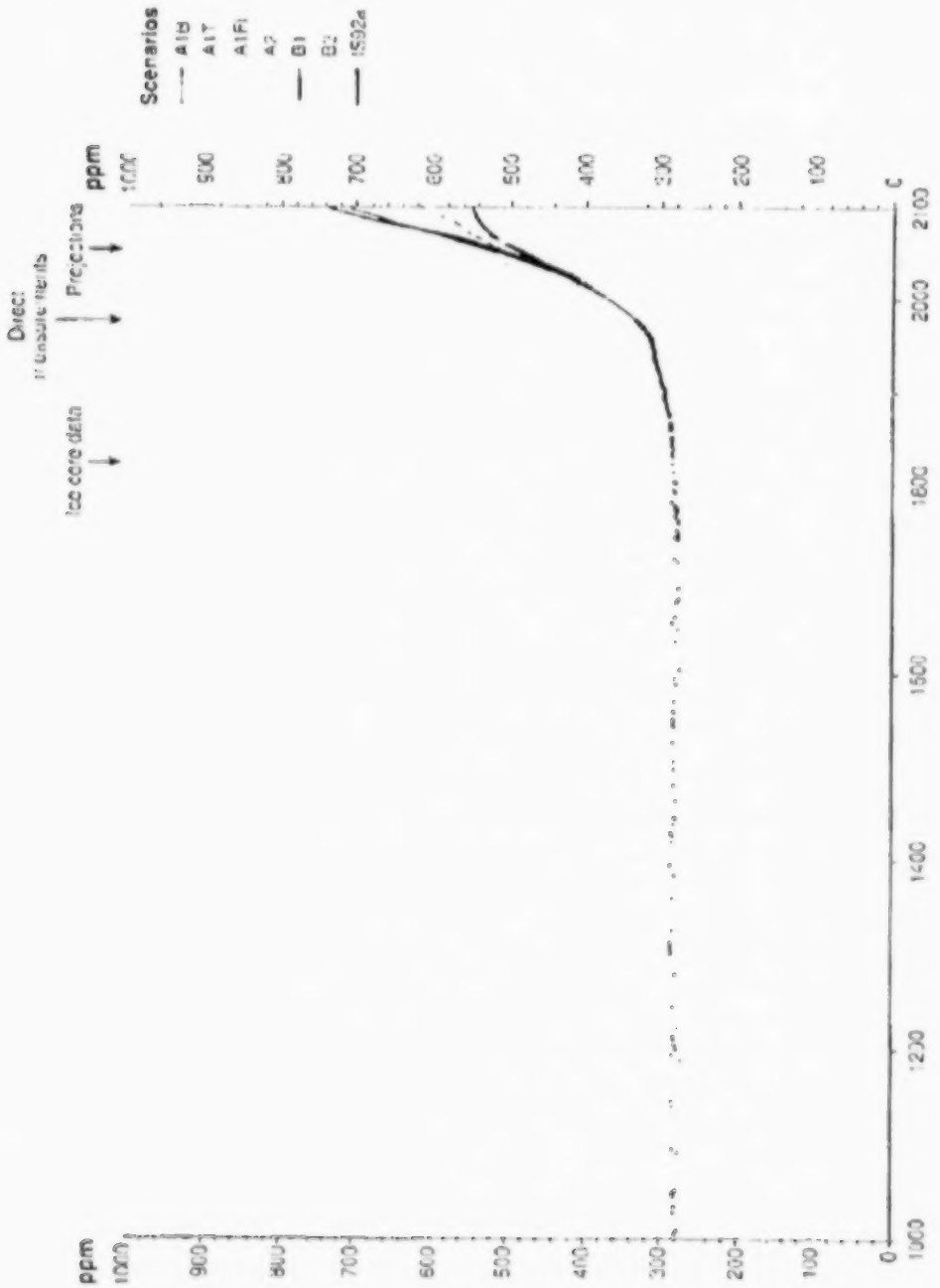
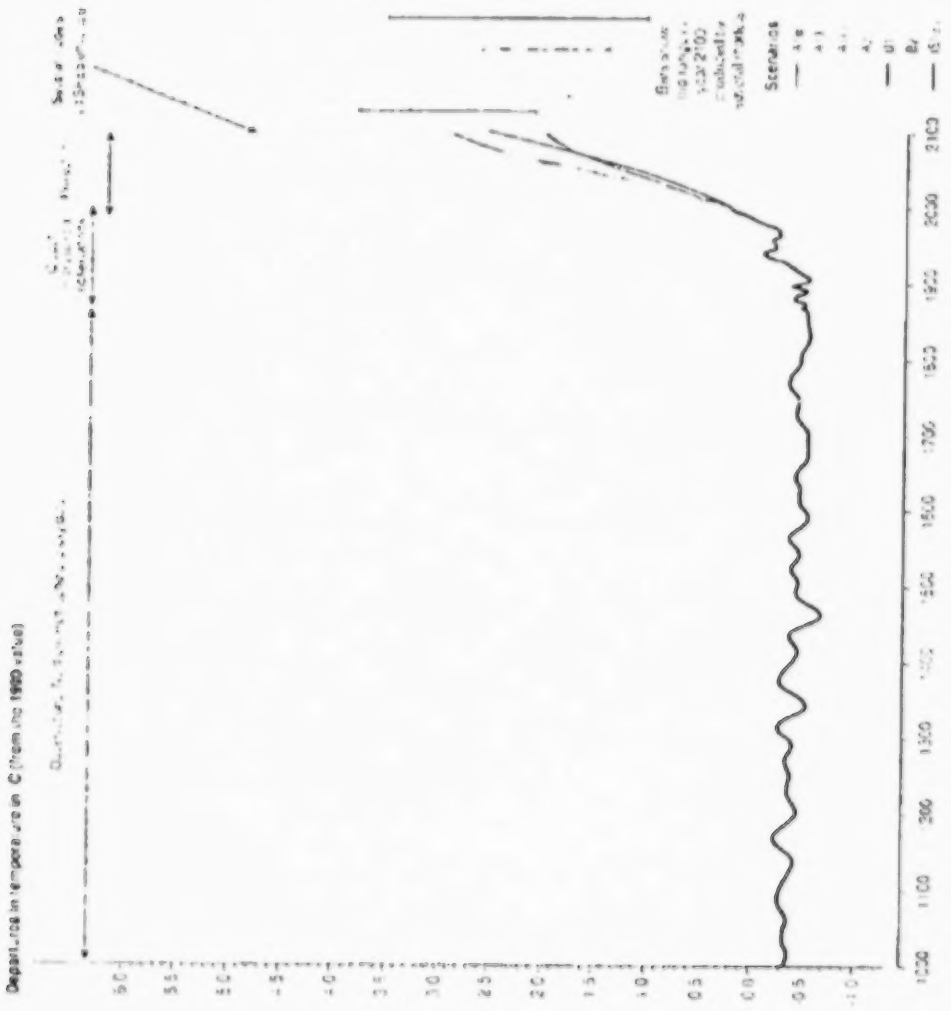


EXHIBIT 3

Variations of the Earth's surface temperature: years 1000 to 2100



IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

[Filed 07/21/04]

No. 04-CV-05670 (LP)
ECF CASE

OPEN SPACE INSTITUTE, INC.;
OPEN SPACE CONSERVANCY, INC.;
AUDUBON SOCIETY OF NEW HAMPSHIRE,
Plaintiffs,

v.

AMERICAN ELECTRIC POWER COMPANY, INC.;
AMERICAN ELECTRIC POWER SERVICE
CORPORATION; THE SOUTHERN COMPANY;
TENNESSEE VALLEY AUTHORITY;
XCEL ENERGY, INC.; CINERGY CORPORATION,
Defendants.

COMPLAINT

NATURE OF THE ACTION

1. Plaintiffs Open Space Institute, Inc. ("OSI"), Open Space Conservancy, Inc. ("OSC"), and Audubon Society of New Hampshire ("NH Audubon") bring this action against Defendant electric power companies under federal common law and state law to abate Defendants' ongoing contributions to global warming.

2. Scientists have concluded that global warming has begun, is altering the natural world, and will accelerate dramatically in the 21st century unless carbon dioxide emissions are reduced. The key contributor to the current global warming is the

emission of greenhouse gases, primarily carbon dioxide from fossil fuel combustion. Greenhouse gases trap heat that otherwise would escape from the atmosphere.

3. By their annual emissions of approximately 650 million tons of carbon dioxide, Defendants are substantial contributors to global warming. They are the five largest emitters of carbon dioxide in the United States, and are among the largest such emitters in the world. Collectively, Defendants' emissions constitute approximately one quarter of the United States electric power sector's carbon dioxide emissions, and approximately ten percent of all carbon dioxide emissions from human activities in the United States.

4. Global warming constitutes a grave public nuisance, interfering unreasonably and substantially with public rights, including, *inter alia*, the rights to use, enjoy, and preserve the aesthetic and ecological values of the natural world.

5. Plaintiffs are nonprofit land trusts that acquire and maintain ecologically significant and sensitive properties for scientific and educational purposes, and for human use and enjoyment. They own nature sanctuaries, outdoor research laboratories, wildlife preserves, recreation areas, and open space.

6. If carbon dioxide emissions continue unrestrained, global warming will accelerate, damaging the ecologically significant and sensitive properties Plaintiffs own.

7. Specifically, global warming will cause the inundation of low-lying land, destroy hardwood trees, and diminish biodiversity on Plaintiffs' properties. Plaintiffs acquired and maintain their properties in order to preserve the very ecological values that global warming will diminish or destroy.

8. The injuries to Plaintiffs' properties will increase with the rate and magnitude of global warming. In turn, the rate and magnitude of global warming depend on the level of anthropogenic greenhouse gas emissions, primarily carbon dioxide emissions. Reducing Defendants' carbon dioxide emissions will reduce the injuries and threatened injuries to Plaintiffs' properties from global warming.

9. Defendants have available to them practical and economically viable options for reducing their carbon dioxide emissions without significantly increasing the cost of electricity to their customers. Such options include using alternative fuels; improving generation efficiency; increasing generation from zero- or low-carbon energy sources such as wind, solar, and gasified coal with emissions capture; co-firing wood or other biomass in coal plants; employing demand-side management techniques; altering the dispatch order of their plants; and other measures.

10. Plaintiffs seek judicial relief under the federal common law of public nuisance or, alternatively, under state private and public nuisance law. Specifically, Plaintiffs seek an order (i) holding each Defendant jointly and severally liable for contributing to the ongoing public nuisance of global warming, and (ii) directing each Defendant to cap its emissions of carbon dioxide and then reduce them by a specified percentage each year for at least a decade.

PARTIES

Plaintiffs

11. Plaintiff OSI is a not-for-profit corporation organized under the laws of the State of New York. OSI was formed to help protect the natural environment by, among other means, preserving open space

and open land for recreation, conservation, and resource and wildlife protection. OSI holds and manages interests in real property in order to preserve and enhance those properties' natural and ecological values. It also assists community organizations that promote environmental protection, including control of harmful air emissions. The global warming to which Defendants' carbon dioxide emissions contribute threatens OSI's core mission and real property.

12. Plaintiff OSC is a not-for-profit corporation organized under the laws of the State of New York. OSC is organized and operated for the exclusive benefit of, and to carry out the purposes of, OSI. OSC holds and manages lands, and conservation easements on lands, in order to preserve and enhance those lands' natural and ecological values. OSC has an inventory of land and conservation easements with a book value of approximately $56 million. The global warming to which Defendants' carbon dioxide emissions contribute threatens OSC's core mission and real property.

13. Plaintiff NH Audubon is a nonprofit corporation organized under the laws of the State of New Hampshire. NH Audubon's mission is to protect New Hampshire's natural environment for wildlife and people. It owns and preserves more than 6,000 acres of sensitive land throughout the state as nature sanctuaries, on which it provides educational programs for children and adults. NH Audubon conducts biodiversity research, monitors endangered species, and advocates sound public policy on environmental issues. The global warming to which Defendants' carbon dioxide emissions contribute threatens NH Audubon's core mission and real property.

Defendants

14. Defendant American Electric Power Company, Inc. ("AEP") is a New York corporation, with its principal place of business located in Columbus, Ohio. AEP is a registered public utility holding company that owns all outstanding common stock of its domestic electric utility subsidiaries, as well as all outstanding common stock of Defendant American Electric Power Service Corporation ("AEP Service"). Its electric power generating facilities are located in Arkansas, Indiana, Kentucky, Louisiana, Michigan, Ohio, Oklahoma, Tennessee, Texas, Virginia, and West Virginia.

15. Defendant AEP Service is a New York corporation, with its principal place of business in Columbus, Ohio. AEP Service is a wholly owned subsidiary of AEP. On information and belief, on behalf of AEP, AEP Service provides management and professional services, including accounting, administrative, information systems, environmental, engineering, financial, legal, maintenance, and other services to, among others, the electric utility subsidiaries of AEP.

16. Defendants AEP and AEP Service, through their employees and/or agents, manage, direct, and/or conduct operations relating to the emission of carbon dioxide from fossil fuel-fired electric generating facilities owned and/or operated by AEP's subsidiaries. AEP and AEP Service exercise this control through a variety of means, including through their employees' and/or agents' implementation of policies, procedures, and programs relating to global warming generally, to carbon dioxide emissions specifically, to the dispatch of electricity from plants with varying carbon dioxide emissions per unit of energy, and/or to the fuels utilized at each plant. As a result of such

control, AEP and AEP Service are responsible for emitting approximately 220 million tons of carbon dioxide annually.

17. Such control is evidenced by, for example, various pledges and agreements AEP has made to exercise control over carbon dioxide emissions from the facilities its subsidiaries own or operate, including its participation in the Chicago Climate Exchange; AEP's submission of annual reports to the United States Department of Energy ("DOE") reporting the amount of carbon dioxide emissions avoided or sequestered from facilities owned and/or operated by its subsidiaries; and AEP's agreement in February, 2004 to analyze its ability to comply with proposed national regulation of carbon dioxide emissions that would require reductions in such emissions from plants owned and/or operated by its subsidiaries.

18. Defendant The Southern Company ("Southern") is a Delaware corporation, with its principal place of business located in Atlanta, Georgia. Southern is a registered public utility company that owns all outstanding common stock of its five major power generating subsidiaries, Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Savannah Electric and Power Company, with facilities located in Alabama, Florida, Georgia, and Mississippi.

19. Through its employees and/or agents, Defendant Southern manages, directs, and/or conducts operations relating to the emission of carbon dioxide at fossil fuel-fired electric generating facilities owned and/or operated by its subsidiaries. Southern exercises this control through a variety of means, including through its employees' and/or agents' implementation of policies, procedures, and programs relating to

global warming generally, to carbon dioxide emissions specifically, to the dispatch of electricity from plants with varying carbon dioxide emissions per unit of energy, and/or to the fuels utilized at each plant. As a result of such control, Southern is responsible for the emission of approximately 171 million tons of carbon dioxide annually.

20. Such control is evidenced by, for example, Southern's agreement in April, 2004 to analyze the financial impact of proposed emission reduction scenarios, including how Southern would respond to new regulations aimed at mitigating global warming; Southern's submission of annual reports to DOE reporting the amount of carbon dioxide emissions avoided or sequestered from facilities owned and/or operated by its subsidiaries; Southern's admission in its 2003 Environmental Progress Report that because it generates nearly 70 percent of its electricity from coal, it releases large amounts of carbon dioxide, which it recognized as "a greenhouse gas"; and Southern's admission in the same report that "there are concerns" about its emissions of carbon dioxide because of the impact those emissions may be having on global climate.

21. Defendant Tennessee Valley Authority ("TVA") is a federal corporation, with its principal place of business located in Knoxville, Tennessee.

22. Defendant TVA directly owns and operates fossil fuel-fired electric generating power plant facilities located in Alabama, Kentucky, Mississippi, and Tennessee, which, together, emit approximately 110 million tons of carbon dioxide annually.

23. Defendant Xcel Energy, Inc. ("Xcel") is a Minnesota corporation, with its principal place of

business located in Minneapolis, Minnesota. Xcel is a registered public utility holding company that owns all outstanding common stock of four major power-generating subsidiaries, Northern States Power Co. (Wisconsin), Northern States Power Co. (Minnesota), Public Service Company of Colorado, and Southwestern Public Service Co., with facilities located in Colorado, Minnesota, New Mexico, South Dakota, Texas, and Wisconsin.

24. Defendant Xcel, through its employees and/or agents, manages, directs, and/or conducts operations relating to the emission of carbon dioxide at fossil fuel-fired electric generating facilities owned and/or operated by its subsidiaries. Xcel exercises this control through a variety of means, including through its employees' and/or agents' implementation of policies, procedures, and programs relating to global warming generally, to carbon dioxide emissions specifically, to the dispatch of electricity from plants with varying carbon dioxide emissions per unit of energy, and/or to the fuels utilized at each plant. As a result of such control, Xcel is responsible for the emission of approximately 75 million tons of carbon dioxide annually.

25. Such control is evidenced by, for example, various pledges Xcel has made to exercise control over carbon dioxide emissions from the facilities its subsidiaries own or operate; Xcel's role as a charter member and participant in DOE's Climate Challenge program since 1993; and Xcel's submission of annual reports to DOE reporting the amount of carbon dioxide emissions avoided or sequestered from facilities owned and/or operated by its subsidiaries.

26. Defendant Cinergy Corporation ("Cinergy") is a Delaware corporation, with its principal place of

business located in Cincinnati, Ohio. Cinergy is a registered public utility holding company that owns all outstanding common stock of two major power generation subsidiaries, The Cincinnati Gas & Electric Company and PSI Energy, Inc., with facilities located in Indiana, Kentucky, and Ohio.

27. Defendant Cinergy, through its employees and/or agents, manages, directs, and/or conducts operations relating to the emission of carbon dioxide at fossil fuel-fired electric generating facilities owned and/or operated by its subsidiaries. Cinergy exercises this control through a variety of means, including through its employees' and/or agents' implementation of policies, procedures, and programs relating to global warming generally, to carbon dioxide emissions specifically, to the dispatch of electricity from plants with varying carbon dioxide emissions per unit of energy, and/or to the fuels utilized at each plant. As a result of such control, Cinergy is responsible for the emission of approximately 70 million tons of carbon dioxide annually.

28. Such control is evidenced by, for example, various pledges and agreements Cinergy has made to exercise control over carbon dioxide emissions from the facilities its subsidiaries own or operate; Cinergy's recent admission of the need to mitigate some of the risk associated with global warming; Cinergy's submission of annual reports to DOE reporting the amount of carbon dioxide emissions avoided or sequestered from facilities owned and/or operated by its subsidiaries; and its agreement in February, 2004 to analyze financial impacts to Cinergy from potential legal limits on carbon dioxide emissions.

JURISDICTION AND VENUE

Subject Matter Jurisdiction

29. Subject matter jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331, because Plaintiffs assert a claim against all Defendants under federal common law. Subject matter jurisdiction over Plaintiffs' claims against TVA is also proper in this Court pursuant to 28 U.S.C. §§ 1331 and 1337, because TVA is a corporation created by a federal statute regulating commerce.

30. Subject matter jurisdiction over Plaintiffs' state law claims against all Defendants is proper pursuant to 28 U.S.C. § 1367. Subject matter jurisdiction over Plaintiffs' state law claims against Defendant TVA is also proper pursuant to 28 U.S.C. §§ 1331 and 1337.

Venue

31. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(1), because all Defendants "reside" in this judicial district as that term is defined in 28 U.S.C. § 1391(c) and other law. Venue is also proper under 28 U.S.C. § 1391(b)(2), because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this judicial district, and/or a substantial part of the property that is the subject of the action is situated in this judicial district. In the alternative, venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(3), because there is no district in which the action may otherwise be brought and at least one Defendant may be found in this judicial district.

Personal Jurisdiction

32. All Defendants engage in tortious conduct outside the State of New York, *i.e.*, the emission of

massive quantities of carbon dioxide, causing injury to persons and property within the State of New York.

33. All Defendants expect or should reasonably expect that their emissions increase the global atmospheric concentration of carbon dioxide and thereby contribute to global warming; interfere with the exercise of public rights, including, *inter alia*, the rights to use, enjoy, and preserve the aesthetic and ecological values of the natural world; and damage or destroy those very aesthetic and ecological values on Plaintiffs' properties, including properties located within the jurisdiction of the Southern District of New York.

34. Some or all of each Defendant's electric generating facilities supply electricity to the Eastern Interconnection, an interstate power grid that includes New York State and is one of two major power grids interconnecting the entire continental United States, excluding Texas. Power flowing onto the interstate grid from any location energizes the entire grid and becomes part of a vast pool of energy that constantly moves in interstate commerce.

35. All Defendants derive substantial revenue from interstate commerce; each individual Defendant has reported 2003 annual revenues ranging from $1.1 billion to $14.5 billion.

36. Directly and/or through their agents and subsidiaries, all Defendants conduct business in and have substantial additional contacts with New York State, as set forth below.

AEP and AEP Service

37. Defendants AEP and AEP Service are New York State corporations that have designated the

Secretary of State of the State of New York as their agent for service of process. Also, AEP Service, as agent for AEP, has contracted to sell power directly or indirectly to New York entities.

Southern

38. Among other things:

(a) Southern owns all of the outstanding common stock of Southern Company Services ("SCS"), a corporation that is registered to do business in the State of New York and, on information and belief, routinely acts as the agent for Southern in New York, rendering services that go beyond mere solicitation and are sufficiently important to Southern that Southern itself would perform equivalent services if no agent were available. SCS is, in effect, a mere department of Southern. For example: (i) SCS, on behalf of Southern, has contracted to sell power directly to New York entities and/or consumers; (ii) SCS provides general and design engineering, purchasing, accounting, statistical analysis, financial, tax, information resources, marketing, auditing, insurance, pension administration, human resources, systems and procedures, and various other services relating to business, operations, and power pool transactions to Southern and, on Southern's behalf, to Southern's operating subsidiaries; (iii) SCS acts as a central dispatcher of power for Southern and, on Southern's behalf, for Southern's operating subsidiaries; (iv) SCS coordinates power allocation on behalf of Southern to provide to the operating companies on a continuous basis the power requirements of their respective service areas; (v) SCS represents the interests of Southern and, on behalf of Southern, of Southern's operating subsidiaries before various agencies, boards, commissions, and courts, including

the Federal Energy Regulatory Commission ("FERC"), the North American Energy Standards Board, and the United States Bankruptcy Court for the Southern District of New York; (vi) SCS and Southern share the same business address; (vii) certain individuals have been officers of both SCS and Southern; and (viii) SCS is financially dependent on Southern, by virtue of Southern's guarantees of various SCS notes, leases, and surety bonds;

(b) From 1993 until 2000, Southern owned all the outstanding stock, and until 2001, 80% of the stock, of Mirant Corporation ("Mirant") (formerly Southern Energy, Inc.), which, in turn, since 1999, has owned and operated, through Mirant Americas Energy Marketing, L.P. (formerly Southern Company Energy Marketing, L.P.) ("Mirant Americas"), eight electric generating facilities located in New York State. Mirant Americas is registered to do business in New York. On information and belief, from 1999 to 2001, Mirant and Mirant Americas owned and/or operated those facilities as agents or mere departments of Southern. Moreover, as part of Southern's 2001 spin-off of its Mirant subsidiary to the holders of Southern's common stock, Southern agreed to continue providing financial, accounting, engineering, and other services to Mirant;

(c) From 1999 to 2001, a representative of Southern participated in regular meetings of the System Operations Advisory Committee of the New York Independent System Operator ("NYISO"), which were held in New York;

(d) Southern is a member of the Clean Air Markets Group ("CAMG"). CAMG acts as an agent in New York State for its members, which are electric power corporations, and, among other things, has

litigated and challenged laws regulating air emissions in New York State on behalf of its members;

(e) Southern has retained a New York advertising agency, and has run television advertisements in New York State to establish its brand-name image; and

(f) On information and belief, Southern does business in New York through the participation of its officers and employees in industry meetings and seminars held in New York.

TVA

39. Among other things:

(a) TVA has contracted to buy power from New York entities;

(b) TVA holds its annual financial analyst and investor meetings in New York City, and sends its officers and employees to participate in industry meetings and seminars in New York; and

(c) TVA regularly retains the services of New York-based investment banks to underwrite bond offerings on the New York Stock Exchange.

Xcel

40. Among other things:

(a) Xcel's wholly owned subsidiary Northern States Power Company ("Northern States"), on information and belief, routinely acts as the agent for Xcel in New York, rendering services that go beyond mere solicitation and are sufficiently important to Xcel that Xcel itself would perform equivalent services if no agent were available, and acts, in effect, as a mere department of Xcel. For example, Northern States is listed on the June 3, 2004 list compiled by the NYISO of companies authorized to buy and sell electric

power in New York State, and acts as Xcel's agent in New York for purposes of buying and/or selling electricity;

(b) Xcel's former subsidiary NRG Energy, Inc. ("NRG") owned and operated, through its operating subsidiaries, electric generating facilities in New York State as an agent or mere department of Xcel. NRG rendered services in New York on behalf of Xcel that went beyond mere solicitation and were sufficiently important to Xcel that Xcel itself would have performed equivalent services if no agent had been available. In 2002, Xcel provided approximately $500 million to NRG in an effort to stave off NRG's bankruptcy. NRG later filed for Chapter 11 bankruptcy and, pursuant to a court-approved reorganization plan, Xcel paid approximately $752 million to NRG's creditors;

(c) Xcel buys natural gas on the New York Mercantile Exchange ("NYMEX") in New York City; and

(d) On information and belief, Xcel transacts business in New York through the participation of its officers and employees in industry meetings and seminars held in New York.

Cinergy

41. Among other things:

(a) Cinergy owns Cinergy Services, Inc. ("CSI"), a corporation registered to do business in the State of New York, which, on information and belief, renders services in New York on behalf of Cinergy that go beyond mere solicitation and are sufficiently important to Cinergy that Cinergy itself would perform equivalent services if no agent were available. CSI is, in effect, a mere department of Cinergy. For example:

(i) CSI provides various services including centralized dispatch of energy from Cinergy's operating subsidiaries, coordination of power purchases and sales, central planning for new generation, coordinated compliance with environmental regulations, and coordinated transmission services and planning; (ii) CSI represents the interests of Cinergy and Cinergy's operating subsidiaries before Congress, the Securities and Exchange Commission, FERC, the United States Bankruptcy Court for the Southern District of New York, and other governmental bodies; (iii) CSI is listed on the June 3, 2004 list compiled by the NYISO of companies authorized to buy and sell electric power in New York State, and has participated in the NYISO's Management and Business committees; (iv) CSI acts as Cinergy's agent in New York for purposes of buying and/or selling electricity, and for other business transaction purposes; (v) CSI and Cinergy share the same business address; (vi) Cinergy's Chairman and Chief Executive Officer is also CSI's Chairman and Chief Executive Officer; (vii) on information and belief, CSI is financially dependent on Cinergy;

(b) Cinergy owns Cinergy Capital and Trading, Inc. ("CCTI"), a corporation registered to do business in the State of New York, which: (i) is listed on the June 3, 2004 list compiled by the NYISO of companies authorized to buy and sell electric power in New York State, and has participated in the NYISO's Management and Business committees; and (ii) on information and belief, acts as Cinergy's agent in New York for the purpose of buying and/or selling electricity, and for other business transaction purposes; and

(c) Cinergy trades electricity futures on the NYMEX in New York City through its agents and subsidiaries, Cinergy Marketing & Trading, L.P., and The Cincinnati Gas & Electric Company.

All Defendants

42. Defendants AEP, AEP Service, Southern, Xcel, and Cinergy are members of, and play a significant role in, the Edison Electric Institute ("EEI"), an electric power industry trade association. The current chairman of EEI is the Chairman and CEO of Xcel; the current first vice-chairman is the president and CEO of AEP; the current second vice-chairman is the president and CEO of Cinergy; the immediate past chairman is the president and CEO of Southern; and the immediate past first vice-chairman is the president and CEO of Xcel.

43. EEI acts as agent for AEP, AEP Service, Southern, Xcel, Cinergy, and its other members on issues relating to global warming and, in this capacity, does business in New York State on their behalf. EEI also acts as an agent for its members and for TVA in a joint government-industry program relating to global warming and the carbon dioxide emissions from EEI members and TVA. Senior EEI officials have addressed meetings of the New York Society of Security Analysts in New York City, in 1998 and 2003, on the topic of global warming, its members' greenhouse gas emissions, and the members' acknowledged need to move "toward eventually reversing the growth in greenhouse emissions." On information and belief, the purposes of these presentations were to inform investors in New York's capital markets about the financial impact on EEI member companies of potential actions to control carbon dioxide emissions. EEI has also launched a

print advertising campaign in The New York Times and other publications to assure its investors regarding the financial strength of its member companies.

FACTS

Greenhouse Gas Emissions

44. There is a clear scientific consensus that global warming has begun, and that most of the current global warming is caused by emissions of greenhouse gases, primarily carbon dioxide from fossil fuel combustion. This consensus has been expressed in official reports from United States and international scientific bodies.

45. For example, the Intergovernmental Panel on Climate Change ("IPCC") concluded in its most recent assessment report, issued in 2001, that "most of the observed warming over the last 50 years is likely to have been due to the increase in greenhouse gas concentrations." In IPCC parlance, "likely" is a term of art denoting a confidence level of 66-90 percent. The IPCC is a collaborative scientific effort among the nations of the world to assess the scientific and technical information relevant to global warming, and provides advice on global warming to all 170 nations, including the United States, that are parties to the United Nations Framework Convention on Climate Change. The IPCC 2001 report is the standard scientific reference on global warming.

46. In 2001, the United States National Academy of Sciences issued a report on global warming, which stated that the "IPCC's conclusion that most of the observed warming of the last 50 years is likely to have been due to the increase in greenhouse gas

concentrations accurately reflects the current thinking of the scientific community on this issue."

47. In 2003, the American Geophysical Union stated that "[s]cientific evidence strongly indicates that natural influences cannot explain the rapid increase in global near-surface temperatures observed during the second half of the 20th century."

Significance of Carbon Dioxide

48. Energy from the sun heats the Earth, which re-radiates the energy into the Earth's atmosphere. Carbon dioxide and other greenhouse gases trap heat in the Earth's atmosphere that would otherwise escape into space.

49. Carbon dioxide is by far the most significant greenhouse gas emitted by human activity. In terms of its heat-trapping ability, carbon dioxide from the combustion of fossil fuels accounts for more than 80 percent of all anthropogenic greenhouse gas emissions in the United States.

50. Carbon dioxide emissions persist in the atmosphere for several centuries, and thus have a lasting effect on climate. Atmospheric concentrations of carbon dioxide continue to increase as each year's emissions are added to those that came before. Carbon dioxide levels in the atmosphere have increased by 34 percent since the dawn of the industrial revolution in the 18th century, and more than one-third of the increase has occurred since 1980. As the IPCC has stated, the current level of carbon dioxide in the atmosphere is higher than at any time in the last 420,000 years, and is likely higher than at any time in the last 20 million years.

51. The combustion of fossil fuels adds large quantities of carbon (in the form of carbon dioxide) to the atmosphere that otherwise would have remained sequestered deep in the Earth. Processes on land and in the oceans that remove carbon dioxide from the atmosphere are unable to keep pace with these emissions. As a result, the natural carbon cycle is out of balance and carbon dioxide levels in the atmosphere are increasing every year.

52. As the planet warms, the oceans become less efficient at removing carbon dioxide from the atmosphere. Similarly, the planet reflects less energy from the sun back into space when, as a result of global warming, white, snowy, or icy areas are transformed into darker areas that absorb more solar heat.

Defendants' Carbon Dioxide Emissions

53. Electric power plants that burn fossil fuels are the largest source of carbon dioxide emissions in the United States. Such plants emit approximately 2.6 billion tons of carbon dioxide each year. These emissions constitute approximately 40 percent of all carbon dioxide emitted by human activities in the United States, and approximately ten percent of worldwide anthropogenic carbon dioxide emissions.

54. Carbon dioxide emissions from the United States' domestic electric power sector increased by more than 24 percent from 1990 to 2001, compared to a 16 percent increase from the economy as a whole. As DOE projects, carbon dioxide emissions from the electric power sector will increase by an additional 41 percent by the year 2025 if effective action is not taken to restrain such emissions. This rate of increase would raise the electric power sector's

annual emissions to approximately 3.5 billion tons, and is significantly higher than the projected growth rate of carbon dioxide emissions from the economy as a whole over the same period.

55. Together, Defendants and their operating subsidiaries emit approximately 650 million tons of carbon dioxide each year from the combustion of fossil fuels in plants they own and/or operate. They are the five largest emitters of carbon dioxide in the United States. Defendants' emissions alone constitute approximately one-quarter of the United States electric power sector's carbon dioxide emissions, and ten percent of all anthropogenic carbon dioxide emissions in the United States.

56. Defendants and their predecessors in interest have emitted large amounts of carbon dioxide from the combustion of fossil fuels for at least many decades. Because the planet's natural systems take hundreds of years to absorb excess carbon dioxide emissions, Defendants' past and present emissions will remain in the atmosphere for many decades, or even centuries.

Current and Projected Global Warming Impacts

57. Empirical evidence underlies the scientific consensus that global warming has arrived. Globally, the 1990s was the hottest decade, and 1998, 2002, and 2003 were the hottest years, since thermometer records were first kept in 1861.

58. As the IPCC has noted, global warming already is causing the retreat of mountain glaciers throughout the world. It is thawing permafrost and causing a later freezing and earlier break-up of ice on rivers and lakes. Global warming has resulted in poleward and altitudinal shifts of plant and animal

ranges, and the decline of animal and plant populations in many locations throughout the world. It is largely responsible for the melting of the Arctic sea ice. This ice, as measured in the summer months, has shrunk by 386,000 square miles over the last 20 years and, if greenhouse emissions are not curtailed, scientists believe it will no longer exist in the summer months later this century.

59. Glacier National Park already has lost two-thirds of the more than 150 glaciers it had in the 19th century. At the current rate of global warming, it will have no glaciers at all in approximately 30 years.

60. Increased ocean water temperature due to global warming already has begun to cause severe damage to the world's coral reefs.

61. In the absence of restrictions on carbon dioxide emissions, global warming will continue to accelerate. As the IPCC has stated, global average surface air temperature is projected to warm 2.5 to 10.4 degrees Fahrenheit from 1990 levels by 2100, depending on the level of greenhouse gas emissions and the response of the planet to the increasing buildup of such gases.

62. According to the IPCC, the projected rate of global warming for the 21st century "is much larger than the observed changes during the 20th century and is very likely to be without precedent during at least the last 10,000 years . . . ."

63. An increase in the planet's average temperature in the projected range of 2.5 to 10.4 degrees Fahrenheit will constitute an extraordinary shift in world climate, with severe consequences for public health and the environment. These consequences will include increases in heat deaths, ground-level smog,

and respiratory diseases; disruption of water supplies; more frequent and severe floods and droughts; disruption of and permanent damage to forests and the ecosystems they support; and accelerated sea level rise, with consequent beach erosion, inundation of low-lying lands and ecologically productive salt marshes and tidal wetlands, and storm surges.

64. Further, the Earth's climate can undergo an abrupt and dramatic change when a radiative forcing agent, such as carbon dioxide, causes the climate system to reach a tipping point. Defendants' unrestrained emissions of carbon dioxide increase the risk of reaching that tipping point, triggering a sudden and potentially catastrophic change in climate. The rapidity of an abrupt climate shift, which can transpire in a period as short as ten years, would magnify all the adverse effects of global warming by shortening the time ecosystems will have to adapt to changing conditions.

65. The level and rate of global warming over the next several decades depends principally on the degree of greenhouse gas emissions, primarily carbon dioxide emissions from the combustion of fossil fuels. Reducing such emissions will prevent, diminish, or delay the harmful effects of global warming.

Special Injuries to Plaintiffs' Property Interests

66. While the global warming to which Defendants contribute injures the public at large, Plaintiffs suffer special injuries, different in degree and kind from injuries to the general public, as described below.

OSI/OSC Properties

67. To carry out their mission, OSI and OSC own real property within the State of New York. They acquire and maintain such properties to preserve

specific ecological and natural resources, to spur scientific research and education, and to provide access and enjoyment for the public. Tens of thousands of people visit these properties annually.

68. OSI and/or OSC hold interests in many properties whose special ecological value will be diminished or destroyed by the global warming to which Defendants' carbon dioxide emissions contribute. Among these real property interests are the following:

Dockside

69. OSC owns in fee simple 26 acres on the eastern bank of the tidal Hudson River, in the Village of Cold Spring, Town of Philipstown, Putnam County, New York. OSC purchased the property in 1999 for $1.3 million. Approximately 20 acres of the 26-acre property lie under the waters of the Hudson River. The remaining acreage is low-lying riverfront land.

Croton-on-Hudson

70. OSC owns a conservation easement on approximately 17 acres of land along the tidal Hudson River, abutting the estuary of Haverstraw Bay, in the Village of Croton-on-Hudson, Westchester County, New York. OSC originally acquired this property in fee simple for $1.2 million in 1996. OSC conveyed the property to the Village of Croton-on-Hudson in 2003, but retained a perpetual conservation easement that restricts development. The Village now manages the property as a public park, and OSC monitors the property on a yearly basis to ensure compliance with the easement.

Sam's Point Preserve

71. OSC owns the 4,700-acre Sam's Point Preserve, located in the Towns of Wawarsing and Shawangunk,

Ulster County, New York, which it acquired in November 1997 for approximately $4.8 million. This property contains the only extensive dwarf pitch pine barrens located on bedrock in the world, as well as extensive stands of upland hardwood trees, including birch and maple.

Glynwood Farm

72. OSC owns approximately 260 acres of land in the Hudson Highlands, in the Town of Philipstown, Putnam County, New York, that it acquired for approximately $1.6 million in 1995. The property contains extensive hardwood forests, including birch and maple. It is currently leased to The Glynwood Center, a tax-exempt charity, which operates an environmental education program on the property.

Last Chance Ranch

73. In December 1993, OSI acquired a conservation easement encumbering approximately 1,400 acres of largely undeveloped real property in the Town of North Elba, Essex County, New York, known as Last Chance Ranch. The property, which is located in the Adirondack Mountains, contains extensive hardwood forest, including birch, maple, and beech.

NH Audubon Properties

74. To carry out its mission, Plaintiff NH Audubon owns real property in the State of New Hampshire. Its primary purposes in acquiring and maintaining such property are to preserve habitat for wildlife and to provide places where people can connect with nature. All of its properties are open to the public, and many have hiking and snowshoeing trails to facilitate public use and enjoyment of the natural world.

75. NH Audubon holds interests in many properties whose special ecological value will be diminished or destroyed by the global warming to which Defendants' carbon dioxide emissions contribute. Among these real property interests are the following:

Bellamy River

76. In Dover, New Hampshire, along the Atlantic coast, NH Audubon owns 26 acres of land, on which a network of trails winds through mature hardwood forest to tidal creeks, marshes, and the Bellamy River. This low-lying land, which lies at the mouth of the tidal river at Bellamy Cove, is an integral part of the ecologically productive Great Bay estuary. The estuary provides breeding grounds for fishes and wintering habitat for bald eagles. The property sustains plant species that are imperiled in New Hampshire. In addition, the property contains numerous species of hardwood trees, including red oak, red maple, black birch, and shagbark hickory.

Brookside

77. NH Audubon owns 31 acres in the Town of Southampton, on the coast of the Atlantic Ocean, one mile north of the Massachusetts border. The property provides habitat for transition-zone breeding birds, and sustains rare wetland plants. The Brookside property also includes stands of hardwood trees such as maple, oak, birch, ash, and beech. It has hiking trails to facilitate public use and enjoyment.

Salt Marshes

78. NH Audubon owns 220 acres of salt marshes in Hampton, Hampton Falls, and Seabrook. These coastal wetlands are one of the rarest habitat types

in New Hampshire, and provide breeding grounds for salt water invertebrates and fish. They are also a feeding ground for migratory birds.

Chase Property

79. NH Audubon owns 660 acres of land in Hopkinton, New Hampshire. A network of trails on the property leads through mixed hardwood forest, marshes, and a large beaver pond. The property supports diverse wildlife, including a rare Black Gum tree sanctuary. Researchers have identified 230 species of plants on the property, as well as 32 bird species. The land includes a range of hardwood trees, including birch, beech, oak, elm, and maple.

Plaintiffs' Special Injuries

80. Unrestrained global warming will accelerate sea level rise via thermal expansion of seawater and the addition of freshwater by melting of glaciers and ice sheets. Accelerated sea level rise caused by global warming will continue for hundreds of years.

81. Sea level rise will raise the level of tidal rivers, including portions of the Hudson River and the Bellamy River. The Hudson River is tidal from Troy, New York, to its mouth 152 miles downstream at New York Harbor. The Bellamy River is tidal between Dover, New Hampshire, and its mouth.

82. Sea level rise caused by global warming will permanently inundate some low-lying property along coasts and tidal rivers, including property that Plaintiffs own or on which they hold conservation easements (collectively, "Plaintiffs' properties").

83. Surges from coastal storms will be superimposed on a higher sea level due to global warming, and thus cause flooding of a much greater area,

including portions of Plaintiffs' properties along coasts or tidal rivers.

84. Accelerated sea level rise from unrestrained global warming will salinize marshes on Plaintiffs' properties, destroying habitat for fish, migratory birds, and other wildlife that are essential to the purposes for which Plaintiffs acquired and maintain these properties.

85. Global warming will harm the hardwood forests that give the Northeast its fall colors. Several species of hardwood trees found on Plaintiffs' properties, including maples, birches, and beeches, will be unable to survive the temperature increases projected to occur as a consequence of unrestrained global warming.

86. Through smog formation, global warming will diminish or destroy the health of the forests that are central ecological features of Plaintiffs' properties. Ground-level smog intensifies with rising temperature, and interferes with the capacity of trees to produce and store food, making them more susceptible to disease, insects, other pollutants, and harsh weather.

87. Given the interconnected nature of ecosystems, the loss or decline of tree species on Plaintiffs' properties will cause the loss or decline of other species inhabiting the same properties, including birds, mammals, and insects that depend for their survival on specific tree species and on each other.

88. Global warming will diminish or destroy the particular ecological and aesthetic values that caused Plaintiffs to acquire, and cause them to maintain, the properties they hold in trust. Defendants' carbon dioxide emissions thus undermine Plaintiffs' special and essential objectives, by interfering with their

efforts to preserve ecologically significant and sensitive land for scientific and educational purposes, and for human use and enjoyment.

Reducing Carbon Dioxide Emissions Reduces All Injuries

89. Reducing carbon dioxide emissions is necessary to postpone, avert, or reduce the injuries described above. The principal factor in determining the rate and magnitude of future warming is the level of anthropogenic greenhouse gas emissions, primarily carbon dioxide emissions. The greater the emissions, the greater and faster the temperature change will be, with greater resulting injuries and threatened injuries to Plaintiffs. The lower the emissions, the smaller and slower the total temperature change will be, with lesser resulting injuries.

90. Reductions in Defendants' massive carbon dioxide emissions will reduce all injuries and risks of injuries to the public, and all special injuries to Plaintiffs, from global warming.

CLAIMS FOR RELIEF

Federal Common Law: Public Nuisance

91. Plaintiffs incorporate by reference paragraphs 1 through 90 above.

92. Defendants' emissions of carbon dioxide from the combustion of fossil fuels at electric generating facilities they own, operate, or otherwise control are causing or contributing to a public nuisance, *i.e.*, global warming.

93. Defendants' emissions of carbon dioxide, by contributing to global warming, constitute a substantial and unreasonable interference with public rights, including, *inter alia*, the rights to use, enjoy, and

preserve the aesthetic and ecological values of the natural world. In the exercise of those rights, Plaintiffs suffer special injuries from Defendants' contributions to global warming, in that global warming will diminish or destroy the ecological and aesthetic values that caused Plaintiffs to acquire, and cause them to maintain, their ecologically significant and sensitive lands.

94. Defendants' carbon dioxide emissions are a direct and proximate contributing cause of global warming and of the injuries and threatened injuries Plaintiffs suffer.

95. Defendants know or should know that their emissions of carbon dioxide contribute to global warming, to the general public injuries such warming will cause, and to Plaintiffs' special injuries. Intentionally or negligently, Defendants have created, contributed to, and/or maintained the public nuisance.

96. Defendants, both individually and collectively, are substantial contributors to global warming and to the injuries and threatened injuries Plaintiffs suffer.

97. Carbon dioxide emissions and the impacts of global warming are inherently interstate in character. Defendants' emissions of carbon dioxide outside New York and New Hampshire increase the global atmospheric concentration of carbon dioxide, causing or contributing to the global warming that injures and threatens to injure Plaintiffs in New York and New Hampshire.

98. Defendants could generate the same amount of electricity, while emitting significantly less carbon dioxide, by employing readily available methods, processes, and technologies.

99. Plaintiffs' injuries and threatened injuries from each Defendant's contributions to global warming are indivisible injuries.

100. Defendants' emissions of carbon dioxide, if unabated, will continue to contribute to global warming and therefore to Plaintiffs' injuries and threatened injuries.

101. Plaintiffs' injuries and threatened injuries from global warming are imminent.

102. Plaintiffs' injuries and threatened injuries from global warming are irreparable, and monetary damages are inadequate to remedy the injuries.

103. Defendants are jointly and severally liable to Plaintiffs under the federal common law of public nuisance.

State Law: Private and Public Nuisance

104. Plaintiffs incorporate by reference paragraphs 1 through 103 above.

105. In the alternative, if federal common law were not to apply, Defendants are liable to Plaintiffs under the statutory and/or common law of private and public nuisance of each of the states where they own, manage, direct, and/or operate fossil fuel-fired electric generating facilities.

106. Defendants' emissions of carbon dioxide, by contributing to global warming, constitute a substantial and unreasonable interference with public rights, including, *inter alia*, the rights to use, enjoy, and preserve the aesthetic and ecological values of the natural world. In the exercise of those rights, Plaintiffs suffer special injuries from Defendants' contributions to global warming, in that global warming will diminish or destroy the ecological and aesthetic

values that caused Plaintiffs to acquire, and cause them to maintain, their ecologically significant and sensitive lands.

107. *Plants located in Alabama.* Defendants Southern and TVA have engaged and continue to engage in intentional or negligent conduct that unreasonably causes hurt, inconvenience, or damage to Plaintiffs' properties, and/or unreasonably interferes with the public's right to physical comfort and enjoyment of property, and that causes hurt, inconvenience, or damage to others, and are therefore liable under the statutory and common law of private and public nuisance of the State of Alabama.

108. *Plants located in Arkansas.* Defendants AEP and AEP Service have engaged and continue to engage in intentional or negligent conduct that unreasonably interferes with the use and enjoyment of Plaintiffs' properties, and/or violates public rights held in common by the community as a whole, and are therefore liable under the common law of private and public nuisance of the State of Arkansas.

109. *Plants located in Colorado.* Defendant Xcel has engaged and continues to engage in intentional or negligent acts or omissions that unreasonably interfere with the use and enjoyment of Plaintiffs' properties, and/or work a substantial annoyance, inconvenience, or injury to the public, and is therefore liable under the common law of private and public nuisance of the State of Colorado.

110. *Plants located in Florida.* Defendant Southern has engaged and continues to engage in intentional or negligent acts or omissions that unreasonably interfere with or tend to obstruct, or render unsafe and insecure, Plaintiffs' use of their properties,

and/or that unreasonably annoy, injure, or endanger the comfort and repose of an entire community or a considerable number of persons, and is therefore liable under the common law of private and public nuisance of the State of Florida.

111. *Plants located in Georgia.* Defendant Southern has engaged and continues to engage in intentional or negligent conduct that unreasonably causes hurt, inconvenience, or damage to Plaintiffs' properties and/or to all persons who come within the sphere of its operations, and is therefore liable under the statutory and common law of private and public nuisance of the State of Georgia.

112. *Plants located in Indiana.* Defendants AEP, AEP Service, and Cinergy have engaged and continue to engage in intentional or negligent conduct that unreasonably interferes with the use and enjoyment of Plaintiffs' properties, and/or interferes with the public's comfortable enjoyment of life or property, and are therefore liable under the statutory and common law of private and public nuisance of the State of Indiana.

113. *Plants located in Kentucky.* Defendants AEP, AEP Service, TVA, and Cinergy have engaged and continue to engage in intentional or negligent conduct that unreasonably interferes with the use and enjoyment of Plaintiffs' properties, and/or creates a condition prejudicial to the comfort or property of the citizenry at large, and are therefore liable under the statutory and common law of private nuisance and the common law of public nuisance of the Commonwealth of Kentucky.

114. *Plants located in Louisiana.* Defendants AEP and AEP Service have engaged and continue to

engage in intentional or negligent conduct that unreasonably causes damage to and/or substantially interferes with the enjoyment of Plaintiffs' properties and/or the property of others, and are therefore liable under the civil law of private and public nuisance of the State of Louisiana.

115. *Plants located in Michigan.* Defendants AEP and AEP Service have engaged and continue to engage in intentional or negligent conduct that unreasonably interferes with the use and enjoyment of Plaintiffs' properties, and/or with rights held in common by the general public, and are therefore liable under the common law of private and public nuisance of the State of Michigan.

116. *Plants located in Minnesota.* Defendant Xcel has engaged and continues to engage in intentional or negligent conduct that unreasonably obstructs the free use of and specially injures Plaintiffs' properties, apart from any common injury, and/or, in a manner generally affecting the public, is unreasonable and indecent or offensive to the senses, or obstructs the free use of property, and is therefore liable under the statutory and common law of private and public nuisance of the State of Minnesota.

117. *Plants located in Mississippi.* Defendants Southern and TVA have engaged and continue to engage in intentional or negligent conduct that unreasonably interferes with the use and enjoyment of Plaintiffs' properties, and/or with rights common to the general public, and are therefore liable under the common law of private and public nuisance of the State of Mississippi.

118. *Plants located in New Mexico.* Defendant Xcel has engaged and continues to engage in intentional

or negligent conduct that unreasonably interferes with the use and enjoyment of Plaintiffs' lands, and/or with rights common to the general public, and is therefore liable under the common law of private and public nuisance of the State of New Mexico.

119. *Plants located in Ohio.* Defendants AEP, AEP Service, and Cinergy have engaged and continue to engage in intentional or negligent conduct that unreasonably interferes with the use and enjoyment of Plaintiffs' properties, and/or with rights common to the general public, and are therefore liable under the common law of private and public nuisance of the State of Ohio.

120. *Plants located in Oklahoma.* Defendants AEP and AEP Service have engaged and continue to engage in intentional or negligent conduct that unreasonably interferes with the use and enjoyment of Plaintiffs' properties, and/or unreasonably annoys, injures, or endangers the comfort and repose of an entire community or a considerable number of persons, and/or have caused, through failure to perform a duty, a condition that annoys, injures, or endangers the comfort and repose of others, and are therefore liable under the statutory and common law of private and public nuisance of the State of Oklahoma.

121. *Plants located in South Dakota.* Defendant Xcel has engaged and continues to engage in intentional or negligent acts or omissions that unreasonably interfere with the use and enjoyment of Plaintiffs' properties, and/or annoy, injure, or endanger the comfort and repose of an entire community or a considerable number of persons, and is therefore liable under the statutory and common law of private and public nuisance of the State of South Dakota.

122. *Plants located in Tennessee.* Defendants AEP, AEP Service, and TVA have engaged and continue to engage in intentional or negligent conduct that unreasonably annoys or disturbs the free use of Plaintiffs' properties; and/or obstructs the ordinary, reasonable, and/or comfortable use of Plaintiffs' properties; and/or unreasonably interferes with the public's use and enjoyment of public places or with other common public rights; and are therefore liable under the common law of private and public nuisance of the State of Tennessee.

123. *Plants located in Texas.* Defendants AEP, AEP Service, and Xcel have engaged and continue to engage in intentional or negligent conduct that unreasonably interferes with the use and enjoyment of Plaintiffs' properties, and/or with rights common to the general public, and are therefore liable under the common law of private and public nuisance of the State of Texas.

124. *Plants located in Virginia.* Defendants AEP and AEP Service have engaged and continue to engage in intentional or negligent conduct that unreasonably interferes with the use and enjoyment of Plaintiffs' properties, and/or injures an indefinite number of people by creating a condition that interferes with a public right, and are therefore liable under the common law of private and public nuisance of the Commonwealth of Virginia.

125. *Plants located in West Virginia.* Defendants AEP and AEP Service have engaged and continue to engage in intentional or negligent conduct that unreasonably interferes with the use and enjoyment of Plaintiffs' properties, and/or hurts or inconveniences an indefinite number of persons, and are

therefore liable under the common law of private and public nuisance of the State of West Virginia.

126. *Plants located in Wisconsin.* Defendant Xcel has engaged and continues to engage in intentional or negligent conduct that unreasonably interferes with the use and enjoyment of Plaintiffs' properties, and/or substantially or unduly interferes with the use of public places or with the activities of an entire community, and is therefore liable under the common law of private and public nuisance of the State of Wisconsin.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that judgment be entered against Defendants as follows:

A. Holding each Defendant jointly and severally liable for creating, contributing to, and/or maintaining a public nuisance, *i.e.*, global warming;

B. Permanently enjoining each Defendant to abate its contribution to the nuisance by requiring it to cap its emissions of carbon dioxide and then reduce them by a specified percentage each year for at least a decade; and

C. Granting such other relief as the Court deems just and proper.

Dated: July 21, 2004

Respectfully submitted,

/s/_____

Mitchell S. Bernard (MB 5823)
Nancy S. Marks (NM 3348)
Sean P. Baldwin (SB 9850)
Lawrence M. Levine (LL 2994)
Natural Resources Defense Council, Inc.
40 West 20th Street
New York, New York 10011
(212) 727-2700

Of counsel:
Matthew F. Pawa
Law Offices of Matthew F. Pawa, P.C.
1280 Centre Street, Suite 230
Newton Centre, MA 02459
(617) 641-9550

Christopher A. Amato (CA 8501)
79 North Pearl Street
Albany, New York 12207
(518) 694-3325

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Filed 09/19/05]

---

04 CIVIL 5669 (LAP)
04 CIVIL 5670 (LAP)

STATE OF CONNECTICUT, *et al.*,
Plaintiffs,

-against-

AMERICAN ELECTRIC POWER COMPANY, INC., *et al.*,
Defendants.

OPEN SPACE INSTITUTE, *et al.*,
Plaintiffs,

-against-

AMERICAN ELECTRIC POWER COMPANY, INC., *et al.*,
Defendants.

JUDGMENT

Defendants having moved to dismiss the complaints, and the matter having come before the Honorable Loretta A. Preska, United States District Judge, and the Court, on September 15, 2005, having rendered its Opinion and Order dismissing the complaints, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion and Order dated September 15, 2005, the complaints are dismissed; accordingly, these cases are closed and all pending motions denied as moot.

Dated: New York, New York
September 19, 2005

J. MICHAEL McMAHON
Clerk of Court

BY: [Illegible]
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed March 16, 2010]

Docket No. 05-5104-cv

STATE OF CONNECTICUT

v.

AMERICAN ELECTRIC POWER COMPANY, INC.

Docket No. 05-5119-cv

OPEN SPACE INSTITUTE, INC.

v.

AMERICAN ELECTRIC POWER COMPANY, INC.

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 16th day of March, two thousand and ten.

Before: Joseph M. McLaughlin
Peter W. Hall,
Circuit Judges.

IT IS HEREBY ORDERED that Appelles' motion to stay the mandate pending filing of a petition for writ of *certiorari* is GRANTED *nunc pro tunc.*

FOR THE COURT,

Catherine O'Hagan Wolfe,
Clerk

/s/ Catherine O'Hagan Wolfe

Judy Pisnanont,
Motions Staff Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed June 9, 2010]

Docket No. 05-5104-cv
05-5119-cv

OPEN SPACE INSTITUTE, INC., OPEN SPACE CONSERVANCY, INC., AND AUDUBON SOCIETY OF NEW HAMPSHIRE,
Plaintiffs-Appellants,

v.

AMERICAN ELECTRIC POWER COMPANY INC., AMERICAN ELECTRIC POWER SERVICE CORPORATION, SOUTHERN COMPANY, TENNESSEE VALLEY AUTHORITY, XCEL ENERGY, INC., AND CINERGY CORPORATION,
Defendants-Appellees.

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 9th day of June, two thousand ten.

Before: Peter W. Hall,
Circuit Judge.

IT IS HEREBY ORDERED that the motion by Appellee Tennessee Valley Authority and Appellee American Electric Power Service Corporation for an order extending the stay of the mandate, is GRANTED. Appellees are reminded to advise the

Clerk of Court when the Petition for Writ of Certiorari has been filed. *See* Fed. R. App. P. 41 (d)(2)(B).

FOR THE COURT,

Catherine O'Hagan Wolfe,
Clerk

/s/ Catherine O'Hagan Wolfe

Judy Pisnanont,
Motions Staff Attorney

PETITIONER'S BRIEF

No. 10-174

IN THE

Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY INC., *et al.*,
Petitioners,

v.

STATE OF CONNECTICUT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE PETITIONERS

F. WILLIAM BROWNELL
NORMAN W. FICHTHORN
ALLISON D. WOOD
HUNTON & WILLIAMS LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 955-1500

Counsel for Petitioner Southern Company

PETER D. KEISLER*
CARTER G. PHILLIPS
DAVID T. BUENTE JR.
ROGER R. MARTELLA JR.
QUIN M. SORENSON
JAMES W. COLEMAN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
pkeisler@sidley.com
(202) 736-8000

Counsel for Petitioners

* Counsel of Record
[Additional Counsel Listed On Inside Cover]

January 31, 2011

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

SHAWN PATRICK REGAN
HUNTON & WILLIAMS LLP
200 Park Avenue
52nd Floor
New York, N.Y. 10166
(212) 309-1000

Counsel for Petitioner Southern Company

MARTIN H. REDISH
NORTHWESTERN UNIVERSITY SCHOOL OF LAW
375 East Chicago Avenue
Chicago, Illinois 60611
(312) 503-8545

Counsel for Petitioners

DONALD B. AYER
KEVIN P. HOLEWINSKI
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

THOMAS E. FENNELL
MICHAEL L. RICE
JONES DAY
2727 North Harwood Street
Dallas, Texas 75201
(214) 220-3939

Counsel for Petitioner Xcel Energy Inc.

QUESTIONS PRESENTED

The court of appeals held that States and private plaintiffs may maintain actions under federal common law alleging that defendants—in this case, five electric utilities—have created a "public nuisance" by contributing to global warming, and may seek injunctive relief capping defendants' carbon dioxide emissions at judicially-determined levels. The questions presented are:

1. Whether States and private parties have standing to seek judicially-fashioned emissions caps on five utilities for their alleged contribution to harms claimed to arise from global climate change caused by more than a century of emissions by billions of independent sources.

2. Whether a cause of action to cap carbon dioxide emissions can be implied under federal common law where no statute creates such a cause of action, and the Clean Air Act speaks directly to the same subject matter and assigns federal responsibility for regulating such emissions to the Environmental Protection Agency.

3. Whether claims seeking to cap defendants' carbon dioxide emissions at "reasonable" levels, based on a court's weighing of the potential risks of climate change against the socioeconomic utility of defendants' conduct, would be governed by "judicially discoverable and manageable standards" or could be resolved without "initial policy determination[s] of a kind clearly for nonjudicial discretion." *Baker* v. *Carr*, 369 U.S. 186, 217 (1962).

PARTIES TO THE PROCEEDINGS

Defendant-appellees below were American Electric Power Company, Inc.; American Electric Power Service Corporation; Cinergy Corporation (merged into Duke Energy Corporation); Southern Company; Xcel Energy Inc.; and the Tennessee Valley Authority.

Plaintiff-appellants below were State of Connecticut; State of New York; People of the State of California; State of Iowa; State of New Jersey; State of Rhode Island; State of Vermont; State of Wisconsin; City of New York; Open Space Institute, Inc.; Open Space Conservancy, Inc.; and Audubon Society of New Hampshire.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
INTRODUCTION	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	12
ARGUMENT	16
I. PLAINTIFFS LACK STANDING TO PURSUE THEIR CLIMATE CHANGE NUISANCE CLAIMS..	16
A. These Claims Cannot Satisfy Core Constitutional Standing Requirements....	17
1. Plaintiffs' Alleged Injuries Are Not Fairly Traceable To Defendants' Emissions.	17
2. The Alleged Harms Will Not Be Redressed By The Relief Sought	23
3. The Standing Analysis In Statutory Rights Cases, Including *Massachusetts* v. *EPA*, Does Not Apply	24
B. Prudential Standing Principles Also Bar These Claims.	30

TABLE OF CONTENTS—Continued

Page

II. A CLIMATE CHANGE NUISANCE CAUSE OF ACTION CANNOT BE MAINTAINED AS A MATTER OF FEDERAL COMMON LAW 31

A. There Is No Federal Common Law Nuisance Cause Of Action To Address Alleged Effects of Climate Change 32

B. Any Federal Common Law Climate Change Nuisance Cause Of Action Has Been Displaced..... 40

III. THIS CASE PRESENTS NON-JUSTICIABLE POLITICAL QUESTIONS..... 46

CONCLUSION 52

STATUTORY ADDENDUM Add-1

TABLE OF AUTHORITIES

CASES Page

Alexander v. *Sandoval*, 532 U.S. 275 (2001) 33, 37, 40, 44, 45
Alfred L. Snapp & Son, Inc. v. *Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982)..... 31
Allen v. *Wright*, 468 U.S. 737 (1984) ..... *passim*
ASARCO Inc. v. *Kadish*, 490 U.S. 605 (1989) ..... *passim*
Ashcroft v. *Iqbal*, 129 S. Ct. 1937 (2009) 20
Ass'n of Data Processing Serv. Orgs., Inc. v. *Camp*, 397 U.S. 150 (1970) 26
Atherton v. *FDIC*, 519 U.S. 213 (1997) 34, 36
Baker v. *Carr*, 369 U.S. 186 (1962)..... 16, 46
Banco Nacional de Cuba v. *Sabbatino*, 376 U.S. 398 (1964)..... 34
Bell Atl. Corp. v. *Twombly*, 550 U.S. 544 (2007) 18, 20
Bennett v. *Spear*, 520 U.S. 154 (1997)... 18, 22, 23
Boyle v. *United Techs. Corp.*, 487 U.S. 500 (1988) 34
Bush v. *Lucas*, 462 U.S. 367 (1983)..... 40
California v. *Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), *appeal dismissed*, No. 07-16908 (9th Cir. June 24, 2009) 3
California v. *Sierra Club*, 451 U.S. 287 (1981) 36
Chevron U.S.A., Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)..... 6, 31, 41
Chi. & S. Air Lines, Inc. v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948) 47
City of Milwaukee v. *Illinois*, 451 U.S. 304 (1981) ..... *passim*

TABLE OF AUTHORITIES—continued

Page

Clearfield Trust Co. v. *United States*, 318 U.S. 363 (1943) 34

Comer v. *Murphy Oil USA*, No. 05-436, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010), *mandamus denied*, No. 10-294 (U.S. Jan. 10, 2011) 3

Corr. Servs. Corp. v. *Malesko*, 534 U.S. 61 (2001) 33

Elk Grove Unified Sch. Dist. v. *Newdow*, 542 U.S. 1 (2004) 14, 30, 31

Erie R.R. v. *Tompkins*, 304 U.S. 64 (1938) ... 32

FEC v. *Akins*, 524 U.S. 11 (1998) 25

Friends of the Earth, Inc. v. *Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000) 28

Friends of the Earth, Inc. v. *Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167 (2000) 25

Georgia v. *Tenn. Copper Co.*, 206 U.S. 230 (1907) 35, 39

Gladstone Realtors v. *Vill. of Bellwood*, 441 U.S. 91 (1979) 19

Hinderlider v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938) 34

Illinois v. *Milwaukee*, 406 U.S. 91 (1972) 36, 37, 42

Illinois v. *Outboard Marine Corp.*, 680 F.2d 473 (7th Cir. 1982) 46

INS v. *Chadha*, 462 U.S. 919 (1983) 46

Int'l Paper Co. v. *Ouellette*, 479 U.S. 481 (1987) 37

Lucas v. *S.C. Coastal Council*, 505 U.S. 1003 (1992) 48

TABLE OF AUTHORITIES—continued

Page

Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) ..... *passim*

Massachusetts v. *EPA*, 549 U.S. 497 (2007) ..... *passim*

Middlesex County Sewage Auth. v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981) 46

Missouri v. *Illinois*, 180 U.S. 208 (1901) 35, 39

Mobil Oil Corp. v. *Higginbotham*, 436 U.S. 618 (1978) 46

N.W. Airlines, Inc. v. *Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77 (1981) 34

Nat'l Audubon Soc'y v. *Dep't of Water*, 869 F.2d 1196 (9th Cir. 1988) 42

Native Vill. of Kivalina v. *ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal filed*, No. 09-17490 (9th Cir. Nov. 5, 2009) 3, 29

North Carolina ex rel. Cooper v. *TVA*, 615 F.3d 291 (4th Cir. 2010) ..... *passim*

North Dakota v. *Minnesota*, 263 U.S. 365 (1923) 35

O'Melveny & Myers v. *FDIC*, 512 U.S. 79 (1994) 39

PIRG v. *Powell Duffryn Terminals Inc.*, 913 F.2d 64 (3d Cir. 1990) 25, 28

Rhode Island v. *Massachusetts*, 37 U.S. (12 Pet.) 657 (1838) 35

Sierra Club v. *Cedar Point Oil Co.*, 73 F.3d 546 (5th Cir. 1996) 28

Sierra Club v. *Morton*, 405 U.S. 727 (1972) 25, 26

TABLE OF AUTHORITIES—continued

Page

Sosa v. *Alvarez-Machain*, 542 U.S. 692 (2004) 32, 33, 34, 38
Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998) 19
Stoneridge Inv. Partners, LLC v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008) 33
Summers v. *Earth Island Inst.*, 129 S. Ct. 1142 (2009) 28, 29
Tex. Indus. v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981) ..... *passim*
Textile Workers Union v. *Lincoln Mills of Ala.*, 353 U.S. 448 (1957) 37
Trafficante v. *Metro. Life Ins. Co.*, 409 U.S. 205 (1972) 29
United States v. *E.C. Knight Co.*, 156 U.S. 1 (1895) 35
United States v. *Reserve Mining Co.*, 380 F. Supp. 11 (D. Minn. 1974) 43
United States v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973) 25
Valley Forge Christian Coll. v. *Am. United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) 30, 50
Vieth v. *Jubelirer*, 541 U.S. 267 (2004) 46, 47
Vt. Agency of Natural Res. v. *United States ex rel. Stevens*, 529 U.S. 765 (2000) 18
Wallis v. *Pan Am. Petroleum Corp.*, 384 U.S. 63 (1966) 38
Warth v. *Seldin*, 422 U.S. 490 (1975) ..... *passim*
West Virginia ex rel. Dyer v. *Sims*, 341 U.S. 22 (1951) 35

TABLE OF AUTHORITIES—continued

Page

Wheaton v. *Peters*, 33 U.S. (8 Pet.) 591 (1834) 32
Willamette Iron Bridge Co. v. *Hatch*, 125 U.S. 1 (1888) 32

CONSTITUTION AND STATUTES

U.S. Const. art. III, § 2, cl. 1 1
Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (1963) 6
Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 6
Clean Air Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 6
Clean Air Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 6
Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, 121 Stat 1844 6
Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492 5
Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 5
Energy Security Act of 1980, Pub. L. No. 96-294, 94 Stat. 611 5
Global Climate Protection Act of 1987, Pub. L. No. 100-204, 101 Stat. 1407 5
Global Change Research Act of 1990, Pub. L. No. 101-606, 104 Stat. 3096 5
National Climate Program Act of 1978, Pub. L. No. 95-367, 92 Stat. 601 5
33 U.S.C. § 1151 (1970) 2, 37, 43
§ 1160 (1970) 2, 37, 43
42 U.S.C. § 7401 ..... 1, 41
§ 7409 ..... 1, 41

TABLE OF AUTHORITIES—continued

Page

42 U.S.C. § 7411 ..... 1, 6, 7, 41
§ 7413 ..... 1, 41, 43
§ 7475 ..... 1, 41, 43
§ 7477 ..... 1, 41, 43
§ 7502 ..... 1, 41
§ 7521 ..... 1, 7, 41
§ 7601 1
§ 7602 ..... 1, 6, 41
§ 7604 ..... 1, 43
§ 7607 ..... 1, 7, 43, 44
§ 7661 1
§ 7661a 1, 7
§ 7661b 1, 7, 41, 43
§ 7661c 1, 7, 41, 43
§ 7661d 1, 7, 44

REGULATIONS

73 Fed. Reg. 44354 (July 30, 2008) 4
74 Fed. Reg. 66496 (Dec. 15, 2009) 8
75 Fed. Reg. 25324 (May 7, 2010) 8
75 Fed. Reg. 31514 (June 3, 2010) 4, 5, 8, 9, 43
75 Fed. Reg. 62739 (Oct. 13, 2010) 8
75 Fed. Reg. 74152 (proposed Nov. 30, 2010) 8
75 Fed. Reg. 82390 (Dec. 30, 2010) 9
75 Fed. Reg. 82392 (Dec. 30, 2010) 9

RULES

Fed. R. Civ. P. 13(h) 50
Fed. R. Civ. P. 20(a)(2) 50

TABLE OF AUTHORITIES—continued

TREATIES Page

Koyoto Protocol, *adopted* Dec. 11, 1997, 37 I.L.M. 22 9

United Nations Framework Convention on Climate Change, *adopted* May 9, 1992, 1771 U.N.T.S. 107, S. Treaty Doc. No. 102-38 9

LEGISLATIVE HISTORY

H.R. 2454, 111th Cong. (2009) 7

S. 3072, 111th Cong. (2010) 8

S. Res. 98, 105th Cong. (1997) 10

136 Cong. Rec. S592 (daily ed. Jan. 31, 1990) 42

136 Cong. Rec. H2511 (daily ed. May 21, 1990) 42

136 Cong. Rec. H12845 (daily ed. Oct. 26, 1990) 42

SCHOLARLY AUTHORITIES

Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. Pa. L. Rev. 1245 (1996) 35

Charles E. Carpenter, *Concurrent Causation*, 83 U. Pa. L. Rev. 941 (1935) 20

R. Fallon, D. Meltzer, & D. Shapiro, *Hart & Wechsler's The Federal Courts and The Federal System* (5th ed. 2003) 31

Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964) 33

Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. Pa. L. Rev. 1231 (1985) 32

TABLE OF AUTHORITIES—continued

OTHER AUTHORITIES

Page

John M. Broder, *Climate Talks End With Modest Deal on Emissions*, N.Y. Times, Dec. 11, 2010 10

Clean Air Act: A Summary of the Act and Its Major Requirements, CRS Report RL30853 (May 2005) 43

Intergovernmental Panel on Climate Change, *Climate Change 2001: Synthesis Report* (2001) 48, 50

Letter from Todd Stern, U.S. Special Envoy for Climate Change, to UNFCCC (Jan. 28, 2010), *available at* http://unfccc.int/files/meetings/application/pdf/unitedstatescphaccord_app.1.pdf 10

Nat'l Research Council, *Climate Change Science* (2001) 3, 4

Restatement (Second) of Torts (1965, 1979) 20, 40, 47

Laurence H. Tribe et al., Wash. Legal Found., Critical Legal Issues Series No. 169, *Too Hot for Courts To Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* (Jan. 2010) 50

U.S. Energy Info. Admin., *Annual Energy Review 2009* (Aug. 2010) 4

OPINIONS BELOW

The Second Circuit's opinion is reported at 582 F.3d 309, and reproduced at Petition Appendix ("Pet. App.") 1a-170a. The Second Circuit's orders denying rehearing or rehearing en banc are reproduced at Pet. App. 188a-191a. The opinion of the United States District Court for the Southern District of New York is published at 406 F. Supp. 2d 265, and reproduced at Pet. App. 171a-187a.

JURISDICTION

The court of appeals entered judgment on September 21, 2009, Pet. App. 1a, and denied timely petitions for rehearing or rehearing en banc on March 5 and 10, 2010, *id.* at 188a-191a. On June 28, 2010, Justice Ginsburg granted an extension of the time for filing a petition for writ of certiorari to and including August 2, 2010. The petition was filed on August 2, 2010, and granted on December 6, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution provides, in pertinent part, that "[t]he Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority ... [and] to Controversies ... between a State and Citizens of another State [or] between Citizens of different States." U.S. Const. art. III, § 2, cl. 1.

Relevant provisions of the Clean Air Act, 42 U.S.C. §§ 7401, 7409, 7411, 7413, 7475, 7477, 7502, 7521,

7601, 7602, 7604, 7607, 7661-7661d, are reproduced at Pet. App. 192a-214a and at Add-13 to Add-72 of the addendum to this brief. Relevant provisions of the 1970 version of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1151, 1160, are reproduced at Add-1 to Add-13 of the addendum.

INTRODUCTION

The Second Circuit in this case held that there exists a federal common law nuisance cause of action for contributing to climate change. Such a claim could be pursued by anyone who claims to be affected by climate change against any source of greenhouse gas emissions. It would empower courts to determine the "reasonable" level of global greenhouse gas emissions, allocate them among economic sectors, and order individual actors to conform their emissions to the court's judgments. These lawsuits would thus allow federal judges, acting without statutory authority or guidance, to adjudicate competing claims about appropriate global, national, and industry-wide emission levels by making policy decisions and tradeoffs that the Constitution commits to the political branches and over which Congress by statute has delegated significant authority to the Environmental Protection Agency (EPA).

Greenhouse gas regulation and climate change are issues of exceptional complexity and extraordinary importance to the Nation, implicating fundamental economic and security concerns and affecting every sector and industry—and every individual—in the country. These issues are wholly inappropriate for resolution by "an unelected, unrepresentative judiciary," *Allen* v. *Wright*, 468 U.S. 737, 750 (1984), under the "vague and indeterminate nuisance concepts" of the common law, *City of Milwaukee* v.

Illinois, 451 U.S. 304, 317 (1981) (*Milwaukee II*). The judgment of the Second Circuit should be reversed.

STATEMENT OF THE CASE

This is one of several climate change tort lawsuits that have been brought in federal courts across the country. These common law actions seek to restrict the greenhouse gas emissions of certain enterprises or to impose monetary liability on those entities as remedies for claimed effects of global warming. In each case, a district court dismissed the claims as presenting non-justiciable political questions and sometimes for lack of standing, based on the inherent unsuitability of a common law approach to issues of such socioeconomic complexity and sensitivity as greenhouse gas regulation and climate change.[1]

1. The claims in this case are based on specific current and future effects alleged to be the result of centuries of accumulation in the atmosphere of greenhouse gases which "trap[ ] solar energy and retard[ ] the escape of reflected heat." *Massachusetts* v. *EPA*, 549 U.S. 497, 505 (2007); see also, *e.g.*, Nat'l Research Council, *Climate Change Science* 1-10 (2001). The phrase "greenhouse gases" refers to a broad group of substances present in the atmosphere, including both man-made chemicals like chlorofluorocarbons and many naturally occurring

---

[1] Pet. App. 187a; *California* v. *Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), *appeal dismissed*, No. 07-16908 (9th Cir. June 24, 2009); *Comer* v. *Murphy Oil USA*, No. 05-436, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007) (unpublished ruling), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010), *mandamus denied*, No. 10-294 (U.S. Jan. 10, 2011); *Native Vill. of Kivalina* v. *ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal filed*, No. 09-17490 (9th Cir. Nov. 5, 2009).

substances. Nat'l Research Council, *supra*, at 1-10. The most pervasive greenhouse gas emitted by anthropogenic activities is carbon dioxide. *Id.* at 9-10.

Greenhouse gases are emitted by a wider variety of sources than any other "air pollutant." *Id.*; see 73 Fed. Reg. 44354, 44402-03 (July 30, 2008). These sources include nearly every utility, factory, and motor vehicle in the United States, and virtually every home, office building, and farm. Nat'l Research Council, *supra*, at 1-10. For this reason, regulating greenhouse gas emissions presents a particularly complex, difficult, and consequential regulatory challenge. *Id.* This is especially true for the regulation of emissions from the combustion of fossil fuels. Because more than 80% of electricity in the United States is generated from fossil fuels, see U.S. Energy Info. Admin., *Annual Energy Review 2009*, at 9 tbl. 1.3 (Aug. 2010), any such regulation carries potentially massive and cascading consequences for the economic productivity and security of the Nation.

Predicting the long- and short-term effects of greenhouse gas regulation on global climate change is, moreover, extremely complex. Nat'l Research Council, *supra*, at 9-10. Greenhouse gases are unique in that they are both well-mixed and long-lived in the atmosphere, so that concentrations of greenhouse gases at a given time are determined by the emissions of all greenhouse gas sources worldwide over centuries, rather than by emissions from local, contemporaneous sources. See 75 Fed. Reg. 31514, 31529 (June 3, 2010). This means that, unlike regulation of most other pollutants, regulation of greenhouse gas emissions in one area or Nation or from one source or set of sources has no effect on greenhouse gas levels that is specific to that area or

Nation, and may even have no effect on global greenhouse gas levels because other sources (including those in other countries) may increase their own emissions. *Id.*; see also, *e.g.*, *North Carolina ex rel. Cooper* v. *TVA*, 615 F.3d 291, 302 (4th Cir. 2010).

2. The enormous complexities of these issues, both scientific and socioeconomic, are reflected in legislative and executive efforts regarding climate change in the United States. Those measures implement and rely on interagency collaboration and research to develop a gradual but comprehensive system of domestic greenhouse gas emissions standards, through statutes and regulations, while also seeking to negotiate a worldwide approach.

a. As early as 1978, Congress established a "national climate program," with the purpose of improving understanding of global climate change through research and international cooperation. National Climate Program Act of 1978, Pub. L. No. 95-367, 92 Stat. 601. Through the 1980s and 1990s, Congress enacted a series of statutes mandating further study of the impact of greenhouse gases and trends in climate change, Energy Policy Act of 1992, Pub. L. No. 102-486, tit. XVI, § 1601, 106 Stat. 2776, 2999; Global Change Research Act of 1990, Pub. L. No. 101-606, 104 Stat. 3096; Energy Security Act of 1980, Pub. L. No. 96-294, tit. VII, § 711, 94 Stat. 611, 774-75, and directing executive officials to coordinate international negotiations concerning global climate change, Global Climate Protection Act of 1987, Pub. L. No. 100-204, tit. XI, 101 Stat. 1407. In the Energy Independence and Security Act of 2007, Congress established nationwide greenhouse gas reduction targets to be satisfied through modified biofuel production methods, as implemented by EPA. Pub.

L. No. 110-140, 121 Stat. 1492. In 2008, Congress formally directed EPA to "develop and publish a ... rule ... to require mandatory reporting of [greenhouse gas] emissions above appropriate thresholds in all sectors of the economy of the United States." Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, tit. II, 121 Stat. 1844, 2128.

Recently, EPA has been pursuing greenhouse gas regulation under the Clean Air Act. First passed by Congress in 1963, and amended several times thereafter,[2] the Act is "a lengthy, detailed, technical, complex, and comprehensive response" to air pollution in the United States. *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 848 (1984). The Act governs the regulation of "air pollutants," defined broadly to encompass "any physical, chemical, [or] biological ... substance ... [which] enters the ambient air." 42 U.S.C. § 7602(g). In *Massachusetts*, this Court held that greenhouse gases, including carbon dioxide, qualify as "air pollutants" under the Act. 549 U.S. at 528-29, 532.

Three parts of the Act—Titles I, II, and V—are particularly relevant for these purposes. Title I addresses the regulation of emissions of air pollutants from stationary sources. For any category of stationary sources that "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare," EPA issues a "standard of performance" requiring "the degree of emission limitation achievable through the application of the best system of emission reduction." 42 U.S.C. § 7411(a), (b). EPA may then,

---

[2] Pub. L. No. 88-206, 77 Stat. 392 (1963); Pub. L. No. 91-604, 84 Stat. 1676 (1970); Pub. L. No. 95-95, 91 Stat. 685 (1977); Pub. L. No. 101-549, 104 Stat. 2399 (1990).

in appropriate circumstances, require States to submit plans to control designated pollutants at existing facilities in light of those standards. *Id.* § 7411(d).

Title II of the Act addresses the regulation of mobile sources of air pollutants. It requires EPA to determine whether emissions of a pollutant from motor vehicles "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." *Id.* § 7521(a)(1). If EPA makes an affirmative "endangerment" determination, it prescribes standards controlling these emissions. *Id.*

Title V sets forth permit requirements for operating major sources of air pollutants. It requires States to administer a comprehensive permit program for sources emitting air pollutants, as necessary to satisfy applicable requirements for each source under the Act. *Id.* § 7661c; see also *id.* § 7661a. Permits must indicate how much of which regulated air pollutants a source is allowed to emit, and the standards to which it is subject. *Id.* A source must prepare a compliance plan and certify compliance with applicable requirements, *id.* § 7661b; and state authorities must notify contiguous and other nearby States of permit applications that may affect them, *id.* § 7661d(a)(2). Affected States and others may petition EPA to object to a permit application, a step that may lead to EPA rejection of the permit. *Id.* § 7661d(b)(2). Denial of such a petition is subject to review in federal court. *Id.* § 7607(b).

In recent years, and continuing to this day, Congress has considered additional greenhouse gas legislation. The House of Representatives passed greenhouse gas "cap-and-trade" legislation in 2009, see H.R. 2454, 111th Cong. (2009), but the Senate did

not vote upon the measure. Most recently, several bills have been offered that would modify EPA's authority to regulate greenhouse gases. *E.g.*, S. 3072, 111th Cong. (2010). None of these proposals has been adopted.

b. Over the last two years, and in response to this Court's decision in *Massachusetts*, EPA has issued a series of findings and rules regarding greenhouse gas emissions.

EPA formally found in 2009 that greenhouse gas emissions from new motor vehicles contribute to air pollution that "endangers" public health and welfare and should be regulated under the Clean Air Act. 74 Fed. Reg. 66496 (Dec. 15, 2009). It issued a final rule establishing greenhouse gas emissions standards for certain model-year light-duty motor vehicles. 75 Fed. Reg. 25324 (May 7, 2010). Since then, EPA also has proposed greenhouse gas emissions standards for certain heavy-duty vehicles, 75 Fed. Reg. 74152 (proposed Nov. 30, 2010), and announced its intent to issue further, more stringent standards for other model-year light-duty vehicles, 75 Fed. Reg. 62739 (Oct. 13, 2010).

Shortly after finalizing the motor vehicle standards, EPA issued rules addressing greenhouse gas emissions by new or modified major stationary sources. 75 Fed. Reg. 31514. Those rules would potentially impose new Clean Air Act obligations on millions of sources throughout the United States, including facilities operated by these defendants; however, in recognition of the massive economic impact of such action, EPA included "tailoring" provisions intended to "phase-in" the regulatory scheme over five years. *Id.* These provisions define the "greenhouse gases" that are regulated in terms of the quantities emitted or increased by a source, and

in their initial phases apply to certain sources already subject to permitting requirements and, later, those emitting threshold quantities of greenhouse gases (generally, at least 75,000 or 100,000 tons per year of "carbon dioxide equivalent," reflecting adjustments accounting for the "global warming potential" of the particular greenhouse gas). *Id.* Regulated sources are required to obtain construction and operating permits from EPA or the appropriate state authority and otherwise to comply with relevant emissions restrictions. *Id.* EPA expects to propose, by July 2011, additional performance standards and guidelines for greenhouse gas emissions from new, modified, and existing electric utility facilities, including those operated by defendants, and to take final action by May 2012 on the proposed standards and guidelines. 75 Fed. Reg. 82392 (Dec. 30, 2010) (announcing proposed settlement agreement, addressing greenhouse gas emissions standards for certain electric generating facilities); see also 75 Fed. Reg. 82390 (Dec. 30, 2010) (announcing proposed settlement agreement addressing refineries).

c. In addition to these domestic measures, the United States has pursued international negotiations to address a worldwide approach to greenhouse gas emissions and climate change. The United States is a signatory to the United Nations Framework Convention on Climate Change (UNFCCC), *adopted* May 9, 1992, 1771 U.N.T.S. 107, S. Treaty Doc. No. 102-38, which established a multinational coalition to develop a coordinated approach to these issues. In 1997, member nations negotiated the Kyoto Protocol, *adopted* Dec. 11, 1997, 37 I.L.M. 22, which called for mandatory reductions in greenhouse gas emissions by developed nations. The protocol was

not, however, formally joined by the United States. See S. Res. 98, 105th Cong. (1997).

More recently, as a result of meetings in Copenhagen in 2009, the United States pledged to cut nationwide greenhouse gas emissions by 17 percent from 2005 levels by the year 2020. Letter from Todd Stern, U.S. Special Envoy for Climate Change, to UNFCCC (Jan. 28, 2010). Additional negotiations were held in December 2010 in Cancún, Mexico, and more talks are scheduled for the coming year in Durban, South Africa. John M. Broder, *Climate Talks End With Modest Deal on Emissions*, N.Y. Times, Dec. 12, 2010.

3. The complaints in this case were not filed pursuant to the Clean Air Act, or any other statute or regulation. J.A. 103-05, 145-47. Rather, they seek to impose emissions reductions on these defendants—which own and operate facilities that are among those subject to EPA's greenhouse gas regulations—based on claims that would be created and adjudicated under federal common law. *Id.*

Eight States, three nonprofit land trusts, and a municipality brought these complaints, seeking to hold these defendants "jointly and severally liable for ... global warming." *Id.* at 56-59, 117-19. The complaints allege that defendants operate facilities that emit carbon dioxide, which contributes to elevated atmospheric levels of greenhouse gases, which in turn contribute to climate change, which in turn contributes to a wide range of alleged future risks, including "increases in respiratory problems," "more droughts and floods," "wildfires," and "widespread loss of species and biodiversity." *Id.* at 57-58, 99-100. The pleadings describe climate change as a "public nuisance," purportedly actionable under federal common law, and demand an order "enjoining

each of the defendants to ... cap[ ] its emissions of carbon dioxide and ... reduc[e] those emissions by a specified percentage each year for at least a decade." *Id.* at 59, 110, 153.

The district court dismissed the claims as presenting non-justiciable political questions. Pet. App. 187a. It reasoned that a court could not resolve the claims without first determining an acceptable global level of greenhouse gas emissions and then determining which particular sectors and industries, and which individual entities within those sectors and industries, should be held responsible for reducing their emissions and by what amounts to achieve that acceptable global level. *Id.* at 183a-185a. These decisions, the district court found, necessarily involve a number of "policy determination[s]" of the type properly reserved for Congress, including "the implications of [emissions reductions] on the United States' ongoing negotiations with other nations concerning global climate change [and] on the United States' energy sufficiency and thus its national security." *Id.* In light of this conclusion, the district court found it unnecessary to address whether plaintiffs had standing or whether federal common law provided a valid basis for their claims. *Id.* at 180a n.6, 187a.

The Second Circuit reversed. *Id.* at 3a. It held that a cause of action for the alleged "nuisance" of climate change could be implied under federal common law, in light of the interstate nature of greenhouse gas emissions and climate change, and that the Clean Air Act did not displace that cause of action because EPA had not (at the time of the Second Circuit's decision) yet exercised authority under the Act to regulate greenhouse gas emissions. *Id.* at 88a. The panel further held that courts could rely on the

"reasonableness" standard of the Restatement (Second) of Torts to adjudicate the claims and that, because the case involved only "six domestic coal-fired electricity plants,"[3] judges would not have to address the broader "policy" issues identified by the district court. *Id.* at 26a, 34a, 119a. Finally, addressing standing, the panel found the allegation that these defendants "contribute" to climate change was adequate to satisfy constitutional requirements. *Id.* at 67a-73a.

The Second Circuit denied timely petitions for rehearing or rehearing en banc. *Id.* at 188a-191a.

SUMMARY OF ARGUMENT

The judgment below, which allows plaintiffs to pursue a federal common law nuisance action against defendants based on their alleged contribution to climate change, transgresses constitutionally and prudentially imposed limits on federal judicial power long recognized and enforced by this Court.

First, plaintiffs lack standing to bring these claims. To establish standing under Article III, a plaintiff must plead facts showing that the alleged harm is both "fairly traceable" to the challenged conduct and "redressable" by the remedy sought. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Neither the specific harms alleged nor climate change generally, however, is traceable to these defendants. According to plaintiffs' own allegations, climate change instead results from greenhouse gas emissions from billions of independent actors over centuries—emissions that have mixed in undiffer-

---

[3] In fact, the complaints identify dozens of facilities owned or operated by these defendants in more than 20 States. J.A. 105-10, 148-53.

entiated fashion in the atmosphere to gradually increase average global temperatures. See J.A. 79-84, 134-36. Nor would plaintiffs' alleged injuries be redressed by the imposition of emissions caps on these five defendants. Plaintiffs ask that the court impose emissions limits that would achieve defendants' "*share* of the ... reductions necessary to significantly slow the rate and magnitude of warming." *Id.* at 102 (emphasis added). As their formulation of the requested relief makes plain, they do not and cannot show that their "remedy" alone would have any effect on climate change, let alone on their risk of injury.

Relying on this Court's decision in *Massachusetts*, the Second Circuit held that the allegation that these defendants "contribute[d]" to climate change through their emissions is sufficient to establish both that defendants' emissions caused the harms asserted and that reducing defendants' share of emissions will redress plaintiffs' injuries. Pet. App. 67a-73a. But, in *Massachusetts*, this Court considered whether the petitioner had standing to pursue a *statutory* cause of action enacted by Congress, not a common law nuisance claim. 549 U.S. at 516. That distinction is "of critical importance" to the standing inquiry. *Id.* This Court found that Congress's decision to create a specific legal right allowed a relaxed causation and redressability analysis for standing to enforce that right. Plaintiffs here do not invoke any statutory right. They seek a tort remedy against private defendants for particular harms, and thus this Court's decision in *Massachusetts* provides no support for the Second Circuit's holding. Plaintiffs must instead satisfy traditional causation and redressability requirements. Their allegations are plainly insufficient to do so.

Plaintiffs' claims are also barred by prudential standing restrictions. Those limitations preclude courts from adjudicating "generalized grievances more appropriately addressed in the representative branches." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 12 (2004). The chain of causation alleged here would allow suits by and against virtually any enterprise on the planet, based on virtually any injury resulting from climatological or meteorological events. The judiciary is ill-suited to that kind of inquiry unless and until Congress establishes statutory requirements reflecting the policy judgments on which it must be based.

Second, even if plaintiffs had standing, their federal common law nuisance claim for injuries alleged to result from climate change should be dismissed. Federal courts have the power to create federal common law causes of action only when they are authorized to do so by federal statute or required to do so by constitutional need. There is no basis for such an "unusual exercise of lawmaking by federal courts" here. *Milwaukee II*, 451 U.S. at 314. Plaintiffs' claims are not based on any statute, and they do not implicate any constitutional interest or necessity that might warrant such an extraordinary exercise of federal common lawmaking power. *Tex. Indus., Inc.* v. *Radcliff Mats., Inc.*, 451 U.S. 630, 641 (1981).

In fact, numerous considerations militate powerfully against the creation of a federal common law cause of action here. This case is unlike prior nuisance cases, involving delineated regions and discrete numbers of sources, that have come before this Court. *Infra* pp. 35, 38-39. A federal common law claim for contribution to climate change is a cause of action almost any person could pursue in any

court against any governmental or economic actor. *Infra* pp. 18-19. It would require judges to resolve fundamental questions of social and economic policy regarding the response to climate change. And, it would result in a patchwork of conflicting regulation of greenhouse gas emissions, undermining any federal interest in coordinated emissions standards.

Furthermore, even if these claims were theoretically cognizable under federal common law, they would be displaced by the Clean Air Act. When Congress "addresse[s] the problem" previously governed by federal common law, the need for federal common law in that area "disappears." *Milwaukee II*, 451 U.S. at 314-315. Congress here has directly "addressed the problem": The Clean Air Act, like the Clean Water Act, establishes a comprehensive scheme for the regulation of pollutants within its scope. *Massachusetts*, 549 U.S. at 528-29, 532. This Court has held that greenhouse gases are an "air pollutant" under the Act, see *id.*, and States and others may request EPA to consider emissions restrictions similar to those they seek from the court in this case, *id.* at 516, 527. Cf. *Milwaukee II*, 451 U.S. at 325 (describing comprehensive nature of the Clean Water Act, which displaced federal common law water pollution claims). Moreover, plaintiffs' claims are displaced whether or not EPA exercises its full regulatory authority under the Act. Where Congress has legislated on a subject and delegated authority to an agency, federal common law claims are displaced regardless of whether, when, or how the agency then exercises its authority. See *id.* at 324.

Third, plaintiffs' claims present non-justiciable political questions. To determine the "share" of global greenhouse gas emissions reductions for which these defendants should be responsible, as plaintiffs

request, J.A. 102, a court would be required to predict potential environmental benefits that might result from imposing caps globally; to compare the social and economic value of the services these defendants provide, as well as services provided by all the other pertinent industry sectors alleged to contribute to global climate change (including manufacturing, transportation, agriculture, petroleum, chemical, and many others); and then to determine the "reasonable" overall level of emissions and "reasonable" emissions-reduction burden to place on defendants' sector and each individual defendant. See Pet. App. 32a-35a (citing "reasonableness" standard of Restatement (Second) of Torts). These decisions involve predictive judgments about every sector of the national and international economies and policy tradeoffs that turn on how the public values different potential economic, social, and environmental risks and benefits. They are precisely the kinds of judgments that are reserved for the political branches. See *Baker* v. *Carr*, 369 U.S. 186, 217 (1962).

The Second Circuit called this an "ordinary tort suit," Pet. App. 34a, but plainly it is not. It seeks to transfer to the judiciary standardless authority for some of the most important and sensitive economic, energy, and social policy issues presently before the country. The decision below should be reversed.

ARGUMENT

I. PLAINTIFFS LACK STANDING TO PURSUE THEIR CLIMATE CHANGE NUISANCE CLAIMS.

The doctrine of standing embraces "core" constitutional requirements, arising directly from Article III, as well as "prudential" considerations, "closely related to Art[icle] III concerns but

essentially matters of judicial self-governance." *Warth* v. *Seldin*, 422 U.S. 490, 499-500 (1975); see also *Allen*, 468 U.S. at 750-52. Neither set of requirements is satisfied here.

A. These Claims Cannot Satisfy Core Constitutional Standing Requirements.

To satisfy the "irreducible constitutional minimum of standing," a plaintiff must plead facts showing an "injury in fact" that is "fairly traceable to the challenged action of the defendant" and "likely ... redressable by a favorable decision." *Lujan*, 504 U.S. at 560-61 (alterations omitted). Plaintiffs in this case cannot meet that standard. The injuries alleged are not traceable, much less "fairly traceable," to these defendants, and would not be redressed by imposing emissions caps on them.

The Second Circuit's contrary theory of standing, under which any of the billions of entities that "contribute" greenhouse gases into the atmosphere could be named as defendants in this and similar lawsuits, does not satisfy constitutional causation and redressability requirements and would effectively eliminate those requirements for climate change tort claims. The decisions on which the Second Circuit relied for that theory, most notably *Massachusetts* v. *EPA*, involved suits brought pursuant to congressionally conferred rights of action that can "give rise to a case or controversy where none existed before," 549 U.S. at 516, and do not apply to these non-statutory claims.

1. Plaintiffs' Alleged Injuries Are Not Fairly Traceable To Defendants' Emissions.

The attenuated link that plaintiffs posit between these defendants' emissions and their alleged injuries

suffers from at least two related and fundamental deficiencies. *First,* the complaint fails to allege a plausible "causal connection" between the injuries and the challenged conduct. *Lujan*, 504 U.S. at 560-61; see *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 560 (2007). *Second*, the alleged causal chain impermissibly depends upon "the independent action[s] of ... third part[ies] not before the court." *Bennett* v. *Spear*, 520 U.S. 154, 167-69 (1997).

a. The alleged chain of causation fails, first, to draw the necessary connection between the "injury to the complaining party" and "the putatively illegal action." *Vt. Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 771-73 (2000); *Warth*, 422 U.S. at 499. The complaints assert that these defendants have contributed to climate change *generally* through their emissions, and that climate change contributes *generally* to increased risks of injuries. See J.A. 79-86, 134-39. But the pleadings never allege the requisite direct connection between these defendants' emissions and the individual risks to which plaintiffs are allegedly exposed.

To the contrary, plaintiffs' own allegations conclusively demonstrate that no such link could reasonably be drawn. The complaints trace climate change to greenhouse gas emissions from billions of sources worldwide over the last several centuries, *id.* at 82, 135, and identify as effects of climate change nearly *every* climatological and meteorological occurrence on the planet, including (among others) "sea-level rise," "the frequency of [damaging] storm[s]," and "an increased likelihood of drought," as well as "the decline of animal and plant populations." *Id.* at 84-102, 137-45. Under this theory, a storm in New York City in 2011 could be traced back to greenhouse gas emissions from a factory in China

that same year, or just as easily to emissions from a California farm in 1961. And those same emissions might later be re-traced forward to a flood in San Francisco in 2111, or to a loss of habitat in the Florida wetlands in 2061. See *id.* at 89, 143 ("Accelerated sea level rise caused by global warming will continue for hundreds of years."). Indeed, emissions from any single facility in the United States might be deemed the "cause" of any adverse climatological or meteorological event anywhere in the world over the next year, or anytime in the next hundred years.

In other words, taking the alleged chain of causation to its logical conclusion, any entity on the planet could sue any other for a risk or injury that could be tied to any natural force, so long as it is alleged to have been affected by global climate change. Responsibility for much of what would traditionally have been called "acts of God" could now be imposed on any entity in the world.

This is not a valid theory of standing. It is not enough for a plaintiff to allege that the defendant's conduct may generally contribute to a risk to "society" or to some group of parties of which the plaintiff is a part. *Gladstone Realtors* v. *Vill. of Bellwood*, 441 U.S. 91, 111-14 (1979); see *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 106-07 (1998). Instead, a complaint must show an actual causal connection between the particular risk or injury to the plaintiff and the particular conduct of the defendant. *Allen*, 468 U.S. at 752, 755-56, 764-66; see *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 615-16 (1989) (opinion of Kennedy, J.). Indeed, a central purpose of standing doctrine is to limit the number of potential plaintiffs and defendants for any given claim to those with a distinct interest in the subject matter at issue. See

Allen, 468 U.S. at 752, 755-56. The theory advanced by plaintiffs accomplishes the opposite: it allows suits by each against all, for any injury resulting from virtually any climate-related natural event.[4]

In nonetheless declining to dismiss the case for lack of standing, the court of appeals placed heavy emphasis on the fact that the case was "at the pleading stage." Pet. App. 42a-44a. With respect to causation, however, the pleadings in this case make only conclusory allegations that emissions from each of these defendants contribute to injuries from climate change. As this Court recently affirmed, such "conclusory" statements are insufficient. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950-51 (2009); *Twombly*, 550 U.S. at 560; see also, *e.g.*, *Warth*, 422 U.S. at 507. The pleadings must, instead, move the claims "across the line from conceivable to plausible." *Iqbal*, 129 S. Ct. at 1950-51. The allegations here fail to do so. They assert a link between greenhouse gas emissions and climate change generally, but they never allege facts that plausibly could explain how any particular defendant's emissions, as opposed to other emissions from countless other actors now and in the past, result in climate change. To go one step further, and suggest that emissions from one of these defendants are the "cause" of a particular risk attributed to

---

[4] This case thus bears little resemblance to the tort "contribution" cases cited by the Second Circuit. Pet. App. 69a-70a. Those cases involved a limited, ascertainable set of contributing forces that combined at a point in time to produce a discrete effect. *See* Restatement (Second) of Torts §§ 432, 840E, 875. In such cases, the restricted group of relevant actors and direct link between contributing forces and discrete effect gave rise to a plausible inference that all might be "substantial factors" in causing the injury. *See id.*; *see also* Charles E. Carpenter, *Concurrent Causation*, 83 U. Pa. L. Rev. 941, 941-45 (1935).

climate change—for example, the risk of a heat-related death in Los Angeles in 2100, J.A. 87-88—is even more untenable.

b. The alleged chain of causation also fails because it depends "on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *ASARCO*, 490 U.S. at 615 (opinion of Kennedy, J.), *quoted in Lujan*, 504 U.S. at 562. Climate change, according to the complaints, "already has begun" and is attributable to greenhouse gas emissions from billions of independent sources around the world over the course of centuries. J.A. 57, 79-84, 134-36. Plaintiffs further acknowledge that the injunctions they seek would merely "achieve [these defendants'] *share* of the ... reductions necessary to significantly slow the rate and magnitude of warming." *Id.* at 102 (emphasis added).

The link alleged between climate change and these defendants' emissions is thus wholly insufficient. Climate change has commenced and will continue, according to the complaints, with or without these defendants' emissions. See *id.* at 57, 79-84, 134-36. And it will abate or slow, again according to the complaints, only if sources other than defendants simultaneously reduce their emissions—a possibility that is entirely speculative. *Id.* at 102. These defendants therefore cannot be said to "cause" climate change in any reasonable sense of the term, much less to "cause" the increased risks of injuries that plaintiffs allege will follow from climate change.

Plaintiffs' characterization of defendants as possible "contributors" to climate change, through their greenhouse gas emissions, does not establish causation for purposes of standing. In *Allen* v.

Wright, 468 U.S. 737 (1984), for example, parents of minority schoolchildren lacked standing to challenge IRS policy concerning tax exemptions to racially segregated private schools in part because, even if those exemptions might contribute to continued segregation in public schools, that injury ultimately resulted from the independent enrollment decisions of other parents. *Id.* at 757-59. In *ASARCO Inc.* v. *Kadish*, 490 U.S. 605 (1989), a teachers association lacked standing to challenge a state law that transferred leasing revenue from school trust funds to other parties because the trust funds were also subsidized by the State, and "the State might reduce its supplement ... so that the [total] money available for schools would be unchanged." *Id.* at 614 (opinion of Kennedy, J.). And, in *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992), the Court dismissed for lack of standing a lawsuit in which the plaintiffs claimed to be injured by agencies' funding of projects that posed risks to endangered species when the agencies at issue "generally suppl[ied] only a fraction of the funding for [the] ... project[s]" and "nothing ... indicate[d] that the projects ... will either be suspended, or do less harm to listed species, if that fraction is eliminated." *Id.* at 571 (plurality); see also *Allen*, 468 U.S. at 759 n.24 (noting that, when the "relief requested [is] simply the cessation of ... allegedly illegal conduct," the traceability and redressability analyses are "identical").

This Court has found standing based on allegations that a defendant "contributed" to an injury that was caused by the separate decisions of third parties only when the defendant's conduct had a "determinative or coercive effect" in producing those third-party decisions and therefore the ultimate injury. *Bennett*, 520 U.S. at 169. In such circumstances, the third-

party decisions are not "independent," because they are themselves traceable to the defendant's actions. See, *e.g.*, *id.* That principle is not applicable here. The chain of events leading to climate change, according to the complaints, depends upon the emissions of greenhouse gases by innumerable independent actors both past and present, J.A. 79-84, 134-36, and those sources neither were nor are directed, or even influenced, by these defendants in any way. An injury that is alleged to be caused by the collective operations of the global economy over generations is not "caused" by, and cannot be "traced" to, the handful of individual defendants named here.

2. The Alleged Harms Will Not Be Redressed By The Relief Sought.

For similar reasons, plaintiffs also do not, and cannot, plausibly allege that the relief they seek will redress their alleged harms. As noted, the complaints assert only that the injunctions requested would "achieve [these defendants'] *share* of the ... reductions necessary to significantly slow the rate and magnitude of warming." J.A. 102 (emphasis added). Put differently, plaintiffs' theory concedes that broader reductions are "necessary" to slow or reverse climate change and to prevent future harm to the interests they have identified; and the relief they seek here represents some unknown increment of those broader reductions.

Such allegations are plainly insufficient to support standing. Although Congress and federal agencies, such as EPA, may attack environmental, social, or economic problems through a series of "incremental step[s]," *Massachusetts*, 549 U.S. at 524, a court is not a legislator or a regulator. A federal court may not enter relief against a particular tort defendant unless the relief sought from that defendant will

redress the plaintiff's injury. *Lujan*, 504 U.S. at 562; see also *ASARCO*, 490 U.S. at 615 (opinion of Kennedy, J.). The complaints in this case do not and cannot allege that the relief requested—only these defendants' "share" of global emissions reductions—would prevent or mitigate plaintiffs' claimed harms.

Equally to the point, the vast bulk of greenhouse gas emissions are from sources that are not parties to this case and would not be reached by a decree in this case; indeed, to an increasing degree, most of these sources are outside the United States and may not be reached even by follow-on cases. Thus, there is no basis to believe that reductions ordered here from particular sources would lead to *any* overall reduction, or prevent or even slow the ongoing global warming effect that plaintiffs allege. To the contrary, it is just as likely that other sources would *increase* their emissions if these defendants limit theirs, thereby negating the purported benefit achieved by these defendants' "share" of emissions reductions in this country. See, *e.g.*, *North Carolina*, 615 F.3d at 302. Even if independent sources might not increase their emissions—so that a decree in this case might result in some overall reduction in worldwide greenhouse gases—that possibility and its scope are "too uncertain to satisfy the redressability prong of federal standing requirements." *ASARCO*, 490 U.S. at 615 (opinion of Kennedy, J.).

3. The Standing Analysis In Statutory Rights Cases, Including *Massachusetts* v. *EPA*, Does Not Apply.

The Second Circuit nevertheless concluded that a plaintiff claiming injury from climate change has standing to sue any defendant that "contributes" to climate change through greenhouse gas emissions. In support of this theory, it relied largely on this

Court's decision in *Massachusetts* v. *EPA*, as well as lower court decisions in Clean Water Act cases such as *PIRG* v. *Powell Duffryn Terminals, Inc.*, 913 F.2d 64 (3d Cir. 1990). Pet. App. 69a-75a. Those cases, however, addressed *statutory* causes of action, where the litigant brought suit to redress a *statutory* violation. 549 U.S. at 516-17. Their holdings have no application in a non-statutory, common law case such as this.

In *Massachusetts* and other cases, this Court has characterized the statutory basis of a cause of action—or, conversely, the lack thereof—as "of critical importance to the standing inquiry." *Id.* at 516. This is so because "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Id.* (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring)); see, *e.g.*, *Warth*, 422 U.S. at 500; *Sierra Club* v. *Morton*, 405 U.S. 727, 732-35 (1972). When a statute confers upon a class of persons an interest in enforcement of its provisions, and an individual within that class suffers a concrete harm "of a kind" the statute was "designed to protect [against]," that individual may under some circumstances have standing to bring suit against the party that caused the statutory violation as a means of vindicating the statutorily protected interest, even if the litigant cannot "meet[] all the normal standards for redressability and immediacy" that would apply in the absence of a statutory cause of action. *Massachusetts*, 549 U.S. at 517-18; *FEC* v. *Akins*, 524 U.S. 11, 20 (1998); *Lujan*, 504 U.S. at 572-73 & nn.7-8, 578; see *Friends of the Earth, Inc.* v. *Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 185-86 (2000); *United States* v. *Students Challenging Regulatory Agency Procedures* (*SCRAP*), 412 U.S.

669, 686-89 (1973); *Morton*, 405 U.S. at 736-38; *Ass'n of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 153-55 (1970).[5]

This explains why in *Massachusetts* the Court concluded that the State had standing to press its claim against EPA. That claim did not seek common law injunctive relief against the alleged nuisance of climate change; it was brought pursuant to an express statutory cause of action under the Clean Air Act, granting the State the right "to challenge agency action unlawfully withheld." 549 U.S. at 516-17 (citing 42 U.S.C. § 7607(b)(1)). Through the claim, the State sought to compel EPA to exercise its statutory authority under the Act to consider, in response to a rulemaking petition, whether greenhouse gas emissions from motor vehicles endanger the public and should be regulated. *Id.* at 514-16. This Court found that the State had standing to bring the claim, even though there was only a "possibility" that EPA would ultimately exercise its discretion to regulate those emissions, because the relief requested would, at a minimum, redress the statutory violation and vindicate the statutorily protected interest in ensuring that EPA makes properly grounded judgments about "air pollutants" that may endanger the public. *Id.* at 518, 524-26.

---

[5] *See also Lujan*, 504 U.S. at 580 (Kennedy, J., concurring) ("Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit."); *cf. Warth*, 422 U.S. at 501 ("[P]ersons to whom Congress has granted a right of action ...may invoke the general public interest in support of their claim."). The process by which Congress "define[s] injuries and articulate[s] chains of causation" might also be described as "elevating to the status of legally cognizable injuries concrete, *de facto* injuries that were previously in-adequate in law." *Lujan*, 504 U.S. at 578.

The Court emphasized that the claims in *Massachusetts* were directed at a regulatory decision under a federal statute. *Id.* at 524-26. Congress and federal agencies need not address "massive problems in one fell regulatory swoop," the Court explained, but may instead "whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more-nuanced understanding of how best to proceed." *Id.* For that reason, the fact that the regulations sought by the State in *Massachusetts* might not "reverse" climate change or mitigate its effects did not preclude standing. *Id.* Because Congress had authorized EPA to address the alleged risks of climate change through "incremental" regulation, *id.*, and had created a cause of action to ensure that EPA properly exercised its authority in considering whether to undertake such regulation, the State had standing to vindicate its statutorily conferred interest in seeking the incremental protection from those risks that regulation might afford. *Id.*

The claims in this case stand on an entirely different footing, because they were brought not to vindicate a statutory interest but to impose individualized injunctions under common law. A court is not a regulator and lacks the discretion of a legislature to craft "tentative" remedies designed to "whittle away" at a larger problem. *Id.* In contrast, in a case seeking individual relief under the common law, a federal court may enter judgment against a particular defendant only where the plaintiff's injury is "traceable" to that defendant and where relief against the defendant would "redress" that injury. In the absence of a statutory right and cause of action, there is no basis to "loosen the strictures of the ... standing inquiry" to allow litigants to sue based on

nothing more than a possible "contribution" to a risk of injury. *Summers* v. *Earth Island Inst.*, 129 S. Ct. 1142, 1151 (2009); *Lujan*, 504 U.S. at 562; see also *ASARCO*, 490 U.S. at 615 (opinion of Kennedy, J.).

The circuit court decisions in *Powell Duffryn* and other Clean Water Act cases on which the court of appeals erroneously relied, Pet. App. 69a-72a, are consistent with that understanding. Those cases interpret the Clean Water Act to create and confer a substantive statutorily protected interest in the enforcement of discharge permits issued under that Act. See, *e.g.*, *Powell Duffryn*, 913 F.2d at 72. They then hold that a person has standing to sue for a violation of the statute (*i.e.*, a "discharge[of] some pollutant in concentrations greater than allowed by [a] permit") if he or she can relate that violation to an actual concrete harm—for example, by showing that the pollutant was discharged "into a waterway in which the plaintiff[ ] ha[s] an interest" and is of a type that likely "causes or contributes to the kinds of injuries alleged by the plaintiffs." *Id.*; see also, *e.g.*, *Friends of the Earth, Inc.* v. *Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000) (en banc); *Sierra Club* v. *Cedar Point Oil Co.*, 73 F.3d 546, 557 (5th Cir. 1996).

Thus, because the Clean Water Act authorized EPA to address the harms of water pollution through discharge limits, and created a private right of action to enforce these limits, the plaintiffs had standing to vindicate their statutorily conferred right to enjoy waterways unmarred by the very types of aesthetic or other injuries that the federal permits were intended to prevent. See, *e.g.*, *Powell Duffryn*, 913 F.2d at 73 (plaintiffs had standing based on aesthetically offensive oily and greasy sheen where permit limited amounts of oil and grease that could be discharged).

By contrast, applying the *Powell Duffryn* analysis in the absence of an alleged discharge in excess of statutorily-authorized federal limits, as the Second Circuit suggested, Pet. App. 71a, ignores the fundamental (indeed, the sole) basis for standing in that and similar cases: that Congress had defined the discharge as a statutory violation and granted individuals a cause of action to remedy it. Compare Pet. App. 70a-71a (concluding that standing requirement in *Powell Duffryn* that there be a discharge in excess of statutory limits is not "meaningful" in this case "because there is no statute") with *Kivalina*, 663 F. Supp. 2d at 879-80 & n.7 (describing Second Circuit's reasoning as "circular").

This Court has never applied such an analysis outside of the statutory rights context or suggested, as the Second Circuit did, Pet. App. 70a-73a, that the statutory basis for a claim is immaterial to standing. To the contrary, the Court consistently has considered this fact "of critical importance" to the standing inquiry. *Massachusetts*, 549 U.S. at 516.[6] Whether or not Congress would have the power to authorize a suit such as this, it has not done so, and because plaintiffs cannot otherwise satisfy Article III traceability and redressability requirements, their claims should be dismissed.

---

[6] *See also Summers*, 129 S. Ct. at 1151 (Kennedy, J., concurring) ("This case would present different considerations if Congress had sought to provide redress for a concrete injury 'giv[ing] rise to a case or controversy where none existed before.'"); *Warth*, 422 U.S. at 513-14 (rejecting standing and noting that the case's "critical distinction" from *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), where standing was upheld in factually analogous circumstances, was that the claims in *Trafficante* arose under a federal statute).

B. Prudential Standing Principles Also Bar These Claims.

In addition to "core" constitutional requirements, the federal judiciary observes "prudential" limitations on its authority. *Valley Forge Christian Coll.* v. *Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474-75 (1982). Most relevant here is "the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches." *Elk Grove*, 542 U.S. at 12.

The claims in this case constitute precisely this type of "generalized grievance." They challenge conduct—the emission of greenhouse gases—that is common to (and necessary for) virtually every enterprise on the planet. *Supra* pp. 3-4. And they assert impacts from climate change that will allegedly be felt by virtually every person around the world. *Supra* pp. 18-19. It is hard to conceive of a grievance more "generalized" than this.

The nature of these claims, as well as the policy judgments necessary to their consideration, see *infra* pp. 47-51, further confirm that they are "more appropriately addressed in the representative branches." *Elk Grove*, 542 U.S. at 12. Indeed, judicial forbearance is "especially important" here: These claims are asserted under federal common law, unsupported by any statute and lacking "manageable standards" for their adjudication, and Congress and EPA are engaged in ongoing legislative and regulatory responses to issues of greenhouse gas emissions and climate change. U.S. Cert. Br. 13; see also *supra* pp. 5-10. For these reasons, and those further explained by the United States in its brief in

support of certiorari, the claims are barred by principles of prudential standing.[7]

II. A CLIMATE CHANGE NUISANCE CAUSE OF ACTION CANNOT BE MAINTAINED AS A MATTER OF FEDERAL COMMON LAW.

Even if plaintiffs had standing, their federal common law cause of action should be dismissed. This Court's decisions make clear that federal courts do not have authority to create a federal common law nuisance cause of action to address climate change. Moreover, even if such a claim otherwise would exist, it has been displaced by, at a minimum, Congress's enactment of the Clean Air Act. That Act establishes a "comprehensive" regulatory process, *Chevron*, 467 U.S. at 848, through which EPA can determine whether and how greenhouse gas emissions should be regulated based on proceedings in which interested persons, including plaintiffs here, may seek emissions restrictions. Cf. *Milwaukee II*, 451 U.S. at 314

---

[7] The Second Circuit suggested that, if the States satisfied the requirements for *parens patriae* standing, the prudential limitation on the adjudication of generalized grievances would not apply. Pet. App. 53a-54a. But the doctrine of *parens patriae* simply allows a State to sue on behalf of its citizens despite the independent prudential prohibition on "a litigant's raising another person's legal rights." *See Elk Grove*, 542 U.S. at 12; *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 611-12 (1982) (Brennan, J., concurring); R. Fallon, D. Meltzer, & D. Shapiro, *Hart & Wechsler's The Federal Courts and The Federal System* 289-93 (5th ed. 2003); *see also Massachusetts*, 549 U.S. at 520 (noting "special solicitude" owed to State's assertion of a quasi-sovereign interest for purposes of *parens patriae*). That doctrine does not eliminate other jurisdictional barriers, prudential or otherwise. *E.g.*, *Massachusetts*, 549 U.S. at 520-26 (addressing "core" constitutional standing after finding that States satisfied *parens patriae*).

(holding that the Clean Water Act displaces federal common law water pollution claims).

A. There Is No Federal Common Law Nuisance Cause Of Action To Address Alleged Effects of Climate Change.

"There is no federal general common law." *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 78 (1938).[8] That is because the Constitution vests general lawmaking power in Congress, not the judiciary. Accordingly, since *Erie*, this Court has recognized that courts have only a highly "restricted" authority to create federal common law. *Tex. Indus.*, 451 U.S. at 640.

This limited authority has been exercised most often to create federal common law rules of decision to resolve claims that litigants are otherwise authorized to bring under state law. See *infra* pp. 34-35. This case, however, involves the far rarer use of federal common law to create a cause of action. Because it is such an extraordinary exercise of power for federal courts to themselves authorize the invocation of their authority to hear cases, this Court

---

[8] For much of the Nation's first 150 years, it was "clear" that "there is no"—and "can be no"—"federal common law of the United States." *Willamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1, 8 (1888); *Wheaton* v. *Peters*, 33 U.S. (8 Pet.) 591, 658-59 (1834); *see* Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. Pa. L. Rev. 1231, 1274-75 (1985). During this period, the "common law" applied by federal courts was not "federal," but was characterized as a "general" corpus of legal principles—a "transcendental body of law outside of any particular State"—which any court, state or federal, could draw from and develop. *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 725-27 (2004). *Erie* rejected this view, holding that common law exists only as authorized by a sovereign entity. 304 U.S. at 78-79. At that point, it became necessary to address whether and when *federal* common law might be available. *Sosa*, 542 U.S. at 725-27; *see* Jay, *supra*, at 1322.

has, for over 30 years, repeatedly held that federal courts should no longer create or expand causes of action. For example, although implying causes of action from statutes was a classic exercise of federal common lawmaking power, see, *e.g.*, Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 421 (1964), the Court more recently has repudiated the practice, *Alexander* v. *Sandoval*, 532 U.S. 275, 287 (2001). It likewise has refused to expand causes of action previously implied from statutes, *e.g.*, *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008), or "to extend *Bivens* liability to any new context or new category of defendants," *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 67-68 (2001). The Court also declined to create a federal common law cause of action for violations of international legal norms—even though the Alien Tort Statute authorized such judicial lawmaking. *Sosa*, 542 U.S. at 727-28. "[A] decision to create a private right of action," the Court explained, "is one better left to legislative judgment in the great majority of cases." *Id.*

The federal "nuisance" cause of action asserted in this case does not arise under any federal statute. Nor do any of the relevant—and very limited—concerns that have justified creation of federal common law causes of action in the past support such an "unusual exercise of lawmaking by federal courts" here. *Milwaukee II*, 451 U.S. at 314. Moreover, even if there were a basis for such an exercise, the exceptional complexity and scope of the issues raised by this lawsuit demonstrate that creation of a "climate change" cause of action falls outside the courts' "limited" and "restricted" federal common lawmaking powers.

1. This Court has upheld the creation of federal common law in only three "enclaves": (i) "[controversies] concerned with the rights and obligations of the United States," (ii) "admiralty cases," and (iii) "interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations." *Tex. Indus.*, 451 U.S. at 641; see also *Sosa*, 542 U.S. at 725-30; *Atherton* v. *FDIC*, 519 U.S. 213, 225-226 (1997). The "uniquely federal interests" that have justified such exercises of judicial lawmaking are "few" and "restricted." *Tex. Indus.*, 451 U.S. at 641. Although these interests have distinct "constitutional underpinnings," *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 423, 426-27 & n.25 (1964), all ultimately rested on some perceived notion of constitutional necessity justifying the creation of federal common law.

Most typically, courts have fashioned federal common law rules of decisions in situations where they have deemed it unacceptable under our constitutional scheme for certain substantive rights to be determined under state law. Cases involving the rights and obligations of the United States are paradigmatic examples of such federal common lawmaking. See, *e.g.*, *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943); see also *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 505-06 (1988) (recognizing "government contractor" defense as "closely related" to rights and obligations of the United States). Other examples have included recognition of an affirmative defense derived from an interstate compact governing the allocation of interstate waters, see *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 104-05 (1938), and much of admiralty law, see *N.W. Airlines, Inc.* v. *Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 95-96 (1981).

Much more rarely, courts have concluded that the structure of our Constitution and the status of the States in our federal system justify creation of a federal common law cause of action. For example, because the Constitution guarantees States a forum to adjudicate their disputes (having denied States the right to address them by treaty or force), the Court recognized a cause of action for the resolution of state boundary disputes. See *Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) 657, 723-31 (1838); cf. *West Virginia ex rel. Dyer* v. *Sims*, 341 U.S. 22, 28 (1951) ("A State cannot be its own ultimate judge in a controversy with a sister State."); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. Pa. L. Rev. 1245, 1322-23 (1996). The Court similarly recognized a cause of action to resolve "the conflicting rights of States," *Tex. Indus.*, 451 U.S. at 641, when one State sued another State to abate a discrete transboundary nuisance, see, *e.g.*, *Missouri* v. *Illinois*, 180 U.S. 208 (1901); *North Dakota* v. *Minnesota*, 263 U.S. 365 (1923). And, at a time when Congress was thought to lack the power to provide any remedy for such harms[9] (and before *Erie* had rejected the idea of a "general common law" enforceable by federal courts), the Court in one case relied on this same reasoning to resolve a discrete nuisance claim brought by the State of Georgia against a company in Tennessee, after Georgia had made "a vain application to the State of Tennessee for relief." *Georgia* v. *Tenn. Copper Co.*, 206 U.S. 230, 236 (1907).

The Second Circuit assumed that the present case qualifies as an "interstate ... dispute[ ]," warranting the creation of federal common law, simply because it

---

[9] *See, e.g., United States* v. *E.C. Knight Co.*, 156 U.S. 1 (1895).

can be characterized as an "interstate pollution dispute." Pet. App. 99a-100a. But this Court has never created a federal common law cause of action merely because a plaintiff alleges wrongs with transboundary effects. Instead, recognition of the federal common law cause of action rested on a perceived constitutional necessity wholly lacking here. See *Atherton*, 519 U.S. at 224 ("To find a justification for federal common law in this argument ... is to substitute analogy or formal symmetry for the controlling legal requirement, namely, the existence of a need to create federal common law arising out of a significant conflict or threat to a federal interest."); see also *California* v. *Sierra Club*, 451 U.S. 287, 296 n.7 (1981) (prior cases adjudicating "nuisance" claims did not somehow "federalize" those claims or "establish a general federal law of nuisance").

To be sure, the opinion in *Illinois* v. *Milwaukee*, 406 U.S. 91 (1972) (*Milwaukee I*), declares broadly that "[w]hen we deal with air and water in their ambient or interstate aspects[ ] there is a federal common law," *id.* at 103. But this statement is plainly *dicta*. First, the case involved "conflicting rights of States," as one State (*i.e.*, Illinois) complained of pollution to its waters caused by the "instrumentalit[y]" of another State (*i.e.*, the City of Milwaukee and its sewerage authority, acting under authority of and in conformance with Wisconsin law). *Id.* at 94-97. Second, and more fundamentally, *Milwaukee I* is properly understood as basing its holding not on the type of constitutional necessity that had theretofore justified the extraordinary use of judicial lawmaking power to create a federal common law cause of action, but on then-existing "federal environmental protection statutes," *id.* at 101-04 & n.5, which the Court

interpreted to contain remedial gaps that (under the then-prevailing view of implied causes of action) allowed for and authorized development of federal common law. See *id.* (citing *Textile Workers Union* v. *Lincoln Mills of Ala.*, 353 U.S. 448 (1957), interpreting Labor Management Relations Act as granting lawmaking authority to the federal courts); see also *Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481, 488 (1987) (explaining that *Milwaukee I* found that the terms of the Clean Water Act were "not sufficiently comprehensive"); *Milwaukee II*, 451 U.S. at 324 n.18 (same). Indeed, according to the Court in *Milwaukee I*, the federal statute then governing water pollution appeared to invite the creation of federal common law, as it "ma[de] clear that it is federal, not state, law that in the end controls the pollution of interstate or navigable waters"; authorized the Attorney General to bring an equitable "abatement" action in federal court; and expressly provided that "[s]tate and interstate action[s] to abate pollution of interstate or navigable waters shall be encouraged and shall not ... be displaced by Federal enforcement action." 406 U.S. at 102-04 (quoting 33 U.S.C. §§ 1151, 1160 (1970)).[10]

Milwaukee I, therefore, cannot properly be understood as having jettisoned the notions of constitutional necessity that justified recognition of a federal common law cause of action for States to sue to abate discrete interstate nuisances. Nor, for the same reason, should it be read to have authorized courts to create federal common law to deal

---

[10] The Court later held in *Milwaukee II* that the Clean Water Act displaced federal common law water pollution claims, 451 U.S. at 325, and it has since rejected the more expansive view of implied causes of action reflected in cases like *Milwaukee I*, *see Alexander*, 532 U.S. at 287.

pervasively and comprehensively with all matters relating to "air and water in their ambient or interstate aspects."[11]

2. No notion of constitutional necessity justifies recognition of the extraordinary federal common law "nuisance" cause of action that plaintiffs purport to assert in this case. This case raises no claims of conflicting States' rights. And, even if it did, no theory of constitutional necessity compels federal courts to provide a remedy, as it is now understood that Congress is fully empowered to do so under the Commerce Clause. Thus, even if Congress had wholly failed to address the issue—which is not the case, see *infra* Part II.B—courts would lack authority to recognize the right that plaintiffs assert. In addition, two overarching factors militate conclusively against "exercising [the] innovative authority over substantive law" necessary to recognize the cause of action sought here. *Sosa*, 542 U.S. at 726; see *Wallis* v. *Pan Am. Petroleum Corp.*, 384 U.S. 63, 68-69 (1966) (noting factors).

First, the nature and complexities of these issues, and the possible ramifications of recognizing a cause of action, strongly counsel against any exercise of judicial lawmaking in this particular context. The nuisance cases this Court adjudicated in the past all

---

[11] To the extent *Milwaukee I* could be so read, this Court should disavow such a reading as fundamentally at odds with the now-prevailing understanding of the federal courts' limited and restricted authority to create federal common law causes of action. *Supra* pp. 32-33. Indeed, as explained below, such an understanding of *Milwaukee I* would arrogate to federal courts responsibility for addressing issues that are wholly unfit for resolution by courts using federal common law and that, under our constitutional scheme, are properly resolved by the political branches.

involved a localized problem that affected a discrete area and was traceable to a discrete source—*i.e.*, nuisances "of simple type." See, *e.g.*, *Tenn. Copper*, 206 U.S. at 237; *Missouri*, 180 U.S. 208. The claims here—alleging that defendants' greenhouse gas emissions combine with emissions from countless other activities around the globe that have been accumulating for centuries to create a worldwide problem—bear no resemblance to those cases or any other previous tort claim.

To hold that anyone affected by climate change may maintain a claim against any source of greenhouse gas emissions under the federal common law of "nuisance" would expand the traditional conception of that cause of action beyond all recognizable bounds. Indeed, it would be unprecedented and transformative, resulting in an essentially limitless set of potential plaintiffs and defendants, see *supra* pp. 18-19, and a judiciary asked to design, enforce, and (over time) modify a set of piecemeal regulatory decrees of great intricacy and enormous consequence for the Nation's energy supply and economic security (and for the international climate change negotiations in which the United States is presently engaged, see *supra* pp. 9-10). The effects would be massive and unpredictable. *North Carolina*, 615 F.3d at 306 ("There is no way to predict the effect on ... utilities generally of supplanting operating permits with mandates derived from public nuisance law, but one suspects the costs and dislocations would be heavy indeed."). Addressing these issues is a task for "those who write the laws, [not] those who interpret them." *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 89 (1994); *Tex. Indus.*, 451 U.S. at 640.

Second, recognition of this cause of action would not serve, and could undermine, any federal interest in

coordination of air emission regulation. No standards would direct judges and juries in assessing a "reasonable" level of emissions in any individual case, other than the "vague and indeterminate" mandate of the Restatement, *Milwaukee II*, 451 U.S. at 317, to "weigh[ ] the gravity of the harm against the utility of the conduct," Restatement (Second) of Torts § 821B cmt. e. Different jurists would invariably "balanc[e] the equities" (Pet. App. 35a) differently, come to different conclusions, and impose different forms of relief against different sources of greenhouse gas emissions. The result would be a "balkanization of clean air regulations and a confused patchwork of standards." *North Carolina*, 615 F.3d at 296.

The judgment of the Second Circuit would thus not only "revert ... to the understanding of private causes of action that held sway 40 years ago," *Alexander*, 532 U.S. at 287, creating a "new substantive legal liability without legislative aid and as at the common law," *Bush* v. *Lucas*, 462 U.S. 367, 390 (1983), based on the court's notion of what rights and remedies would best serve the public interest. It would do so in a context far *more* complex, policy-laden, and consequential than any at issue in the prior cases on which the court of appeals relied for support.

B. Any Federal Common Law Climate Change Nuisance Cause Of Action Has Been Displaced.

Even if there would otherwise have been a federal common law cause of action to address the "nuisance" of climate change, any such cause of action has been displaced by Congress. Federal common law is relied upon as a "necessary expedient" in the "absence of an applicable act of Congress." *Milwaukee II*, 451 U.S. at 314-15. For that reason, when Congress "addresse[s] the problem" previously governed by

federal common law, "the need for such an unusual exercise of lawmaking by federal courts disappears." *Id.* Congress has addressed the issue of greenhouse gas emissions: this Court held in *Massachusetts* that the Clean Air Act defines those emissions as an "air pollutant," 549 U.S. at 528-29, 532, and required EPA to consider regulation of those emissions consistent with its statutory duties, *id.* Just as the Clean Water Act displaced the federal common law water pollution claims asserted in *Milwaukee II*, the Clean Air Act displaces the common law air emission claims asserted here. See *Milwaukee II*, 451 U.S. at 325 ("the invocation of federal common law ... in the face of congressional legislation ... is peculiarly inappropriate in areas as complex as water pollution control," the problems of which are "particularly unsuited to the [*ad hoc* adjudicative] approach inevitable under a regime of federal common law").

1. The Clean Air Act, like the Clean Water Act, is a "comprehensive" regulatory scheme to address environmental pollution. *Chevron*, 467 U.S. at 848; see also 42 U.S.C. § 7401. It vests in EPA responsibility to consider regulating any "air pollutant," defined broadly to encompass "any physical, chemical, [or] biological ... substance ... [which] enters the ambient air," 42 U.S.C. § 7602(g); authorizes EPA to require, when it makes certain findings, that mobile and stationary sources meet technology- and air quality-based emission standards, *id.* §§ 7409, 7411, 7502, 7521; requires major sources to secure operating permits as well as pre-construction permits that establish emissions limitations, *id.* §§ 7475(a), 7661b(a), 7661c(a); and grants EPA rights to enforce those limitations through administrative and judicial proceedings, *id.* §§ 7413, 7477. The Act is "sweeping" and "capacious."

Massachusetts, 549 U.S. at 528-29, 532; see *North Carolina*, 615 F.3d at 298 ("To say this regulatory and permitting regime is comprehensive would be an understatement.").

Throughout the debates and reports of Congress, its sponsors repeatedly characterized the Act as "comprehensive," and commented on its expansive reach. *E.g.*, 136 Cong. Rec. S592 (daily ed. Jan. 31, 1990); *id.* at H2511 (daily ed. May 21, 1990); *id.* at H12845 (daily ed. Oct. 26, 1990). Like the Clean Water Act, the legislation was "self-consciously comprehensive." *Milwaukee II*, 451 U.S. at 319. Nothing in the Act or legislative history suggests that Congress intended to leave "room for courts to attempt to improve on that program with federal common law." *Id.*; see also *North Carolina*, 615 F.3d at 304 ("Congress in the Clean Air Act opted rather emphatically for the benefits of agency expertise in setting standards of emissions controls, especially in comparison with ... judicially managed nuisance decrees"); *Nat'l Audubon Soc'y* v. *Dep't of Water*, 869 F.2d 1196, 1202 (9th Cir. 1988) (same).

The Second Circuit analogized the Clean Air Act to the pre-1972 Federal Water Pollution Control Act (FWPCA), Pet. App. 142a-44a, which *Milwaukee I* found did not displace common law water pollution claims, 406 U.S. at 98-100. But the FWPCA at that time did not provide any authority for direct enforcement of discharge limitations for individual pollutants. Instead, it provided that, if EPA believed that a particular discharge constituted a danger to the public, it could—after seeking voluntary resolution, petitioning the State to act, and holding a public hearing—ask the Attorney General to bring an equitable "abatement" action in federal court. *Id.* at 102-03 (citing 33 U.S.C. §§ 1151, 1160 (1970)); see

United States v. *Reserve Mining Co.*, 380 F. Supp. 11 (D. Minn. 1974) (addressing claims under FWPCA). In contrast, the Clean Air Act vests EPA with broad authority not only to promulgate national standards for pollutants, but also to enforce those standards directly, through administrative or judicial proceedings, and to mandate that stationary sources in identified categories secure pre-construction and operating permits. *Massachusetts*, 549 U.S. at 528-29; see 42 U.S.C. §§ 7413, 7475, 7477, 7604, 7607, 7661b, 7661c. This statute bears no resemblance to the FWPCA addressed in *Milwaukee I*. Instead, it more closely mirrors the post-1972 Clean Water Act in *Milwaukee II*, on which the permit requirements of the Clean Air Act were modeled. *Clean Air Act: A Summary of the Act and Its Major Requirements*, CRS Report RL30853, at 15 (May 2005).

Most fundamentally, greenhouse gases collectively have been held to be an "air pollutant" within the meaning of the Clean Air Act, see *Massachusetts*, 549 U.S. at 528-29, 532 (citing 42 U.S.C. § 7602(g)), and EPA has interpreted the Act to provide it with authority to consider restrictions on greenhouse gas emissions from mobile and stationary sources, including those of these defendants. See 75 Fed. Reg. 31514. Accordingly, through the Clean Air Act, Congress has established a legislative scheme that "speaks directly" to the alleged problem identified in the complaint, rendering resort to federal common law not only unnecessary but improper. See *Milwaukee II*, 451 U.S. at 314-15, 325.

2. The Clean Air Act's displacement of federal common law claims is further underscored by other aspects of the federal regulatory scheme. In particular, federal law specifically defines methods by which States and other persons may seek, through

rulemaking petitions, regulations addressing greenhouse gas emissions. See *Massachusetts*, 549 U.S. at 527; cf. *Milwaukee II*, 451 U.S. at 326-28. In other words, Congress has already provided a statutory means by which these plaintiffs could pursue essentially the same relief they now seek through common law.

Federal law allows interested persons, including plaintiffs here, to petition EPA to consider rulemaking with respect to any category of air pollution sources they contend poses a risk to the public. See *Massachusetts*, 549 U.S. at 516-17. The denial of such a petition is subject to judicial review in the courts of appeals, with the option of further review in this Court—the basis for the State's claim in *Massachusetts*. *Id.* (citing 42 U.S.C. § 7607(b)). And, once regulations are adopted, whenever a State issues an operating permit to a major stationary pollution source in its jurisdiction, that State must notify contiguous and other nearby States that might be affected, and those States may petition EPA to revise or reject the permit terms. 42 U.S.C. § 7661d(a)(2), (b)(2). Again, the denial of such a petition is subject to review in a federal court of appeals. *Id.* § 7607(b).

Congress's decision to provide these express avenues for States and others to seek emissions limitations means that federal courts may not allow plaintiffs to bypass those paths and seek similar relief in diverse district courts under federal common law standards fashioned by judges. See *Alexander*, 532 U.S. at 290 ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."). As was true in *Milwaukee II*, any common law cause of action that might have been recognized has been displaced.

3. The Second Circuit believed that the Clean Air Act did not have displacing effect—despite its comprehensive character, specific coverage of greenhouse gases as "pollutants," and applicable remedial schemes—because EPA had not exercised its authority under the Act to regulate greenhouse gas emissions by these individual defendants. Pet. App. 140a-44a. In particular, the court of appeals focused on the fact that EPA had not yet issued regulations finding that such emissions "endanger" the public or controlling emissions from stationary sources. *Id.* These two predicates are no longer true, as the United States pointed out in arguing that current regulations compel displacement. U.S. Cert. Br. 22-24. But, even leaving aside these regulatory developments, the absence of regulations would not alter the displacing effect of the Act.

It is Congress that can create or eliminate causes of action. Agencies have no lawmaking power but that which Congress invests in them. *Alexander*, 532 U.S. at 290-91. Rulemaking by an agency, for that reason, can neither independently support the development of federal common law, nor expand or diminish the displacing effect of a federal statute. See *id.* Thus, once Congress legislates on the subject and delegates authority to an agency to make regulatory decisions implementing Congress's basic policy choices, federal common law claims are displaced regardless of whether or how the agency exercises its delegated authority. As this Court explained in *Milwaukee II*, "[d]emanding specific regulations of general applicability before concluding that Congress has addressed the problem to the exclusion of federal common law asks the wrong question[: t]he question is whether the field has been occupied, not whether it has been occupied in a particular manner." 451 U.S.

at 324; see also *Middlesex Cnty. Sewer Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 21-22 (1981); *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 622-23 (1978).

Likewise here, the Clean Air Act delegates regulatory authority over carbon dioxide emissions to EPA, and thus displaces federal common law claims addressing those emissions without regard to how the agency has exercised or may exercise its authority. If, for example, EPA had found (contrary to its actual finding) that greenhouse gases *do not* endanger the public health and welfare, there would be no basis for a federal court then to make a competing assessment under a federal common law of torts. To hold, as the court of appeals did, that there are still "interstices" for courts to "fill[ ]," Pet. App. 37a, is "no different from holding that the solution Congress chose is not adequate. This [a court] cannot do." *Illinois* v. *Outboard Marine Corp.*, 680 F.2d 473, 478 (7th Cir. 1982).

III. THIS CASE PRESENTS NON-JUSTICIABLE POLITICAL QUESTIONS.

By virtue of their subject matter, certain cases are not cognizable in the courts because they present "political questions." *Vieth* v. *Jubelirer*, 541 U.S. 267, 277 (2004) (plurality). A political question is present if, upon a "discriminating inquiry into the precise facts and posture of the particular [claims]," *Baker*, 369 U.S. at 217, adjudication of the claims would require the courts to make "an initial policy determination of a kind clearly for nonjudicial discretion," to decide a case in the absence of "judicially discoverable and manageable standards," or otherwise to resolve a question that has been or should be decided by the other branches. *Id.*; see *INS* v. *Chadha*, 462 U.S. 919, 941 (1983) (a political

question exists "when *any one* of the ... circumstances [outlined in *Baker*] is present") (emphasis added). While the claims in this case implicate all of these concerns, see, *e.g.*, *supra* pp. 5-9, 40-46, it is particularly clear that their adjudication would require an impermissible "initial policy determination" made in the absence of "judicially discoverable and manageable standards."

"One of the most obvious limitations imposed by [Article III] is that judicial action must be governed by *standard*, by *rule*." *Vieth*, 541 U.S. at 278 (plurality) (emphasis in original). Those rules must be "principled, rational, and based upon reasoned distinctions," and not the result of "ad hoc" policy judgments. *Id.* By contrast, claims that would "cast [judges] forth upon a sea of imponderables," *id.* at 290, or "involve large elements of prophecy," *Chi. & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948), are not justiciable.

Adjudication of the claims in this case would place a judge in that intractable situation. Central to any common law "nuisance" claim is the allegation that the defendant's actions constitute "an unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B(1); see *id.* §§ 821B cmt. e, 822. To determine whether an interference is "unreasonable," a judge must "weigh[ ] ... the gravity of the harm against the utility of the conduct." *Id.* § 821B cmt. e.

No "principled" or "reasoned" standards would govern this inquiry in the context of the claims alleged in this case. To determine a "reasonable" emissions level for a single defendant, a judge would first have to determine the "reasonable" level of global emissions in light of the global risks of climate change, and the global costs and benefits of

emissions-producing activities and associated reduction measures. The posited risks of climate change and the costs and benefits of emissions reductions, however, are not quantifiable or predictable even under the report described in the complaints as "a standard scientific reference on global warming." J.A. 80; see Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2001: Synthesis Report*, at 2-5 (2001) (noting "uncertainties" in addressing these issues). And, even if a judge could somehow determine a "reasonable" aggregate emissions level for sources worldwide, in order then to determine a "reasonable" level for an individual source the judge could not simply divide the global level by the number of historical worldwide sources of greenhouse gas emissions (assuming that number could somehow be obtained), but would necessarily have to tailor emissions levels on a nation-by-nation, sector-by-sector (if not entity-by-entity) basis, weighing the gravity of harm to plaintiffs against the utility of each sector's and each defendant's conduct. Moreover, because total worldwide emissions are in flux and the relative quantities of emissions are ever-changing among nations, sectors, and individual sources, these allocations would need to be revisited by courts in perpetuity.

A judge in this circumstance would "search[ ] in vain ... for anything resembling a principle in the common law of nuisance." *Lucas* v. *S.C. Coastal Council*, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting). Thus, to resolve these claims, any decisionmaker would need to make *ad hoc* policy judgments, for which there is no "right" or "wrong" answer. For example, a judge that accepts the argument that climate change produced the risks

allegedly facing these plaintiffs could, under that theory, "trace" the phenomenon to automotive companies' decisions to offer fuel-intensive sport-utility vehicles, but find that the electric utilities and oil and coal companies had responsibly limited their emissions over time and therefore were "reasonable." Or, the judge might determine that individual car ownership is integral to the national economy and that other industries "caused" climate change and should have reduced their emissions. Or, the judge might trace climate change to the emissions of the U.S. Department of Defense or other government entities and hold that utilities, oil companies, and car companies and drivers acted reasonably. Whether our Nation should have had more public transportation and fewer cars, more electricity from nuclear power or solar power, or less electricity and slower economic growth are not decisions that any judge should make. These are issues of "high policy" that only a legislature has the capacity and authority to address. *Tex. Indus.*, 451 U.S. at 647.

This case is thus hardly an "ordinary tort suit," as the Second Circuit described it. Pet. App. 34a. Prior common law pollution claims involved a discrete number of emitters, a clear chain of causation, and a specific injury resulting from the discharged substance itself in a localized area, even when the emissions crossed state lines. See *supra* pp. 35, 38-39. In contrast, the emissions here are not inherently harmful, but instead are produced by virtually all enterprises on the planet. According to the pleadings, defendants' emissions combined in the Earth's atmosphere with undifferentiated emissions from billions of sources around the planet over centuries to trap heat, altering the global environment and, in turn, influencing by undefined

increments the impact of naturally occurring processes that already affect the planet. Indeed, because under plaintiffs' theory liability for climate change could be traced to any emitter of greenhouse gases over the past centuries, all emitters (to the extent they are still in existence) would presumably be subject to joinder as defendants. See Fed. R. Civ. P. 13(h), 20(a)(2). Far from an "ordinary" nuisance suit, a climate change tort case such as this could become the largest and most complex in the history of jurisprudence. This fact simply underscores that, to resolve these claims, a judge would be making decisions committed to the political branches.

"The requirements of Art[icle] III are not satisfied merely because a party ... has couched [its] request for ... relief ... in terms that have a familiar ring to those trained in the legal process." *Valley Forge*, 454 U.S. at 471. Whatever the label applied to these claims, only a legislature has the capacity and authority to assess and weigh the cost of one societal harm (the possible risks of climate change and its effects) against the innumerable other societal harms (including increased costs and lost productivity) that would flow from restrictions on emissions of carbon dioxide and other greenhouse gases. See Laurence H. Tribe et al., Wash. Legal Found., Critical Legal Issues Series No. 169, *Too Hot for Courts To Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* 13-15 (Jan. 2010); see also IPCC, *supra*, at 2 (describing these decisions as "value judgments [that must be] determined through socio-political processes, taking into account considerations such as development, equity, and sustainability, as well as uncertainties and risk"). *Massachusetts* explained that, although the Court could adjudicate the agency's compliance with the

Clean Air Act—"a question eminently suitable to resolution in federal court," 549 U.S. at 516—it had "neither the expertise nor the authority to evaluate the[] policy judgments" identified by EPA as counseling against greenhouse gas regulation. *Id.* at 533-34. These are the very judgments courts would have to make if the claims in this case were adjudicated.

The lack of judicially manageable standards, the need for initial policy decisions to be made by judges, and the actual and potential conflicts with current and future legislation and regulation addressing greenhouse gas emissions and climate change all demonstrate that this case presents "political questions" that are reserved for the representative branches.

CONCLUSION

The decision of the court of appeals should be reversed, and the case should be remanded with instructions that it be dismissed.

Respectfully submitted,

F. WILLIAM BROWNELL
NORMAN W. FICHTHORN
ALLISON D. WOOD
HUNTON & WILLIAMS LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 955-1500

Counsel for Petitioner Southern Company

PETER D. KEISLER*
CARTER G. PHILLIPS
DAVID T. BUENTE JR.
ROGER R. MARTELLA JR.
QUIN M. SORENSON
JAMES W. COLEMAN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
pkeisler@sidley.com
(202) 736-8000

Counsel for Petitioners

SHAWN PATRICK REGAN
HUNTON & WILLIAMS LLP
200 Park Avenue
52nd Floor
New York, N.Y. 10166
(212) 309-1000

Counsel for Petitioner Southern Company

MARTIN H. REDISH
NORTHWESTERN UNIVERSITY SCHOOL OF LAW
375 East Chicago Avenue
Chicago, Illinois 60611
(312) 503-8545

Counsel for Petitioners

DONALD B. AYER
KEVIN P. HOLEWINSKI
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

THOMAS E. FENNELL
MICHAEL L. RICE
JONES DAY
2727 North Harwood Street
Dallas, Texas 75201
(214) 220-3939

Counsel for Petitioner Xcel Energy Inc.

January 31, 2011

* Counsel of Record

STATUTORY ADDENDUM

STATUTORY ADDENDUM

33 U.S.C. § 1151 (1970). Congressional declaration of policy in controlling water pollution; right of States to waters.

(a) The purpose of this chapter is to enhance the quality and value of our water resources and to establish a national policy for the prevention, control, and abatement of water pollution.

(b) In connection with the exercise of jurisdiction over the waterways of the Nation and in consequence of the benefits resulting to the public health and welfare by the prevention and control of water pollution, it is declared to be the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution, to support and aid technical research relating to the prevention and control of water pollution, and to provide Federal technical services and financial aid to State and interstate agencies and to municipalities in connection with the prevention and control of water pollution. The Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter through the Environmental Protection Agency. The Secretary of Health, Education, and Welfare shall supervise and direct the administration of all functions of the Department of Health, Education, and Welfare which relate to water pollution.

(c) Nothing in this chapter shall be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

33 U.S.C. § 1160 (1970). Enforcement measures against pollution of interstate or navigable waters.

(a) Pollution of waters subject to abatement.

The pollution of interstate or navigable Waters in or adjacent to any State or States (whether the matter causing or contributing to such pollution is discharged directly into such waters or reaches such waters after discharge into a tributary of such waters), which endangers the health or welfare of any persons, shall be subject to abatement as provided in this chapter.

(b) Encouragement of State and interstate action.

Consistent with the policy declaration of this chapter, State and interstate action to abate pollution of interstate or navigable waters shall be encouraged and shall not, except as otherwise provided by or pursuant to court order under subsection (h) of this section, be displaced by Federal enforcement action.

(c) Water quality standards; procedure for establishment; considerations governing establishment; approval or modification by Hearing Board; violations.

(1) If the Governor of a State or a State water pollution control agency files, within one year after October 2, 1965, a letter of intent that such State, after public hearings, will before June 30, 1967, adopt (A) water quality criteria applicable to interstate waters or portions thereof within such State, and (B) a plan for the implementation and enforcement of the water quality criteria adopted, and if such criteria and plan are established in accordance with the letter of intent, and if the Administrator determines that

such State criteria and plan are consistent with paragraph (3) of this subsection, such State criteria and plan shall thereafter be the water quality standards applicable to such interstate waters or portions thereof.

(2) If a State does not (A) file a letter of intent or (B) establish water quality standards in accordance with paragraph (1) of this subsection, or if the Administrator or the Governor of any State affected by water quality standards established pursuant to this subsection desires a revision in such standards, the Administrator may, after reasonable notice and a conference of representatives of appropriate Federal departments and agencies, interstate agencies, States, municipalities and industries involved, prepare regulations setting forth standards of water quality to be applicable to interstate waters or portions thereof. If, within six months from the date the Administrator publishes such regulations, the State has not adopted water quality standards found by the Administrator publishes such regulations, the State has not adopted water quality standards found by the Administrator to be consistent with paragraph (3) of this subsection, or a petition for public hearing has not been filed under paragraph (4) of this subsection, the Administrator shall promulgate such standards.

(3) Standards of quality established pursuant to this subsection shall be such as to protect the public health or welfare, enhance the quality of water and such standards the Administrator, the Hearing Board, or the appropriate State authority shall take into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other legitimate uses. In establishing such

standards the Administrator, the Hearing Board, or the appropriate State authority shall take into consideration their use and value for navigation.

(4) If at any time prior to 30 days after standards have been promulgated under paragraph (2) of this subsection, the Governor of any State affected by such standards petitions the Administrator for a hearing, the Administrator shall call a public hearing, to be held in or near one or more of the places where the water quality standards will take effect, before a Hearing Board of five or more persons appointed by the Administrator. Each State which would be affected by such standards shall be given an opportunity to select one member of the Hearing Board. The Department of Commerce and other affected Federal departments and agencies shall each be given an opportunity to select a member of the Hearing Board and not less than a majority of the Hearing Board shall be persons other than officers or employees of the Environmental Protection Agency.

The members of the Board who are not officers or employees of the United States, while participating in the hearing conducted by such Hearing Board or otherwise engaged on the work of such Hearing Board, shall be entitled to receive compensation at a rate fixed by the Administrator, but not exceeding $100 per diem, including travel time, and while away from their homes or regular places of business they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 73b-2 of Title 5 for persons in the Government service employed intermittently. Notice of such hearing shall be published in the Federal Register and given to the State water pollution control agencies, interstate agencies and municipalities involved at least 30 days prior to the date of such hearing. On the basis of the

evidence presented at such hearing the Hearing Board shall make findings as to whether the standards published or promulgated by the Administrator should be approved or modified and transmit its findings to the Administrator. If the Hearing Board approves the standards as published or promulgated by the Administrator, the standards shall take effect on receipt by the Administrator of the Hearing Board's recommendations. If the Hearing Board recommends modifications in the standards as published or promulgated by the Administrator, the Administrator shall promulgate revised regulations setting forth standards of water quality in accordance with the Hearing Board's recommendations which will become effective immediately upon promulgation.

(5) The discharge of matter into such interstate waters or portions thereof, which reduces the quality of such waters below the water quality standards established under this subsection (whether the matter causing or contributing to such reduction is discharged directly into such waters or reaches such waters after discharge into tributaries of such waters), is subject to abatement in accordance with the provisions of paragraph (1) or (2) of subsection (g) of this section, except that at least 180 days before any abatement action is initiated under either paragraph (1) or (2) of subsection (g) of this section as authorized by this subsection, the Administrator shall notify the violators and other interested parties of the violation of such standards. In any suit brought under the provisions of this subsection the court shall receive in evidence a transcript of the proceedings of the conference and hearing provided for in this subsection, together with the recommendations of the conference and Hearing Board and the recommendations and standards promulgated by the

Administrator, and such additional evidence, including that relating to the alleged violation of the standards, as it deems necessary to a complete review of the standards and to a determination of all other issues relating to the alleged violation. The court, giving due consideration to the practicability and to the physical and economic feasibility of complying with such standards, shall have jurisdiction to enter such judgment and orders enforcing such judgment as the public interest and the equities of the case may require.

(6) Nothing in this subsection shall (A) prevent the application of this section to any case to which subsection (a) of this section would otherwise be applicable, or (B) extend Federal jurisdiction over water not otherwise authorized by this chapter.

(7) In connection with any hearings under this section no witness or any other person shall be required to divulge trade secrets or secret processes.

(d) Notification of pollution; conference of State and interstate agencies; notice of conference date; summary of conference discussions.

(1) Whenever requested by the Governor of any State or a State water pollution control agency, or (with the concurrence of the Governor and of the State water pollution control agency for the State in which the municipality is situated) the governing body of any municipality, the Administrator shall, if such request refers to pollution of waters which is endangering the health or welfare of persons in a State other than that in which the discharge or discharges (causing or contributing to such pollution) originates, give formal notification thereof to the water pollution control agency and interstate agency, if any, of the State or States where such discharge or

discharges originate and shall call promptly a conference of such agency or agencies and of the State water pollution control agency and Interstate agency, if any, of the State or States, if any, which may be adversely affected by such pollution.

Whenever requested by the Governor of any State, the Administrator shall, if such request refers to pollution of interstate or navigable waters which is endangering the health or welfare of persons only in the requesting State in which the discharge or discharges (causing or contributing to such pollution) originate, give formal notification thereof to the water pollution control agency and interstate agency, if any, of such State and shall promptly call a conference of such agency or agencies, unless, in the judgment of the Administrator, the effect of such pollution on the legitimate uses of the waters is not of sufficient significance to warrant exercise of Federal jurisdiction under this section. The Administrator shall also call such a conference whenever, on the basis of reports, surveys, or studies, he has reason to believe that any pollution referred to in subsection (a) of this section and endangering the health or welfare of persons in a State other than that in which the discharge or discharges originate is occurring;- or he finds that substantial economic injury results from the inability to market shellfish or shellfish products in interstate commerce because of pollution referred to in subsection (a) of this section and action of Federal, State, or local authorities.

(2) Whenever the Administrator, upon receipt of reports, surveys, or studies from any duly constituted international agency, has reason to believe that any pollution referred to in subsection (a) of this section which endangers the health or welfare of persons in a foreign country is occurring, and the Secretary of

State requests him to abate such pollution, he shall give formal notification thereof to the State water pollution control agency of the State in which such discharge or discharges originate and to the interstate water pollution control agency, If any, and shall call promptly a conference of such agency or agencies, if he believes that such rant such action. The Administrator, through the Secretary of State, shall invite the foreign country which may be adversely affected by the pollution to attend and participate in the conference, and the representative of such country shall, for the purpose of the conference and any further proceeding resulting from such conference, have all the rights of a State water pollution control agency. The paragraph shall apply only to a foreign country which the Administrator determines has given the United States essentially the same rights with respect to the prevention and control of water pollution occurring in that country as is given that country by this paragraph.

Nothing in this paragraph shall be construed to modify, amend, repeal, or otherwise affect the provisions of the 1909 Boundary Waters Treaty between Canada and the United States or the Water Utilization Treaty of 1944 between Mexico and the United States (59 Stat. 1219), relative to the control and abatement of water pollution in waters covered by those treaties.

(3) The agencies called to attend such conference may bring such persons as they desire to the conference.

In addition, it shall be the responsibility of the chairman of the conference to give every person contributing to the alleged pollution or affected by it an opportunity to make a full statement of his views to the conference. Not less than three weeks' prior

notice of the conference date shall be given to such agencies.

(4) Following this conference, the Administrator shall prepare and forward to all the water pollution control agencies attending the conference a summary of conference discussions including (A) occurrence of pollution of interstate or navigable waters subject to abatement under this chapter; (B) adequacy of measures taken toward abatement of the pollution; and (C) nature of delays, if any, being encountered in abating the pollution.

(c) Recommendation of Administrator to State agency to take remedial action.

If the Administrator believes, upon the conclusion of the conference or thereafter, that effective progress toward abatement of such pollution is not being made and that the health or welfare of any persons is being endangered, he shall recommend to the appropriate State water pollution control agency that it take necessary remedial action. The Administrator shall allow at least six months from the date he makes such recommendations for the taking of such recommended action.

(f) Failure to take remedial action: public hearing: appointment of Board; notice of hearing; findings and recommendations; action of Administrator; requests for reports from persons whose alleged activities result in discharges causing or contributing to water pollution; failure to file report; forfeiture; prosecution.

(1) If, at the conclusion of the period so allowed, such remedial action has not been taken or action which in the Judgment of the Administrator is reasonably calculated to secure abatement of such

pollution has not been taken, the Administrator shall call a public hearing, to be held in or near one or more of the places where the discharge or discharges causing or contributing to such pollution originated, before a Hearing Board of five or more persons appointed by the Administrator. Each State in which any discharge causing or contributing to such pollution originates and each State claiming to be adversely affected by such pollution shall be given an opportunity to select one member of the Hearing Board and at least one member shall be a representative of the Department of Commerce, and not less than a majority of the Hearing Board shall be persons other than officers or employees of the Environmental Protection Agency. At least three weeks' prior notice of such hearing shall be given to the State water pollution control agencies and interstate agencies, if any, called to attend the aforesaid hearing and the alleged polluter or polluters. It shall be the responsibillty of the Hearing Board to give every person contributing to the alleged pollution or affected by it, an opportunity to make a full statement of his views to the Hearing Board. On the basis of the evidence presented at such hearing, the Hearing Board shall make findings as to whether pollution referred to in subsection (a) of this section is occurring and whether effective progress toward abatement thereof is being made. If the Hearing Board finds such pollution is occurring and effective progress toward abatement thereof is not being made, it shall make recommendations to the Administrator concerning the measures, if any, which it finds to be reasonable and equitable to secure abatement of such pollution. The Administrator shall send such findings and recommendations to the person or persons discharging any matter causing or contributing to such pollution, together with a notice specifying a

reasonable time (not less than six months) to secure abatement of such pollution, and shall also send such findings and recommendations and such notice to the State water pollution control agency and to the interstate agency, if any, of the State or States where such discharge or discharges originate.

(2) In connection with any hearing called under this section the Administrator is authorized to require any person whose alleged activities result in discharges causing or contributing to water pollution to file with him, in such form as he may prescribe, a report based on existing data, furnishing such information as may reasonably be required as to the character, kind, and quantity of such discharges and the use of facilities or other means to prevent or reduce such discharges by the person filing such a report. Such report shall be made under oath or otherwise, as the Administrator may prescribe, and shall be filed with the Administrator within such reasonable period as the Administrator may prescribe, unless additional time be granted by the Administrator. No person shall be required in such report to divulge trade secrets or secret processes, and all information reported shall be considered confidential for the purposes of section 1905 of Title 18.

(3) If any person required to file any report under paragraph (2) of this subsection shall fail to do so within the time fixed by the Administrator for filing the same, and such failure' shall continue for thirty days after notice of such default, such person shall forefeit I to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the

district where such person has his principal office or in any district in which he does business. The Administrator may upon application therefor remit or mitigate any forfeiture provided for under this paragraph and he shall have authority to determine the facts upon all such applications.

(4) It shall be the duty of the various United States attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of such forfeitures.

(g) Action on behalf of United States to secure abatement of the pollution.

If action reasonably calculated to secure abatement of the pollution within the time specified in the notice following the public hearing is not taken, the Administrator—

(1) in the case of pollution of waters which is endangering the health or welfare of persons in a State other than that in which the discharge or discharges (causing or contributing to such pollution) originate, may request the Attorney General to bring a suit on behalf of the United States to secure abatement of pollution, and

(2) in the case of pollution of waters which is endangering the health or welfare of persons only in the State in which the discharge or discharges (causing or contributing to such pollution) originate, may, with the written consent of the Governor of such State, request the Attorney General to bring a suit on behalf of the United States to secure abatement of the pollution.

(h) Evidence; jurisdiction of court.

The court shall receive in evidence in any such suit a transcript of the proceedings before the Board and a copy of the Board's recommendations and shall receive such further evidence as the court in its discretion deems proper. The court, giving due consideration to the practicability and to the physical and economic feasibility of securing abatement of any pollution proved, shall have jurisdiction to enter such judgment, and orders enforcing such judgment, as the public interest and the equities of the case may require.

* * * *

42 U.S.C. § 7409. National primary and secondary ambient air quality standards

(a) Promulgation

(1) The Administrator—

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after December 31, 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b) Protection of public health and welfare

(1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) of this section shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

(c) National primary ambient air quality standard for nitrogen dioxide

The Administrator shall, not later than one year after August 7, 1977, promulgate a national primary ambient air quality standard for NO_2 concentrations over a period of not more than 3 hours unless, based on the criteria issued under section 7408(c) of this

title, he finds that there is no significant evidence that such a standard for such a period is requisite to protect public health.

(d) Review and revision of criteria and standards; independent scientific review committee; appointment; advisory functions

(1) Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 7408 of this title and the national ambient air quality standards promulgated under this section and shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 7408 of this title and subsection (b) of this section. The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.

(2)(A) The Administrator shall appoint an independent scientific review committee composed of seven members including at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies.

(B) Not later than January 1, 1980, and at five-year intervals thereafter, the committee referred to in subparagraph (A) shall complete a review of the criteria published under section 7408 of this title and the national primary and secondary ambient air quality standards promulgated under this section and shall recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards as may be appropriate under section 7408 of this title and subsection (b) of this section.

(C) Such committee shall also (i) advise the Administrator of areas in which additional knowledge is required to appraise the adequacy and basis of existing, new, or revised national ambient air quality standards, (ii) describe the research efforts necessary to provide the required information, (iii) advise the Administrator on the relative contribution to air pollution concentrations of natural as well as anthropogenic activity, and (iv) advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards.

42 U.S.C. § 7411. Standards of performance for new stationary sources

(a) Definitions

For purposes of this section:

(1) The term "standard of performance" means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

(2) The term "new source" means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this

section which will be applicable to such source.

(3) The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant. Nothing in subchapter II of this chapter relating to nonroad engines shall be construed to apply to stationary internal combustion engines.

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

(5) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source.

(6) The term "existing source" means any stationary source other than a new source.

(7) The term "technological system of continuous emission reduction" means—

(A) a technological process for production or operation by any source which is inherently low-polluting or nonpolluting, or

(B) a technological system for continuous reduction of the pollution generated by a source before such pollution is emitted into the ambient air, including precombustion cleaning or treatment of fuels.

(8) A conversion to coal (A) by reason of an order under section 2(a) of the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C. § 792(a)] or any amendment thereto, or any subsequent enactment which supersedes

such Act [15 U.S.C. § 791 et seq.], or (B) which qualifies under section 7413(d)(5)(A)(ii) of this title, shall not be deemed to be a modification for purposes of paragraphs (2) and (4) of this subsection.

(b) List of categories of stationary sources; standards of performance; information on pollution control techniques; sources owned or operated by United States; particular systems; revised standards

(1)(A) The Administrator shall, within 90 days after December 31, 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.

(B) Within one year after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one year after such publication, such standards with such modifications as he deems appropriate. The Administrator shall, at least every 8 years, review and, if appropriate, revise such standards following the procedure required by this subsection for promulgation of such standards. Notwithstanding the requirements of the previous sentence, the Administrator need not review any such standard if the Administrator determines that such review is not appropriate in light of readily available

information on the efficacy of such standard. Standards of performance or revisions thereof shall become effective upon promulgation. When implementation and enforcement of any requirement of this chapter indicate that emission limitations and percent reductions beyond those required by the standards promulgated under this section are achieved in practice, the Administrator shall, when revising standards promulgated under this section, consider the emission limitations and percent reductions achieved in practice.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards.

(3) The Administrator shall, from time to time, issue information on pollution control techniques for categories of new sources and air pollutants subject to the provisions of this section.

(4) The provisions of this section shall apply to any new source owned or operated by the United States.

(5) Except as otherwise authorized under subsection (h) of this section, nothing in this section shall be construed to require, or to authorize the Administrator to require, any new or modified source to install and operate any particular technological system of continuous emission reduction to comply with any new source standard of performance.

(6) The revised standards of performance required by enactment of subsection (a)(1)(A)(i) and (ii) of this section shall be promulgated not later than one year after August 7, 1977. Any new or modified fossil fuel fired stationary source which commences construction prior to the date of publication of the proposed

revised standards shall not be required to comply with such revised standards.

(c) State implementation and enforcement of standards of performance

(1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this chapter to implement and enforce such standards.

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable standard of performance under this section.

(d) Standards of performance for existing sources; remaining useful life of source

(1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) of this title or emitted from a source category which is regulated under section 7412 of this title but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance. Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the

remaining useful life of the existing source to which such standard applies.

(2) The Administrator shall have the same authority—

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 7410(c) of this title in the case of failure to submit an implementation plan, and

(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections 7413 and 7414 of this title with respect to an implementation plan.

In promulgating a standard of performance under a plan prescribed under this paragraph, the Administrator shall take into consideration, among other factors, remaining useful lives of the sources in the category of sources to which such standard applies.

(e) Prohibited acts

After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

(f) New source standards of performance

(1) For those categories of major stationary sources that the Administrator listed under subsection (b)(1)(A) of this section before November 15, 1990, and for which regulations had not been proposed by the Administrator by November 15, 1990, the Administrator shall—

(A) propose regulations establishing standards of performance for at least 25 percent of such

categories of sources within 2 years after November 15, 1990;

(B) propose regulations establishing standards of performance for at least 50 percent of such categories of sources within 4 years after November 15, 1990; and

(C) propose regulations for the remaining categories of sources within 6 years after November 15, 1990.

(2) In determining priorities for promulgating standards for categories of major stationary sources for the purpose of paragraph (1), the Administrator shall consider—

(A) the quantity of air pollutant emissions which each such category will emit, or will be designed to emit;

(B) the extent to which each such pollutant may reasonably be anticipated to endanger public health or welfare; and

(C) the mobility and competitive nature of each such category of sources and the consequent need for nationally applicable new source standards of performance.

(3) Before promulgating any regulations under this subsection or listing any category of major stationary sources as required under this subsection, the Administrator shall consult with appropriate representatives of the Governors and of State air pollution control agencies.

(g) Revision of regulations

(1) Upon application by the Governor of a State showing that the Administrator has failed to specify in regulations under subsection (f)(1) of this section

any category of major stationary sources required to be specified under such regulations, the Administrator shall revise such regulations to specify any such category.

(2) Upon application of the Governor of a State, showing that any category of stationary sources which is not included in the list under subsection (b)(1)(A) of this section contributes significantly to air pollution which may reasonably be anticipated to endanger public health or welfare (notwithstanding that such category is not a category of major stationary sources), the Administrator shall revise such regulations to specify such category of stationary sources.

(3) Upon application of the Governor of a State showing that the Administrator has failed to apply properly the criteria required to be considered under subsection (f)(2) of this section, the Administrator shall revise the list under subsection (b)(1)(A) of this section to apply properly such criteria.

(4) Upon application of the Governor of a State showing that—

> (A) a new, innovative, or improved technology or process which achieves greater continuous emission reduction has been adequately demonstrated for any category of stationary sources, and
>
> (B) as a result of such technology or process, the new source standard of performance in effect under this section for such category no longer reflects the greatest degree of emission limitation achievable through application of the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and

any non-air quality health and environmental impact and energy requirements) has been adequately demonstrated,

the Administrator shall revise such standard of performance for such category accordingly.

(5) Unless later deadlines for action of the Administrator are otherwise prescribed under this section, the Administrator shall, not later than three months following the date of receipt of any application by a Governor of a State, either—

(A) find that such application does not contain the requisite showing and deny such application, or

(B) grant such application and take the action required under this subsection.

(6) Before taking any action required by subsection (f) of this section or by this subsection, the Administrator shall provide notice and opportunity for public hearing.

(h) Design, equipment, work practice, or operational standard; alternative emission limitation

(1) For purposes of this section, if in the judgment of the Administrator, it is not feasible to prescribe or enforce a standard of performance, he may instead promulgate a design, equipment, work practice, or operational standard, or combination thereof, which reflects the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated. In the event the Administrator promulgates a design or

equipment standard under this subsection, he shall include as part of such standard such requirements as will assure the proper operation and maintenance of any such element of design or equipment.

(2) For the purpose of this subsection, the phrase "not feasible to prescribe or enforce a standard of performance" means any situation in which the Administrator determines that (A) a pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any Federal, State, or local law, or (B) the application of measurement methodology to a particular class of sources is not practicable due to technological or economic limitations.

(3) If after notice and opportunity for public hearing, any person establishes to the satisfaction of the Administrator that an alternative means of emission limitation will achieve a reduction in emissions of any air pollutant at least equivalent to the reduction in emissions of such air pollutant achieved under the requirements of paragraph (1), the Administrator shall permit the use of such alternative by the source for purposes of compliance with this section with respect to such pollutant.

(4) Any standard promulgated under paragraph (1) shall be promulgated in terms of standard of performance whenever it becomes feasible to promulgate and enforce such standard in such terms.

(5) Any design, equipment, work practice, or operational standard, or any combination thereof, described in this subsection shall be treated as a standard of performance for purposes of the

provisions of this chapter (other than the provisions of subsection (a) of this section and this subsection).

(i) Country elevators

Any regulations promulgated by the Administrator under this section applicable to grain elevators shall not apply to country elevators (as defined by the Administrator) which have a storage capacity of less than two million five hundred thousand bushels.

(j) Innovative technological systems of continuous emission reduction

(1)(A) Any person proposing to own or operate a new source may request the Administrator for one or more waivers from the requirements of this section for such source or any portion thereof with respect to any air pollutant to encourage the use of an innovative technological system or systems of continuous emission reduction. The Administrator may, with the consent of the Governor of the State in which the source is to be located, grant a waiver under this paragraph, if the Administrator determines after notice and opportunity for public hearing, that—

(i) the proposed system or systems have not been adequately demonstrated,

(ii) the proposed system or systems will operate effectively and there is a substantial likelihood that such system or systems will achieve greater continuous emission reduction than that required to be achieved under the standards of performance which would otherwise apply, or achieve at least an equivalent reduction at lower cost in terms of energy, economic, or nonair quality environmental impact,

(iii) the owner or operator of the proposed source has demonstrated to the satisfaction of the Administrator that the proposed system will not cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation, function, or malfunction, and

(iv) the granting of such waiver is consistent with the requirements of subparagraph (C).

In making any determination under clause (ii), the Administrator shall take into account any previous failure of such system or systems to operate effectively or to meet any requirement of the new source performance standards. In determining whether an unreasonable risk exists under clause (iii), the Administrator shall consider, among other factors, whether and to what extent the use of the proposed technological system will cause, increase, reduce, or eliminate emissions of any unregulated pollutants; available methods for reducing or eliminating any risk to public health, welfare, or safety which may be associated with the use of such system; and the availability of other technological systems which may be used to conform to standards under this section without causing or contributing to such unreasonable risk. The Administrator may conduct such tests and may require the owner or operator of the proposed source to conduct such tests and provide such information as is necessary to carry out clause (iii) of this subparagraph. Such requirements shall include a requirement for prompt reporting of the emission of any unregulated pollutant from a system if such pollutant was not emitted, or was emitted in significantly lesser amounts without use of such system.

(B) A waiver under this paragraph shall be granted on such terms and conditions as the Administrator determines to be necessary to assure—

(i) emissions from the source will not prevent attainment and maintenance of any national ambient air quality standards, and

(ii) proper functioning of the technological system or systems authorized.

Any such term or condition shall be treated as a standard of performance for the purposes of subsection (e) of this section and section 7413 of this title.

(C) The number of waivers granted under this paragraph with respect to a proposed technological system of continuous emission reduction shall not exceed such number as the Administrator finds necessary to ascertain whether or not such system will achieve the conditions specified in clauses (ii) and (iii) of subparagraph (A).

(D) A waiver under this paragraph shall extend to the sooner of—

(i) the date determined by the Administrator, after consultation with the owner or operator of the source, taking into consideration the design, installation, and capital cost of the technological system or systems being used, or

(ii) the date on which the Administrator determines that such system has failed to—

(I) achieve at least an equivalent continuous emission reduction to that required to be achieved under the standards of performance which would otherwise apply, or

(II) comply with the condition specified in paragraph (1)(A)(iii),

and that such failure cannot be corrected.

(E) In carrying out subparagraph (D)(i), the Administrator shall not permit any waiver for a source or portion thereof to extend beyond the date—

(i) seven years after the date on which any waiver is granted to such source or portion thereof, or

(ii) four years after the date on which such source or portion thereof commences operation,

whichever is earlier.

(F) No waiver under this subsection shall apply to any portion of a source other than the portion on which the innovative technological system or systems of continuous emission reduction is used.

(2)(A) If a waiver under paragraph (1) is terminated under clause (ii) of paragraph (1)(D), the Administrator shall grant an extension of the requirements of this section for such source for such minimum period as may be necessary to comply with the applicable standard of performance under this section. Such period shall not extend beyond the date three years from the time such waiver is terminated.

(B) An extension granted under this paragraph shall set forth emission limits and a compliance schedule containing increments of progress which require compliance with the applicable standards of performance as expeditiously as practicable and include such measures as are necessary and practicable in the interim to minimize emissions. Such schedule shall be treated as a standard of

performance for purposes of subsection (e) of this section and section 7413 of this title.

42 U.S.C. § 7413. Federal enforcement

(a) In general

(1) Order to comply with SIP

Whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated or is in violation of any requirement or prohibition of an applicable implementation plan or permit, the Administrator shall notify the person and the State in which the plan applies of such finding. At any time after the expiration of 30 days following the date on which such notice of a violation is issued, the Administrator may, without regard to the period of violation (subject to section 2462 of Title 28)—

(A) issue an order requiring such person to comply with the requirements or prohibitions of such plan or permit,

(B) issue an administrative penalty order in accordance with subsection (d) of this section, or

(C) bring a civil action in accordance with subsection (b) of this section.

(2) State failure to enforce SIP or permit program

Whenever, on the basis of information available to the Administrator, the Administrator finds that violations of an applicable implementation plan or an approved permit program under subchapter V of this chapter are so widespread that such violations appear to result from a failure of the State in which the plan or permit program applies to enforce the plan or permit program effectively, the Administrator

shall so notify the State. In the case of a permit program, the notice shall be made in accordance with subchapter V of this chapter. If the Administrator finds such failure extends beyond the 30th day after such notice (90 days in the case of such permit program), the Administrator shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan or permit program (hereafter referred to in this section as "period of federally assumed enforcement"), the Administrator may enforce any requirement or prohibition of such plan or permit program with respect to any person by—

(A) issuing an order requiring such person to comply with such requirement or prohibition,

(B) issuing an administrative penalty order in accordance with subsection (d) of this section, or

(C) bringing a civil action in accordance with subsection (b) of this section.

(3) EPA enforcement of other requirements

Except for a requirement or prohibition enforceable under the preceding provisions of this subsection, whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated, or is in violation of, any other requirement or prohibition of this subchapter, section 7603 of this title, subchapter IV-A, subchapter V, or subchapter VI of this chapter, including, but not limited to, a requirement or prohibition of any rule, plan, order, waiver, or permit promulgated, issued, or approved under those provisions or subchapters, or for the payment of any fee owed to the United States under this chapter (other than subchapter II of this chapter), the Administrator may—

(A) issue an administrative penalty order in accordance with subsection (d) of this section,

(B) issue an order requiring such person to comply with such requirement or prohibition,

(C) bring a civil action in accordance with subsection (b) of this section or section 7605 of this title, or

(D) request the Attorney General to commence a criminal action in accordance with subsection (c) of this section.

(4) Requirements for orders

An order issued under this subsection (other than an order relating to a violation of section 7412 of this title) shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation. A copy of any order issued under this subsection shall be sent to the State air pollution control agency of any State in which the violation occurs. Any order issued under this subsection shall state with reasonable specificity the nature of the violation and specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection (or notice to a violator under paragraph (1)) is issued to a corporation, a copy of such order (or notice) shall be issued to appropriate corporate officers. An order issued under this subsection shall require the person to whom it was issued to comply with the requirement as expeditiously as practicable, but in no event longer than one year after the date the order was issued, and shall be nonrenewable. No order issued under this subsection shall prevent the State

or the Administrator from assessing any penalties nor otherwise affect or limit the State's or the United States authority to enforce under other provisions of this chapter, nor affect any person's obligations to comply with any section of this chapter or with a term or condition of any permit or applicable implementation plan promulgated or approved under this chapter.

(5) Failure to comply with new source requirements

Whenever, on the basis of any available information, the Administrator finds that a State is not acting in compliance with any requirement or prohibition of the chapter relating to the construction of new sources or the modification of existing sources, the Administrator may—

(A) issue an order prohibiting the construction or modification of any major stationary source in any area to which such requirement applies;[1]

(B) issue an administrative penalty order in accordance with subsection (d) of this section, or

(C) bring a civil action under subsection (b) of this section.

Nothing in this subsection shall preclude the United States from commencing a criminal action under subsection (c) of this section at any time for any such violation.

(b) Civil judicial enforcement

The Administrator shall, as appropriate, in the case of any person that is the owner or operator of an affected source, a major emitting facility, or a major stationary source, and may, in the case of any other

---

[1] So in original. The semicolon probably should be a comma.

person, commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than $25,000 per day for each violation, or both, in any of the following instances:

(1) Whenever such person has violated, or is in violation of, any requirement or prohibition of an applicable implementation plan or permit. Such an action shall be commenced (A) during any period of federally assumed enforcement, or (B) more than 30 days following the date of the Administrator's notification under subsection (a)(1) of this section that such person has violated, or is in violation of, such requirement or prohibition.

(2) Whenever such person has violated, or is in violation of, any other requirement or prohibition of this subchapter, section 7603 of this title, subchapter IV-A, subchapter V, or subchapter VI of this chapter, including, but not limited to, a requirement or prohibition of any rule, order, waiver or permit promulgated, issued, or approved under this chapter, or for the payment of any fee owed the United States under this chapter (other than subchapter II of this chapter).

(3) Whenever such person attempts to construct or modify a major stationary source in any area with respect to which a finding under subsection (a)(5) of this section has been made.

Any action under this subsection may be brought in the district court of the United States for the district in which the violation is alleged to have occurred, or is occurring, or in which the defendant resides, or where the defendant's principal place of business is located, and such court shall have jurisdiction to

restrain such violation, to require compliance, to assess such civil penalty, to collect any fees owed the United States under this chapter (other than subchapter II of this chapter) and any noncompliance assessment and nonpayment penalty owed under section 7420 of this title, and to award any other appropriate relief. Notice of the commencement of such action shall be given to the appropriate State air pollution control agency. In the case of any action brought by the Administrator under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to the party or parties against whom such action was brought if the court finds that such action was unreasonable.

(c) Criminal penalties

(1) Any person who knowingly violates any requirement or prohibition of an applicable implementation plan (during any period of federally assumed enforcement or more than 30 days after having been notified under subsection (a)(1) of this section by the Administrator that such person is violating such requirement or prohibition), any order under subsection (a) of this section, requirement or prohibition of section 7411(e) of this title (relating to new source performance standards), section 7412 of this title, section 7414 of this title (relating to inspections, etc.), section 7429 of this title (relating to solid waste combustion), section 7475(a) of this title (relating to preconstruction requirements), an order under section 7477 of this title (relating to preconstruction requirements), an order under section 7603 of this title (relating to emergency orders), section 7661a(a) or 7661b(c) of this title (relating to permits), or any requirement or prohibition of subchapter IV-A of this chapter

(relating to acid deposition control), or subchapter VI of this chapter (relating to stratospheric ozone control), including a requirement of any rule, order, waiver, or permit promulgated or approved under such sections or subchapters, and including any requirement for the payment of any fee owed the United States under this chapter (other than subchapter II of this chapter) shall, upon conviction, be punished by a fine pursuant to Title 18, or by imprisonment for not to exceed 5 years, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

(2) Any person who knowingly—

(A) makes any false material statement, representation, or certification in, or omits material information from, or knowingly alters, conceals, or fails to file or maintain any notice, application, record, report, plan, or other document required pursuant to this chapter to be either filed or maintained (whether with respect to the requirements imposed by the Administrator or by a State);

(B) fails to notify or report as required under this chapter; or

(C) falsifies, tampers with, renders inaccurate, or fails to install any monitoring device or method required to be maintained or followed under this chapter[2]

shall, upon conviction, be punished by a fine pursuant to Title 18, or by imprisonment for not more

---

[2] So in original. Probably should be followed by a comma.

than 2 years, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

(3) Any person who knowingly fails to pay any fee owed the United States under this subchapter, subchapter III, IV-A, V, or VI of this chapter shall, upon conviction, be punished by a fine pursuant to Title 18, or by imprisonment for not more than 1 year, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

(4) Any person who negligently releases into the ambient air any hazardous air pollutant listed pursuant to section 7412 of this title or any extremely hazardous substance listed pursuant to section 11002(a)(2) of this title that is not listed in section 7412 of this title, and who at the time negligently places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under Title 18, or by imprisonment for not more than 1 year, or both. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment.

(5)(A) Any person who knowingly releases into the ambient air any hazardous air pollutant listed pursuant to section 7412 of this title or any extremely hazardous substance listed pursuant to section 11002(a)(2) of this title that is not listed in section

7412 of this title, and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under Title 18, or by imprisonment of not more than 15 years, or both. Any person committing such violation which is an organization shall, upon conviction under this paragraph, be subject to a fine of not more than $1,000,000 for each violation. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment. For any air pollutant for which the Administrator has set an emissions standard or for any source for which a permit has been issued under subchapter V of this chapter, a release of such pollutant in accordance with that standard or permit shall not constitute a violation of this paragraph or paragraph (4).

(B) In determining whether a defendant who is an individual knew that the violation placed another person in imminent danger of death or serious bodily injury--

(i) the defendant is responsible only for actual awareness or actual belief possessed; and

(ii) knowledge possessed by a person other than the defendant, but not by the defendant, may not be attributed to the defendant;

except that in proving a defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to be shielded from relevant information.

(C) It is an affirmative defense to a prosecution that the conduct charged was freely consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of—

(i) an occupation, a business, or a profession; or

(ii) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent.

The defendant may establish an affirmative defense under this subparagraph by a preponderance of the evidence.

(D) All general defenses, affirmative defenses, and bars to prosecution that may apply with respect to other Federal criminal offenses may apply under subparagraph (A) of this paragraph and shall be determined by the courts of the United States according to the principles of common law as they may be interpreted in the light of reason and experience. Concepts of justification and excuse applicable under this section may be developed in the light of reason and experience.

(E) The term "organization" means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons.

(F) The term "serious bodily injury" means bodily injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement or protracted loss or

impairment of the function of a bodily member, organ, or mental faculty.

(6) For the purpose of this subsection, the term "person" includes, in addition to the entities referred to in section 7602(e) of this title, any responsible corporate officer.

(d) Administrative assessment of civil penalties

(1) The Administrator may issue an administrative order against any person assessing a civil administrative penalty of up to $25,000, per day of violation, whenever, on the basis of any available information, the Administrator finds that such person—

(A) has violated or is violating any requirement or prohibition of an applicable implementation plan (such order shall be issued (i) during any period of federally assumed enforcement, or (ii) more than thirty days following the date of the Administrator's notification under subsection (a)(1) of this section of a finding that such person has violated or is violating such requirement or prohibition); or

(B) has violated or is violating any other requirement or prohibition of this subchapter or subchapter III, IV-A, V, or VI of this chapter, including, but not limited to, a requirement or prohibition of any rule, order, waiver, permit, or plan promulgated, issued, or approved under this chapter, or for the payment of any fee owed the United States under this chapter (other than subchapter II of this chapter); or

(C) attempts to construct or modify a major stationary source in any area with respect to

which a finding under subsection (a)(5) of this section has been made.

The Administrator's authority under this paragraph shall be limited to matters where the total penalty sought does not exceed $200,000 and the first alleged date of violation occurred no more than 12 months prior to the initiation of the administrative action, except where the Administrator and the Attorney General jointly determine that a matter involving a larger penalty amount or longer period of violation is appropriate for administrative penalty action. Any such determination by the Administrator and the Attorney General shall not be subject to judicial review.

(2)(A) An administrative penalty assessed under paragraph (1) shall be assessed by the Administrator by an order made after opportunity for a hearing on the record in accordance with sections 554 and 556 of Title 5. The Administrator shall issue reasonable rules for discovery and other procedures for hearings under this paragraph. Before issuing such an order, the Administrator shall give written notice to the person to be assessed an administrative penalty of the Administrator's proposal to issue such order and provide such person an opportunity to request such a hearing on the order, within 30 days of the date the notice is received by such person.

(B) The Administrator may compromise, modify, or remit, with or without conditions, any administrative penalty which may be imposed under this subsection.

(3) The Administrator may implement, after consultation with the Attorney General and the States, a field citation program through regulations establishing appropriate minor violations for which field citations assessing civil penalties not to exceed $5,000

per day of violation may be issued by officers or employees designated by the Administrator. Any person to whom a field citation is assessed may, within a reasonable time as prescribed by the Administrator through regulation, elect to pay the penalty assessment or to request a hearing on the field citation. If a request for a hearing is not made within the time specified in the regulation, the penalty assessment in the field citation shall be final. Such hearing shall not be subject to section 554 or 556 of Title 5, but shall provide a reasonable opportunity to be heard and to present evidence. Payment of a civil penalty required by a field citation shall not be a defense to further enforcement by the United States or a State to correct a violation, or to assess the statutory maximum penalty pursuant to other authorities in the chapter, if the violation continues.

(4) Any person against whom a civil penalty is assessed under paragraph (3) of this subsection or to whom an administrative penalty order is issued under paragraph (1) of this subsection may seek review of such assessment in the United States District Court for the District of Columbia or for the district in which the violation is alleged to have occurred, in which such person resides, or where such person's principal place of business is located, by filing in such court within 30 days following the date the administrative penalty order becomes final under paragraph (2), the assessment becomes final under paragraph (3), or a final decision following a hearing under paragraph (3) is rendered, and by simultaneously sending a copy of the filing by certified mail to the Administrator and the Attorney General. Within 30 days thereafter, the Administrator shall file in such court a certified copy, or certified index,

as appropriate, of the record on which the administrative penalty order or assessment was issued. Such court shall not set aside or remand such order or assessment unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the order or penalty assessment constitutes an abuse of discretion. Such order or penalty assessment shall not be subject to review by any court except as provided in this paragraph. In any such proceedings, the United States may seek to recover civil penalties ordered or assessed under this section.

(5) If any person fails to pay an assessment of a civil penalty or fails to comply with an administrative penalty order—

(A) after the order or assessment has become final, or

(B) after a court in an action brought under paragraph (4) has entered a final judgment in favor of the Administrator,

the Administrator shall request the Attorney General to bring a civil action in an appropriate district court to enforce the order or to recover the amount ordered or assessed (plus interest at rates established pursuant to section 6621(a)(2) of Title 26 from the date of the final order or decision or the date of the final judgment, as the case may be). In such an action, the validity, amount, and appropriateness of such order or assessment shall not be subject to review. Any person who fails to pay on a timely basis a civil penalty ordered or assessed under this section shall be required to pay, in addition to such penalty and interest, the United States enforcement expenses, including but not limited to attorneys fees and costs incurred by the United States for collection

proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be 10 percent of the aggregate amount of such person's outstanding penalties and nonpayment penalties accrued as of the beginning of such quarter.

(e) Penalty assessment criteria

(1) In determining the amount of any penalty to be assessed under this section or section 7604(a) of this title, the Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation. The court shall not assess penalties for noncompliance with administrative subpoenas under section 7607(a) of this title, or actions under section 7414 of this title, where the violator had sufficient cause to violate or fail or refuse to comply with such subpoena or action.

(2) A penalty may be assessed for each day of violation. For purposes of determining the number of days of violation for which a penalty may be assessed under subsection (b) or (d)(1) of this section, or section 7604(a) of this title, or an assessment may be made under section 7420 of this title, where the Administrator or an air pollution control agency has notified the source of the violation, and the plaintiff makes a prima facie showing that the conduct or events giving rise to the violation are likely to have

continued or recurred past the date of notice, the days of violation shall be presumed to include the date of such notice and each and every day thereafter until the violator establishes that continuous compliance has been achieved, except to the extent that the violator can prove by a preponderance of the evidence that there were intervening days during which no violation occurred or that the violation was not continuing in nature.

(f) Awards

The Administrator may pay an award, not to exceed $10,000, to any person who furnishes information or services which lead to a criminal conviction or a judicial or administrative civil penalty for any violation of this subchapter or subchapter III, IV-A, V, or VI of this chapter enforced under this section. Such payment is subject to available appropriations for such purposes as provided in annual appropriation Acts. Any officer, or employee of the United States or any State or local government who furnishes information or renders service in the performance of an official duty is ineligible for payment under this subsection. The Administrator may, by regulation, prescribe additional criteria for eligibility for such an award.

(g) Settlements; public participation

At least 30 days before a consent order or settlement agreement of any kind under this chapter to which the United States is a party (other than enforcement actions under this section, section 7420 of this title, or subchapter II of this chapter, whether or not involving civil or criminal penalties, or judgments subject to Department of Justice policy on public participation) is final or filed with a court, the Administrator shall provide a reasonable opportunity

by notice in the Federal Register to persons who are not named as parties or intervenors to the action or matter to comment in writing. The Administrator or the Attorney General, as appropriate, shall promptly consider any such written comments and may withdraw or withhold his consent to the proposed order or agreement if the comments disclose facts or considerations which indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of this chapter. Nothing in this subsection shall apply to civil or criminal penalties under this chapter.

(h) Operator

For purposes of the provisions of this section and section 7420 of this title, the term "operator", as used in such provisions, shall include any person who is senior management personnel or a corporate officer. Except in the case of knowing and willful violations, such term shall not include any person who is a stationary engineer or technician responsible for the operation, maintenance, repair, or monitoring of equipment and facilities and who often has supervisory and training duties but who is not senior management personnel or a corporate officer. Except in the case of knowing and willful violations, for purposes of subsection (c)(4) of this section, the term "a person" shall not include an employee who is carrying out his normal activities and who is not a part of senior management personnel or a corporate officer. Except in the case of knowing and willful violations, for purposes of paragraphs (1), (2), (3), and (5) of subsection (c) of this section the term "a person" shall not include an employee who is carrying out his normal activities and who is acting under orders from the employer.

42 U.S.C. § 7475. Preconstruction requirements

(a) Major emitting facilities on which construction is commenced

No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless—

(1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part;

(2) the proposed permit has been subject to a review in accordance with this section, the required analysis has been conducted in accordance with regulations promulgated by the Administrator, and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations;

(3) the owner or operator of such facility demonstrates, as required pursuant to section 7410(j) of this title, that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this chapter;

(4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility;

(5) the provisions of subsection (d) of this section with respect to protection of class I areas have been complied with for such facility;

(6) there has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility;

(7) the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source; and

(8) in the case of a source which proposes to construct in a class III area, emissions from which would cause or contribute to exceeding the maximum allowable increments applicable in a class II area and where no standard under section 7411 of this title has been promulgated subsequent to August 7, 1977, for such source category, the Administrator has approved the determination of best available technology as set forth in the permit.

(b) Exception

The demonstration pertaining to maximum allowable increases required under subsection (a)(3) of this section shall not apply to maximum allowable increases for class II areas in the case of an expansion or modification of a major emitting facility

which is in existence on August 7, 1977, whose allowable emissions of air pollutants, after compliance with subsection (a)(4) of this section, will be less than fifty tons per year and for which the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur oxides will not cause or contribute to ambient air quality levels in excess of the national secondary ambient air quality standard for either of such pollutants.

(c) Permit applications

Any completed permit application under section 7410 of this title for a major emitting facility in any area to which this part applies shall be granted or denied not later than one year after the date of filing of such completed application.

(d) Action taken on permit applications; notice; adverse impact on air quality related values; variance; emission limitations

(1) Each State shall transmit to the Administrator a copy of each permit application relating to a major emitting facility received by such State and provide notice to the Administrator of every action related to the consideration of such permit.

(2)(A) The Administrator shall provide notice of the permit application to the Federal Land Manager and the Federal official charged with direct responsibility for management of any lands within a class I area which may be affected by emissions from the proposed facility.

* * * *

42 U.S.C. § 7477. Enforcement

The Administrator shall, and a State may, take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part, or which is proposed to be constructed in any area designated pursuant to section 7407(d) of this title as attainment or unclassifiable and which is not subject to an implementation plan which meets the requirements of this part.

42 U.S.C. § 7502. Nonattainment plan provisions in general

(a) Classifications and attainment dates

(1) Classifications

(A) On or after the date the Administrator promulgates the designation of an area as a nonattainment area pursuant to section 7407(d) of this title with respect to any national ambient air quality standard (or any revised standard, including a revision of any standard in effect on November 15, 1990), the Administrator may classify the area for the purpose of applying an attainment date pursuant to paragraph (2), and for other purposes. In determining the appropriate classification, if any, for a nonattainment area, the Administrator may consider such factors as the severity of nonattainment in such area and the availability and feasibility of the pollution control measures that the Administrator believes may be necessary to provide for attainment of such standard in such area.

(B) The Administrator shall publish a notice in the Federal Register announcing each classification

under subparagraph (A), except the Administrator shall provide an opportunity for at least 30 days for written comment. Such classification shall not be subject to the provisions of sections 553 through 557 of Title 5 (concerning notice and comment) and shall not be subject to judicial review until the Administrator takes final action under subsection (k) or (l) of section 7410 of this title (concerning action on plan submissions) or section 7509 of this title (concerning sanctions) with respect to any plan submissions required by virtue of such classification.

(C) This paragraph shall not apply with respect to nonattainment areas for which classifications are specifically provided under other provisions of this part.

(2) Attainment dates for nonattainment areas

(A) The attainment date for an area designated nonattainment with respect to a national primary ambient air quality standard shall be the date by which attainment can be achieved as expeditiously as practicable, but no later than 5 years from the date such area was designated nonattainment under section 7407(d) of this title, except that the Administrator may extend the attainment date to the extent the Administrator determines appropriate, for a period no greater than 10 years from the date of designation as nonattainment, considering the severity of nonattainment and the availability and feasibility of pollution control measures.

(B) The attainment date for an area designated nonattainment with respect to a secondary national ambient air quality standard shall be the date by which attainment can be achieved as expeditiously as practicable after the date such area was designated nonattainment under section 7407(d) of this title.

(C) Upon application by any State, the Administrator may extend for 1 additional year (hereinafter referred to as the "Extension Year") the attainment date determined by the Administrator under subparagraph (A) or (B) if—

(i) the State has complied with all requirements and commitments pertaining to the area in the applicable implementation plan, and

(ii) in accordance with guidance published by the Administrator, no more than a minimal number of exceedances of the relevant national ambient air quality standard has occurred in the area in the year preceding the Extension Year.

No more than 2 one-year extensions may be issued under this subparagraph for a single nonattainment area.

(D) This paragraph shall not apply with respect to nonattainment areas for which attainment dates are specifically provided under other provisions of this part.

(b) Schedule for plan submissions

At the time the Administrator promulgates the designation of an area as nonattainment with respect to a national ambient air quality standard under section 7407(d) of this title, the Administrator shall establish a schedule according to which the State containing such area shall submit a plan or plan revision (including the plan items) meeting the applicable requirements of subsection (c) of this section and section 7410(a)(2) of this title. Such schedule shall at a minimum, include a date or dates, extending no later than 3 years from the date of the nonattainment designation, for the submission of a plan or plan revision (including the plan items)

meeting the applicable requirements of subsection (c) of this section and section 7410(a)(2) of this title.

(c) Nonattainment plan provisions

The plan provisions (including plan items) required to be submitted under this part shall comply with each of the following:

(1) In general

Such plan provisions shall provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology) and shall provide for attainment of the national primary ambient air quality standards.

(2) RFP

Such plan provisions shall require reasonable further progress.

(3) Inventory

Such plan provisions shall include a comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant or pollutants in such area, including such periodic revisions as the Administrator may determine necessary to assure that the requirements of this part are met.

(4) Identification and quantification

Such plan provisions shall expressly identify and quantify the emissions, if any, of any such pollutant or pollutants which will be allowed, in accordance with section 7503(a)(1)(B) of this title, from the construction and operation of

major new or modified stationary sources in each such area. The plan shall demonstrate to the satisfaction of the Administrator that the emissions quantified for this purpose will be consistent with the achievement of reasonable further progress and will not interfere with attainment of the applicable national ambient air quality standard by the applicable attainment date.

(5) Permits for new and modified major stationary sources

Such plan provisions shall require permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area, in accordance with section 7503 of this title.

(6) Other measures

Such plan provisions shall include enforceable emission limitations, and such other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emission rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to provide for attainment of such standard in such area by the applicable attainment date specified in this part.

(7) Compliance with section 7410(a)(2)

Such plan provisions shall also meet the applicable provisions of section 7410(a)(2) of this title.

(8) Equivalent techniques

Upon application by any State, the Administrator may allow the use of equivalent

modeling, emission inventory, and planning procedures, unless the Administrator determines that the proposed techniques are, in the aggregate, less effective than the methods specified by the Administrator.

(9) Contingency measures

Such plan shall provide for the implementation of specific measures to be undertaken if the area fails to make reasonable further progress, or to attain the national primary ambient air quality standard by the attainment date applicable under this part. Such measures shall be included in the plan revision as contingency measures to take effect in any such case without further action by the State or the Administrator.

(d) Plan revisions required in response to finding of plan inadequacy

Any plan revision for a nonattainment area which is required to be submitted in response to a finding by the Administrator pursuant to section 7410(k)(5) of this title (relating to calls for plan revisions) must correct the plan deficiency (or deficiencies) specified by the Administrator and meet all other applicable plan requirements of section 7410 of this title and this part. The Administrator may reasonably adjust the dates otherwise applicable under such requirements to such revision (except for attainment dates that have not yet elapsed), to the extent necessary to achieve a consistent application of such requirements. In order to facilitate submittal by the States of adequate and approvable plans consistent with the applicable requirements of this chapter, the Administrator shall, as appropriate and from time to time, issue written guidelines, interpretations, and information to the States which shall be available to

the public, taking into consideration any such guidelines, interpretations, or information provided before November 15, 1990.

(e) Future modification of standard

If the Administrator relaxes a national primary ambient air quality standard after November 15, 1990, the Administrator shall, within 12 months after the relaxation, promulgate requirements applicable to all areas which have not attained that standard as of the date of such relaxation. Such requirements shall provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation.

42 U.S.C. § 7661a. Permit programs

(a) Violations

After the effective date of any permit program approved or promulgated under this subchapter, it shall be unlawful for any person to violate any requirement of a permit issued under this subchapter, or to operate an affected source (as provided in subchapter IV-A of this chapter), a major source, any other source (including an area source) subject to standards or regulations under section 7411 or 7412 of this title, any other source required to have a permit under parts[1] C or D of subchapter I of this chapter, or any other stationary source in a category designated (in whole or in part) by regulations promulgated by the Administrator (after notice and public comment) which shall include a finding setting forth the basis for such designation, except in compliance with a permit issued by a

---

[1] So in original. Probably should be "part".

permitting authority under this subchapter. (Nothing in this subsection shall be construed to alter the applicable requirements of this chapter that a permit be obtained before construction or modification.) The Administrator may, in the Administrator's discretion and consistent with the applicable provisions of this chapter, promulgate regulations to exempt one or more source categories (in whole or in part) from the requirements of this subsection if the Administrator finds that compliance with such requirements is impracticable, infeasible, or unnecessarily burdensome on such categories, except that the Administrator may not exempt any major source from such requirements.

(b) Regulations

The Administrator shall promulgate within 12 months after November 15, 1990, regulations establishing the minimum elements of a permit program to be administered by any air pollution control agency. These elements shall include each of the following:

(1) Requirements for permit applications, including a standard application form and criteria for determining in a timely fashion the completeness of applications.

(2) Monitoring and reporting requirements.

* * * *

(4) Requirements for adequate personnel and funding to administer the program.

(5) A requirement that the permitting authority have adequate authority to:

(A) issue permits and assure compliance by all sources required to have a permit under this

subchapter with each applicable standard, regulation or requirement under this chapter;

(B) issue permits for a fixed term, not to exceed 5 years;

(C) assure that upon issuance or renewal permits incorporate emission limitations and other requirements in an applicable implementation plan;

(D) terminate, modify, or revoke and reissue permits for cause;

(E) enforce permits, permit fee requirements, and the requirement to obtain a permit, including authority to recover civil penalties in a maximum amount of not less than $10,000 per day for each violation, and provide appropriate criminal penalties; and

(F) assure that no permit will be issued if the Administrator objects to its issuance in a timely manner under this subchapter.

(6) Adequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete, for processing such applications, for public notice, including offering an opportunity for public comment and a hearing, and for expeditious review of permit actions, including applications, renewals, or revisions, and including an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law.

(7) To ensure against unreasonable delay by the permitting authority, adequate authority and procedures to provide that a failure of such

permitting authority to act on a permit application or permit renewal application (in accordance with the time periods specified in section 7661b of this title or, as appropriate, subchapter IV-A of this chapter) shall be treated as a final permit action solely for purposes of obtaining judicial review in State court of an action brought by any person referred to in paragraph (6) to require that action be taken by the permitting authority on such application without additional delay.

(8) Authority, and reasonable procedures consistent with the need for expeditious action by the permitting authority on permit applications and related matters, to make available to the public any permit application, compliance plan, permit, and monitoring or compliance report under section 7661b(e) of this title, subject to the provisions of section 7414(c) of this title.

(9) A requirement that the permitting authority, in the case of permits with a term of 3 or more years for major sources, shall require revisions to the permit to incorporate applicable standards and regulations promulgated under this chapter after the issuance of such permit. Such revisions shall occur as expeditiously as practicable and consistent with the procedures established under paragraph (6) but not later than 18 months after the promulgation of such standards and regulations. No such revision shall be required if the effective date of the standards or regulations is a date after the expiration of the permit term. Such permit revision shall be treated as a permit renewal if it complies with the requirements of this subchapter regarding renewals.

(10) Provisions to allow changes within a permitted facility (or one operating pursuant to section 7661b(d) of this title) without requiring a permit revision, if

the changes are not modifications under any provision of subchapter I of this chapter and the changes do not exceed the emissions allowable under the permit (whether expressed therein as a rate of emissions or in terms of total emissions:[2] Provided, That the facility provides the Administrator and the permitting authority with written notification in advance of the proposed changes which shall be a minimum of 7 days, unless the permitting authority provides in its regulations a different timeframe for emergencies.

(c) Single permit

A single permit may be issued for a facility with multiple sources.

(d) Submission and approval

(1) Not later than 3 years after November 15, 1990, the Governor of each State shall develop and submit to the Administrator a permit program under State or local law or under an interstate compact meeting the requirements of this subchapter. In addition, the Governor shall submit a legal opinion from the attorney general (or the attorney for those State air pollution control agencies that have independent legal counsel), or from the chief legal officer of an interstate agency, that the laws of the State, locality, or the interstate compact provide adequate authority to carry out the program. Not later than 1 year after receiving a program, and after notice and opportunity for public comment, the Administrator shall approve or disapprove such program, in whole or in part. The Administrator may approve a program to the extent that the program meets the requirements of this

---

[2] So in original. A closing parenthesis probably should precede the colon.

chapter, including the regulations issued under subsection (b) of this section. If the program is disapproved, in whole or in part, the Administrator shall notify the Governor of any revisions or modifications necessary to obtain approval. The Governor shall revise and resubmit the program for review under this section within 180 days after receiving notification.

* * * *

(e) Suspension

The Administrator shall suspend the issuance of permits promptly upon publication of notice of approval of a permit program under this section, but may, in such notice, retain jurisdiction over permits that have been federally issued, but for which the administrative or judicial review process is not complete. The Administrator shall continue to administer and enforce federally issued permits under this subchapter until they are replaced by a permit issued by a permitting program. Nothing in this subsection should be construed to limit the Administrator's ability to enforce permits issued by a State.

(f) Prohibition

No partial permit program shall be approved unless, at a minimum, it applies, and ensures compliance with, this subchapter and each of the following:

(1) All requirements established under subchapter IV-A of this chapter applicable to "affected sources".

(2) All requirements established under section 7412 of this title applicable to "major sources", "area sources," and "new sources".

(3) All requirements of subchapter I of this chapter (other than section 7412 of this title) applicable to sources required to have a permit under this subchapter.

Approval of a partial program shall not relieve the State of its obligation to submit a complete program, nor from the application of any sanctions under this chapter for failure to submit an approvable permit program.

(g) Interim approval

If a program (including a partial permit program) submitted under this subchapter substantially meets the requirements of this subchapter, but is not fully approvable, the Administrator may by rule grant the program interim approval. In the notice of final rulemaking, the Administrator shall specify the changes that must be made before the program can receive full approval. An interim approval under this subsection shall expire on a date set by the Administrator not later than 2 years after such approval, and may not be renewed. For the period of any such interim approval, the provisions of subsection (d)(2) of this section, and the obligation of the Administrator to promulgate a program under this subchapter for the State pursuant to subsection (d)(3) of this section, shall be suspended. Such provisions and such obligation of the Administrator shall apply after the expiration of such interim approval.

(h) Effective date

The effective date of a permit program, or partial or interim program, approved under this subchapter, shall be the effective date of approval by the Administrator. The effective date of a permit

program, or partial permit program, promulgated by the Administrator shall be the date of promulgation.

(i) Administration and enforcement

(1) Whenever the Administrator makes a determination that a permitting authority is not adequately administering and enforcing a program, or portion thereof, in accordance with the requirements of this subchapter, the Administrator shall provide notice to the State and may, prior to the expiration of the 18-month period referred to in paragraph (2), in the Administrator's discretion, apply any of the sanctions specified in section 7509(b) of this title.

(2) Whenever the Administrator makes a determination that a permitting authority is not adequately administering and enforcing a program, or portion thereof, in accordance with the requirements of this subchapter, 18 months after the date of the notice under paragraph (1), the Administrator shall apply the sanctions under section 7509(b) of this title in the same manner and subject to the same deadlines and other conditions as are applicable in the case of a determination, disapproval, or finding under section 7509(a) of this title.

(3) The sanctions under section 7509(b)(2) of this title shall not apply pursuant to this subsection in any area unless the failure to adequately enforce and administer the program relates to an air pollutant for which such area has been designated a nonattainment area.

(4) Whenever the Administrator has made a finding under paragraph (1) with respect to any State, unless the State has corrected such deficiency within 18 months after the date of such finding, the Administrator shall, 2 years after the date of such

finding, promulgate, administer, and enforce a program under this subchapter for that State. Nothing in this paragraph shall be construed to affect the validity of a program which has been approved under this subchapter or the authority of any permitting authority acting under such program until such time as such program is promulgated by the Administrator under this paragraph.

42 U.S.C. § 7661b. Permit applications

(a) Applicable date

Any source specified in section 7661a(a) of this title shall become subject to a permit program, and required to have a permit, on the later of the following dates—

(1) the effective date of a permit program or partial or interim permit program applicable to the source; or

(2) the date such source becomes subject to section 7661a(a) of this title.

(b) Compliance plan

(1) The regulations required by section 7661a(b) of this title shall include a requirement that the applicant submit with the permit application a compliance plan describing how the source will comply with all applicable requirements under this chapter. The compliance plan shall include a schedule of compliance, and a schedule under which the permittee will submit progress reports to the permitting authority no less frequently than every 6 months.

(2) The regulations shall further require the permittee to periodically (but no less frequently than

annually) certify that the facility is in compliance with any applicable requirements of the permit, and to promptly report any deviations from permit requirements to the permitting authority.

(c) Deadline

Any person required to have a permit shall, not later than 12 months after the date on which the source becomes subject to a permit program approved or promulgated under this subchapter, or such earlier date as the permitting authority may establish, submit to the permitting authority a compliance plan and an application for a permit signed by a responsible official, who shall certify the accuracy of the information submitted. The permitting authority shall approve or disapprove a completed application (consistent with the procedures established under this subchapter for consideration of such applications), and shall issue or deny the permit, within 18 months after the date of receipt thereof, except that the permitting authority shall establish a phased schedule for acting on permit applications submitted within the first full year after the effective date of a permit program (or a partial or interim program). Any such schedule shall assure that at least one-third of such permits will be acted on by such authority annually over a period of not to exceed 3 years after such effective date. Such authority shall establish reasonable procedures to prioritize such approval or disapproval actions in the case of applications for construction or modification under the applicable requirements of this chapter.

(d) Timely and complete applications

Except for sources required to have a permit before construction or modification under the applicable requirements of this chapter, if an applicant has

submitted a timely and complete application for a permit required by this subchapter (including renewals), but final action has not been taken on such application, the source's failure to have a permit shall not be a violation of this chapter, unless the delay in final action was due to the failure of the applicant timely to submit information required or requested to process the application. No source required to have a permit under this subchapter shall be in violation of section 7661a(a) of this title before the date on which the source is required to submit an application under subsection (c) of this section.

(e) Copies; availability

A copy of each permit application, compliance plan (including the schedule of compliance), emissions or compliance monitoring report, certification, and each permit issued under this subchapter, shall be available to the public. If an applicant or permittee is required to submit information entitled to protection from disclosure under section 7414(c) of this title, the applicant or permittee may submit such information separately. The requirements of section 7414(c) of this title shall apply to such information. The contents of a permit shall not be entitled to protection under section 7414(c) of this title.

42 U.S.C. § 7661c. Permit requirements and conditions

(a) Conditions

Each permit issued under this subchapter shall include enforceable emission limitations and standards, a schedule of compliance, a requirement that the permittee submit to the permitting authority, no less often than every 6 months, the

results of any required monitoring, and such other conditions as are necessary to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan.

(b) Monitoring and analysis

The Administrator may by rule prescribe procedures and methods for determining compliance and for monitoring and analysis of pollutants regulated under this chapter, but continuous emissions monitoring need not be required if alternative methods are available that provide sufficiently reliable and timely information for determining compliance. Nothing in this subsection shall be construed to affect any continuous emissions monitoring requirement of subchapter IV-A of this chapter, or where required elsewhere in this chapter.

(c) Inspection, entry, monitoring, certification, and reporting

Each permit issued under this subchapter shall set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions. Such monitoring and reporting requirements shall conform to any applicable regulation under subsection (b) of this section. Any report required to be submitted by a permit issued to a corporation under this subchapter shall be signed by a responsible corporate official, who shall certify its accuracy.

(d) General permits

The permitting authority may, after notice and opportunity for public hearing, issue a general permit covering numerous similar sources. Any general permit shall comply with all requirements applicable to permits under this subchapter. No source covered

by a general permit shall thereby be relieved from the obligation to file an application under section 7661b of this title.

(e) Temporary sources

The permitting authority may issue a single permit authorizing emissions from similar operations at multiple temporary locations. No such permit shall be issued unless it includes conditions that will assure compliance with all the requirements of this chapter at all authorized locations, including, but not limited to, ambient standards and compliance with any applicable increment or visibility requirements under part C of subchapter I of this chapter. Any such permit shall in addition require the owner or operator to notify the permitting authority in advance of each change in location. The permitting authority may require a separate permit fee for operations at each location.

(f) Permit shield

Compliance with a permit issued in accordance with this subchapter shall be deemed compliance with section 7661a of this title. Except as otherwise provided by the Administrator by rule, the permit may also provide that compliance with the permit shall be deemed compliance with other applicable provisions of this chapter that relate to the permittee if—

(1) the permit includes the applicable requirements of such provisions, or

(2) the permitting authority in acting on the permit application makes a determination relating to the permittee that such other provisions (which shall be referred to in such determination) are not applicable and the permit

includes the determination or a concise summary thereof.

Nothing in the preceding sentence shall alter or affect the provisions of section 7603 of this title, including the authority of the Administrator under that section.

* * * *

42 U.S.C. § 7661d. Notification to Administrator and contiguous States

(a) Transmission and notice

(1) Each permitting authority—

(A) shall transmit to the Administrator a copy of each permit application (and any application for a permit modification or renewal) or such portion thereof, including any compliance plan, as the Administrator may require to effectively review the application and otherwise to carry out the Administrator's responsibilities under this chapter, and

(B) shall provide to the Administrator a copy of each permit proposed to be issued and issued as a final permit.

(2) The permitting authority shall notify all States—

(A) whose air quality may be affected and that are contiguous to the State in which the emission originates, or

(B) that are within 50 miles of the source,

of each permit application or proposed permit forwarded to the Administrator under this section, and shall provide an opportunity for such States to

submit written recommendations respecting the issuance of the permit and its terms and conditions. If any part of those recommendations are not accepted by the permitting authority, such authority shall notify the State submitting the recommendations and the Administrator in writing of its failure to accept those recommendations and the reasons therefor.

(b) Objection by EPA

(1) If any permit contains provisions that are determined by the Administrator as not in compliance with the applicable requirements of this chapter, including the requirements of an applicable implementation plan, the Administrator shall, in accordance with this subsection, object to its issuance. The permitting authority shall respond in writing if the Administrator (A) within 45 days after receiving a copy of the proposed permit under subsection (a)(1) of this section, or (B) within 45 days after receiving notification under subsection (a)(2) of this section, objects in writing to its issuance as not in compliance with such requirements. With the objection, the Administrator shall provide a statement of the reasons for the objection. A copy of the objection and statement shall be provided to the applicant.

(2) If the Administrator does not object in writing to the issuance of a permit pursuant to paragraph (1), any person may petition the Administrator within 60 days after the expiration of the 45-day review period specified in paragraph (1) to take such action. A copy of such petition shall be provided to the permitting authority and the applicant by the petitioner. The petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the

permitting agency (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period). The petition shall identify all such objections. If the permit has been issued by the permitting agency, such petition shall not postpone the effectiveness of the permit. The Administrator shall grant or deny such petition within 60 days after the petition is filed. The Administrator shall issue an objection within such period if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of this chapter, including the requirements of the applicable implementation plan. Any denial of such petition shall be subject to judicial review under section 7607 of this title. The Administrator shall include in regulations under this subchapter provisions to implement this paragraph. The Administrator may not delegate the requirements of this paragraph.

(3) Upon receipt of an objection by the Administrator under this subsection, the permitting authority may not issue the permit unless it is revised and issued in accordance with subsection (c) of this section. If the permitting authority has issued a permit prior to receipt of an objection by the Administrator under paragraph (2) of this subsection, the Administrator shall modify, terminate, or revoke such permit and the permitting authority may thereafter only issue a revised permit in accordance with subsection (c) of this section.

(c) Issuance or denial

If the permitting authority fails, within 90 days after the date of an objection under subsection (b) of this section, to submit a permit revised to meet the

objection, the Administrator shall issue or deny the permit in accordance with the requirements of this subchapter. No objection shall be subject to judicial review until the Administrator takes final action to issue or deny a permit under this subsection.

* * * *

RESPONDENT'S BRIEF

(2)

AUG 24 2010

No. 10-174

In the Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY INC., ET AL.,
PETITIONERS

v.

STATE OF CONNECTICUT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE TENNESSEE VALLEY AUTHORITY IN SUPPORT OF PETITIONERS

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

TONY WEST
Assistant Attorney General

IGNACIA S. MORENO
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

ETHAN G. SHENKMAN
Deputy Assistant Attorney General

CURTIS E. GANNON
Assistant to the Solicitor General

LISA E. JONES
H. THOMAS BYRON
JUSTIN R. PIDOT
CHARLES R. SCOTT
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

RALPH E. RODGERS
Acting General Counsel

HARRIET A. COOPER
Assistant General Counsel

MARIA V. GILLEN
Attorney
Tennessee Valley Authority
Knoxville, TN 37902

QUESTIONS PRESENTED

Plaintiffs allege that significant emitters of carbon dioxide in 20 States have created, contributed to, or maintained a common-law public nuisance by contributing to global warming and thus injuring plaintiffs in their capacities as sovereigns or landowners. This brief addresses the following questions:

1. Whether plaintiffs' federal common-law nuisance claims are barred by principles of prudential standing.

2. Whether, assuming plaintiffs have alleged cognizable public-nuisance claims under federal common law, that federal common law has been displaced in this context by the Clean Air Act and associated actions of the United States Environmental Protection Agency.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 9
A. Even if Article III jurisdiction exists, plaintiffs' suits should be barred as generalized grievances more appropriately addressed in the representative Branches 11
B. Any federal common-law claims here have been displaced by EPA actions taken after the court of appeals issued its decision 22
Conclusion 32

TABLE OF AUTHORITIES

Cases:

Alfred L. Snapp & Son, Inc. v. *Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982) 18
Allen v. *Wright*, 468 U.S. 737 (1984) 11, 22
American Farm Bureau Fed'n v. *EPA*, 559 F.3d 512 (D.C. Cir. 2009) 24
Baker v. *Carr*, 369 U.S. 186 (1962) 5, 6
Bender v. *Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986) 21
Bennett v. *Spear*, 520 U.S. 154 (1997) 20
California v. *General Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) 10
Chevron U.S.A Inc. v. *NRDC*, 467 U.S. 837 (1984) .. 16, 24
City of Milwaukee v. *Illinois*, 451 U.S. 304 (1981) 15, 23, 31

Cases—Continued: Page

Comer v. *Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), opinion vacated pending reh'g en banc, 598 F.3d 208, appeal dismissed, 607 F.3d 1049 (5th Cir. 2010) 10

Cutter v. *Wilkinson*, 544 U.S. 709 (2005) 22

DaimlerChrysler Corp v. *Cuno*, 547 U.S. 332 (2006) 18

Elk Grove Unified Sch. Dist. v. *Newdow*, 542 U.S. 1 (2004) 11, 12, 18, 19, 20, 22

Environmental Def. v. *EPA*, 489 F.3d 1320 (D.C. Cir. 2007) 3

Environmental Integrity Project v. *EPA*, 425 F.3d 992 (2005) 27

FCC v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) 22

FEC v. *Akins*, 524 U.S. 11 (1998) 18, 20

Hein v. *Freedom from Religion Found.*, 551 U.S. 587 (2007) 17

Illinois v. *City of Milwaukee*, 406 U.S. 91 (1972) 15

Illinois v. *Outboard Marine Corp.*, 680 F.2d 473 (7th Cir. 1982) 31

Kowalski v. *Tesmer*, 543 U.S. 125 (2004) 19

Lance v. *Coffman*, 549 U.S. 437 (2007) 17

Land v. *Dollar*, 330 U.S. 731(1947) 9

Latino Issues Forum v. *United States EPA*, 558 F.3d 936 (9th Cir. 2009) 24

Lawrence v. *Chater*, 516 U.S. 163 (1996) 32

Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 7, 18, 20, 21

Cases—Continued: Page

Lujan v. *National Wildlife Fed'n*, 497 U.S. 871 (1990) 21
Massachusetts v. *EPA*, 549 U.S. 497 (2007) ..... *passim*
Massachusetts v. *Mellon*, 262 U.S. 447 (1923) 18
Michigan v. *United States EPA*, 581 F.3d 524 (7th Cir. 2009) 24
Middlesex County Sewerage Auth. v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981) 28
Mobil Oil Corp. v. *Higginbotham*, 436 U.S. 618 (1978) 22, 31
Native Vill. of Kivalina v. *ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), appeal pending, No. 09-17490 (9th Cir.) 10
New Eng. Legal Found. v. *Costle*, 666 F.2d 30 (2d Cir. 1981) 16
North Carolina v. *TVA*, No. 09-1623, 2010 WL 2891572 (4th Cir. July 26, 2010) 17
NRDC v. *EPA*, 571 F.3d 1245 (D.C. Cir. 2009) 16
Tenet v. *Doe*, 544 U.S. 1 (2005) 19
Thompson v. *County of Franklin*, 15 F.3d 245 (2d Cir. 1994) 22
United Food & Commercial Workers v. *Brown Group, Inc.*, 517 U.S. 544 (1996) 20
VMI v. *United States*, 508 U.S. 946 (1993) 9
Virginia v. *Browner*, 80 F.3d 869 (4th Cir. 1996), cert. denied, 519 U.S. 1090 (1997) 27
Warth v. *Seldin*, 422 U.S. 490 (1975) 12, 20
Whitman v. *American Trucking Ass'ns*, 531 U.S. 457 (2001) 3

Constitution, statutes and regulations: Page

U.S. Const., Art. III ..... *passim*
Clean Air Act, 42 U.S.C. 7401 *et seq.* 2
Tit. I, 42 U.S.C. 7401 *et seq.*:
§ 108, 42 U.S.C. 7408 ..... 2, 3
§ 109, 42 U.S.C. 7409 3
§§ 109-110, 42 U.S.C. 7409-7410 3
§ 111, 42 U.S.C. 7411 ..... 25, 29, 30
§ 111(b)(1)(A), 42 U.S.C. 7411(b)(1)(A) 3
§ 111(b)(1)(B), 42 U.S.C. 7411(b)(1)(B) 3
§ 111(d), 42 U.S.C. 7411(d) 3, 29
§ 112, 42 U.S.C. 7412 3
§§ 160-169, 42 U.S.C. 7470-7479 26
§ 165, 42 U.S.C. 7475 ..... 4, 26
§ 165(a), 42 U.S.C. 7475(a) 26
§ 165(a)(4), 42 U.S.C. 7475(a)(4) 4, 9, 27
§ 169(1), 42 U.S.C. 7479(1) 4, 26
Tit. II, 42 U.S.C. 7521 *et seq.*:
§ 202, 42 U.S.C. 7521 ..... 2, 8, 25
§ 202(a)(1), 42 U.S.C. 7521(a)(1) 2, 26
Tit. III, 42 U.S.C. 7601 *et seq.*:
§ 302(g), 42 U.S.C. 7602(g) 2
§ 302(j), 42 U.S.C. 7602(j) 27
§ 304, 42 U.S.C. 7604 ..... 13, 20
§ 307(b)(1), 42 U.S.C. 7607(b)(1) 13
Tit. V, 42 U.S.C. 7661 *et seq.* 4, 27, 28
§ 361(2)(B), 42 U.S.C. 7661(2)(B) 27
§§ 361-361f, 42 U.S.C. 7661-7661f 4

Statutes and regulations—Continued: Page

§ 361a, 42 U.S.C. 7661a 4
§ 361a(a), 42 U.S.C. 7661a(a) 27
16 U.S.C. 831 4
16 U.S.C. 831a 4
16 U.S.C. 831d(*l*) 4
40 C.F.R.:
Section 52.21(a)(2) 26
Section 52.21(b)(2)(i) 26
Section 52.21(b)(50)(iv) 26
Sections 60.14-60.15 29
Sections 60.20-60.29 3

Miscellaneous:

EPA, *National Emission Standards for Hazardous Air Pollutants From the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants* (Aug. 9, 2010), http://www.epa.gov/ttn/oarpg/t1/fr_notices/portland_cement_fr_080910.pdf 30
71 Fed. Reg. 9869 (2006) 29
73 Fed. Reg. 44,487 (2008) 30
74 Fed. Reg. (2009):
p. 56,260 25
p. 56,264 25
p. 56,265 25
p. 66,497 25
p. 66,499 25

Miscellaneous—Continued: Page

75 Fed. Reg. (2010):
p. 25,324 25
p. 25,327 26
pp. 25,329-25,330 26
p. 25,332 26
p. 31,514 27
p. 31,516 ..... 27, 28
p. 31,519 14
pp. 31,520-31,521 4
p. 31,521 4
pp. 31,523-31,524 28
pp. 31,549-31,551 26
pp. 31,551-31,554 27
p. 49,556 25
Restatement (Second) of Torts (1977) 7
U.S. Dep't of State, *U.S. Climate Action Report 2010*, http://www.state.gov/documents/organization/140636.pdf 2

In the Supreme Court of the United States

No. 10-174

AMERICAN ELECTRIC POWER COMPANY INC., ET AL.,
PETITIONERS

v.

STATE OF CONNECTICUT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE TENNESSEE VALLEY AUTHORITY IN SUPPORT OF PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-170a) is reported at 582 F.3d 309. The opinion of the district court (Pet. App. 171a-187a) is reported at 406 F. Supp. 2d 265.

JURISDICTION

The judgments of the court of appeals were entered on September 21, 2009. Petitions for rehearing were denied on March 5, 2010, and March 10, 2010 (Pet. App. 188a-191a). On May 26, 2010, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including July 6, 2010. On June 28, 2010, Justice Ginsburg further extended the time to Au-

gust 2, 2010, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Clean Air Act (Act or CAA), 42 U.S.C. 7401 *et seq.*, establishes a comprehensive framework for regulation of air pollution and vests EPA (and to some extent the States) with implementing authority. The statute broadly defines "air pollutant" to include "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive * * * substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S.C. 7602(g). In the wake of this Court's decision in *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), EPA has recently taken several major steps to begin the process of regulating greenhouse-gas emissions under the CAA. Those steps are consistent with the United States' efforts to address climate change in recent international negotiations.[1]

Massachusetts held that Section 202 of the CAA—which authorizes EPA to prescribe standards for emissions of air pollutants from new motor vehicles, 42 U.S.C. 7521(a)(1)—"authorizes EPA to regulate greenhouse gas emissions" if it "forms a 'judgment' that such emissions contribute to climate change." 549 U.S. at 528. Section 108 of the CAA also provides EPA with a mechanism for listing pollutants that "endanger public health or welfare" and meet certain other criteria. 42 U.S.C. 7408. When an air pollutant is listed, the Act

---

[1] See, *e.g.*, U.S. Dep't of State, *U.S. Climate Action Report 2010* at 3, http://www.state.gov/documents/organization/140636.pdf (noting that as part of the Copenhagen Accord, the United States proposed to "reduce emissions in the range of 17 percent from 2005 levels by 2020").

requires States to regulate emissions to prevent pollution from exceeding EPA standards. 42 U.S.C. 7409-7410.[2]

In addition, Section 111 of the Act authorizes EPA to list categories of stationary sources that "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. 7411(b)(1)(A). Once EPA exercises its discretion to list a category of stationary sources, Section 111 directs it to establish federal performance standards for emissions of pollutants specified by EPA from new (or modified) sources in that category. 42 U.S.C. 7411(b)(1)(B). Furthermore, in some circumstances, once EPA has established such new source performance standards (NSPS) for a category of sources, States are required by Section 111(d) to issue performance standards—in accordance with EPA procedures—for *existing* sources in that category.[3] EPA may issue such standards directly if a State does not do so. 42 U.S.C. 7411(d); see also 40 C.F.R. 60.20-60.29 (establishing procedures for adoption of state plans).

---

[2] Section 109 of the CAA (42 U.S.C. 7409) directs EPA to establish national ambient air quality standards (NAAQS) for air pollutants for which "air quality criteria" have been issued under Section 108. *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 462-463 (2001). Once a NAAQS for a "criteria" pollutant has been established, each State must inform EPA of which areas within the State have attained the standard and which have not; States must then submit implementation plans for attainment and maintenance of the standard. See generally *Environmental Def.* v. *EPA*, 489 F.3d 1320, 1323 (D.C. Cir. 2007).

[3] Section 111(d) standards for existing sources are required only if the NSPS regulates emissions of an air pollutant for which a NAAQS has not been established, or which is not regulated under Section 112 (42 U.S.C. 7412).

Section 165 of the CAA requires that any new "major emitting facility" (or one to which a major modification is made) must obtain a pre-construction permit to ensure prevention of significant deterioration (PSD) of air quality. 42 U.S.C. 7475; see generally 75 Fed. Reg. 31,520-31,521 (2010) (discussing PSD provisions pertinent to greenhouse-gas emissions). The definition of "major emitting facility" includes stationary sources that exceed specified amounts of emissions of any pollutant. 42 U.S.C. 7479(1). A permit application must show that the facility will employ "the best available control technology for each pollutant subject to regulation under [the CAA]." 42 U.S.C. 7475(a)(4).

Although Title V of the CAA (42 U.S.C. 7661-7661f) generally does not add control requirements, it requires operators of major stationary sources to apply for operating permits that contain all otherwise applicable requirements imposed by the CAA, and to follow EPA-prescribed procedures in doing so. 42 U.S.C. 7661a; see generally 75 Fed. Reg. at 31,521 (discussing Title V permitting provisions pertinent to greenhouse-gas emissions).

b. The Tennessee Valley Authority (TVA) is an Executive Branch agency with responsibility for the multipurpose development of the Tennessee Valley Region. 16 U.S.C. 831. Members of its board of directors are appointed by the President with the advice and consent of the Senate. 16 U.S.C. 831a. TVA is expressly authorized by federal statute to "produce, distribute, and sell electric power." 16 U.S.C. 831d(*l*).

2. Petitioners and TVA (collectively, defendants) are six entities that operate fossil-fuel-fired electric power generation facilities in 20 States. Pet. App. 2a. Respondents (other than TVA) are eight States, the City of

New York, and three land trusts (collectively, plaintiffs). *Ibid.*

In July 2004, plaintiffs filed two similar complaints in the United States District Court for the Southern District of New York. Pet. App. 8a, 11a. Both complaints allege that defendants are substantial contributors to carbon-dioxide emissions—amounting to 10% of such emissions caused by human activities in the United States—and thus contribute to global warming. *Id.* at 8a. Plaintiffs claim that defendants are liable for creating, contributing to, or maintaining a public nuisance under federal common law (or, in the alternative, state common law). *Id.* at 8a, 11a, 12a-13a. They seek permanent injunctive relief requiring defendants to abate the nuisance by capping and then reducing their emissions "by a specified percentage each year for at least a decade." *Id.* at 178a.

Defendants moved to dismiss the complaints for lack of jurisdiction and for failure to state a claim upon which relief can be granted. Pet. App. 178a-179a. In September 2005, the district court granted defendants' motions. *Id.* at 171a-187a. It held that both cases "present nonjusticiable political questions" because their resolution would "require[] identification and balancing of economic, environmental, foreign policy, and national security interests." *Id.* at 187a.

3. On September 21, 2009, a two-judge panel of the Second Circuit reversed. Pet. App. 1a-170a.[4]

The court of appeals discussed the six indicia of a political question articulated in *Baker* v. *Carr*, 369 U.S. 186, 217 (1962), and held that plaintiffs' lawsuits do not

[4] Justice Sotomayor was a member of the panel that heard oral argument, but joined this Court before the court of appeals issued its decision. Pet. App. 2a n.*.

present a nonjusticiable political question. Pet. App. 23a-41a. With respect to the first *Baker* factor, it held that defendants had forfeited any argument that limiting carbon-dioxide emissions was textually committed to the political Branches under the Commerce Clause, and that the case would not interfere with the President's foreign-policy prerogatives because a single court decision in a common-law-nuisance action could not "establish a *national* or *international* emissions policy." *Id.* at 24a-25a, 26a. With respect to the second factor—whether there is a "lack of judicially discoverable and manageable standards for resolving" an issue, 369 U.S. at 217—the court of appeals concluded that "federal courts have successfully adjudicated complex common law public nuisance cases for over a century," Pet. App. 28a, and that there would be judicially manageable standards here because "[w]ell-settled principles of tort and public nuisance law provide appropriate guidance," *id.* at 34a. With respect to the third factor—whether it is impossible to decide an issue "without an initial policy determination of a kind clearly for nonjudicial discretion," 369 U.S. at 217—the court found that there would be no need for any such "initial policy determination" because this case "appears to be an ordinary tort suit." Pet. App. 38a-39a (internal quotation marks omitted). Finally, the court held that the last three *Baker* factors —which involve the potential for disagreement between the judicial and political Branches—do not apply because the United States has "no unified policy on greenhouse gas emissions." *Id.* at 40a.

The court of appeals proceeded to consider three other issues that defendants had raised as alternative grounds for affirmance: (1) whether plaintiffs have Article III standing; (2) whether their complaints state a

claim under federal common law; and (3) whether the CAA has displaced any such federal common-law claim.

With respect to standing, the court of appeals held that the State plaintiffs have *parens patriae* Article III standing based on their interest in safeguarding public health and natural resources. Pet. App. 44a-55a. The court also concluded that the States and the land trusts have met the Article III standard articulated in *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992), because (1) they would allegedly suffer injury in fact as a result of the effects of climate change on their property and proprietary interests, Pet. App. 60a-67a; (2) their allegations that defendants' emissions contribute to climate change satisfy the causation requirement, at least at the motion-to-dismiss stage, *id.* at 67a-73a; and (3) a court could provide effective relief, because reducing defendants' emissions would "*slow or reduce*" climate change, *id.* at 75a; see also *id.* at 76a (agreeing with the proposition that "[e]ven if emissions increase elsewhere, the magnitude of [p]laintiffs' injuries will be less if [d]efendants' emissions are reduced than they would be without a remedy").

Next, the court of appeals held that plaintiffs have stated a claim under federal common law. Pet. App. 77a-123a. Applying Section 821B of the Restatement (Second) of Torts (1977), it found that plaintiffs stated a claim by alleging that defendants contribute to an "unreasonable interference with public rights," Pet. App. 82a-84a, 121a, including "the right to public comfort and safety, the right to protection of vital natural resources and public property, and the right to use, enjoy, and preserve the aesthetic and ecological values of the natural world," *id.* at 83a-84a.

Finally, the court of appeals held that the CAA has not displaced a federal common-law public nuisance cause of action seeking to cap and reduce carbon-dioxide emissions that contribute to global warming. Pet. App. 137a-144a. The court of appeals' discussion of displacement drew a line between the actual "regulation" of greenhouse-gas emissions and mere "study" or "monitor[ing]" of such emissions. *Id.* at 135a & n.46, 156a. It discussed EPA's 2009 proposed finding in the context of Section 202 of the CAA that greenhouse gases endanger public health and welfare, but said that "[u]ntil EPA completes the rulemaking process, we cannot speculate as to whether the hypothetical regulation of greenhouse gases under the Clean Air Act would in fact speak directly to the particular issue raised" by plaintiffs here. *Id.* at 142a (internal quotation marks and alterations omitted). The court observed that "EPA has yet to make any determination that [greenhouse-gas] emissions are subject to regulation under the Act, much less endeavor *actually* to regulate the emissions." *Id.* at 144a. In the absence of "the requisite findings" from EPA, the court concluded that the CAA "does not (1) regulate greenhouse gas emissions or (2) regulate such emissions from stationary sources." *Ibid.* As a result, the court held that plaintiffs' federal common-law claim had not yet been displaced. *Ibid.*

Petitioners and TVA filed petitions for panel or en banc rehearing. The court of appeals denied those petitions on March 5, 2010 and March 10, 2010. Pet. App. 188a-191a.

4. As discussed below (see pp. 25-30, *infra*), in the 11 months since the court of appeals issued its decision, EPA has taken several actions pursuant to its authority under the CAA to address emissions of greenhouse

gases (including carbon dioxide). EPA has finalized the proposed rule that the court of appeals discussed and has also adopted standards governing emissions of greenhouse gases from certain motor vehicles. It has taken actions to render carbon dioxide a "pollutant subject to regulation under [the CAA]," 42 U.S.C. 7475(a)(4), effective January 2, 2011. EPA is also, pursuant to a voluntary remand from the D.C. Circuit, evaluating whether and how to add greenhouse gases to the new source performance standards that apply to power plants.

ARGUMENT

Key features of this case counsel against plenary review by this Court at this time. In particular, the case is in an interlocutory posture, which is itself often a sufficient reason to deny certiorari. See, *e.g.*, *VMI* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari). Moreover, the courts of appeals are not, at present, in conflict on the questions presented.

Nevertheless, limited intervention by the Court is appropriate at this juncture. The court of appeals' decision resolves multiple issues—most of which the district court did not have occasion to address because it dismissed the case on political question grounds—that will be "fundamental to the further conduct of [this] case." *Land* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947). There is also a significant likelihood that the decision will guide or control much additional litigation. Because the predicate for plaintiffs' lawsuits is *global* warming—which is caused by emissions from all around the world and can have detrimental effects almost anywhere in the world—the principal geographic limitation for such suits within

the United States is likely to be the ability to exercise personal jurisdiction over the defendants any particular plaintiff might choose to sue. Thus, so long as the court of appeals' decision provides an extensive roadmap for resolving several threshold questions in favor of plaintiffs in such cases, courts in the Second Circuit will likely host a disproportionate share of such suits, perhaps forestalling percolation of similar issues in other circuits. Accordingly, action by this Court would meaningfully affect an emerging category of litigation over greenhouse-gas emissions that implicates myriad plaintiffs and defendants.[5]

As explained below, this Court should grant certiorari, vacate the judgments of the court of appeals, and remand to enable the court of appeals to consider two questions in the first instance: (1) whether, independent

---

[5] As petitioners discuss (Pet. 8-10), even before the decision below, other cases were brought presenting similar common-law claims of public nuisance against a wide swath of defendants based on alleged contributions to global warming. See *Native Vill. of Kivalina* v. *ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009) (suit by Eskimo village against 24 oil, energy, and utility companies, alleging that their emissions have, by contributing to global warming, caused Arctic sea ice to diminish), appeal pending, No. 09-17490 (9th Cir.); *Comer* v. *Murphy Oil USA*, 585 F.3d 855, 861 (5th Cir. 2009) (class-action suit by Mississippi coastal residents and landowners against oil and electric-power companies, alleging that their emissions "contribut[ed] to global warming" and "added to the ferocity of Hurricane Katrina"), opinion vacated pending reh'g en banc, 598 F.3d 208, appeal dismissed, 607 F.3d 1049 (5th Cir. 2010); *California* v. *General Motors Corp.*, No. C06-05755, 2007 WL 2726871, at *1 (N.D. Cal. Sept. 17, 2007) (suit by State of California against automobile manufacturers alleging that the vehicles they produce emit carbon dioxide, which causes global warming, which reduces snow pack and increases sea levels, resulting in reduced water supplies, increased risk of flooding, increased coastal erosion, and increased risk and intensity of wildfires).

of Article III standing requirements, plaintiffs' suits should be barred as a matter of prudential standing; and (2) whether, in light of multiple actions that EPA has taken since the court of appeals issued its decision, any otherwise cognizable federal common-law claims here have been displaced.

A. Even If Article III Jurisdiction Exists, Plaintiffs' Suits Should Be Barred As Generalized Grievances More Appropriately Addressed In The Representative Branches

Petitioners advance two threshold, nonmerits grounds for dismissing these suits: that plaintiffs lack standing (Pet. 13-20), and that these suits should be dismissed under the political-question doctrine (Pet. 26-31). Those arguments are both rooted in petitioners' concerns about the unprecedentedly broad nature of plaintiffs' nuisance suits, which would require a federal court, in the course of resolving claims against six defendants, to make numerous significant scientific, technical, and policy determinations about whether and how to slow global warming—even though that phenomenon is, by plaintiffs' own account, a result of the actions of innumerable sources of various kinds of emissions from all around the world over a period of many decades.

As a legal matter, petitioners' concerns are best expressed as defects in demonstrating prudential standing. Principles of prudential standing have been developed largely as a matter of judicial self-restraint and exist independently of Article III. One such principle requires federal courts to refrain from adjudicating "generalized grievances more appropriately addressed in the representative branches." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 12 (2004) (quoting *Allen* v. *Wright*, 468 U.S. 737, 751 (1984)).

1. As this Court has explained, standing doctrine comprises two parts: "Article III standing, which enforces the Constitution's case-or-controversy requirement, and prudential standing, which embodies judicially self-imposed limits on the exercise of federal jurisdiction." *Newdow*, 542 U.S. at 11 (citation and internal quotation marks omitted). While prudential standing limitations are "closely related to Art[icle] III concerns," they are not constitutionally compelled and are "essentially matters of judicial self-governance." *Id.* at 12 (quoting *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975)). "Without such limitations * * * the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Ibid.* (quoting *Warth*, 422 U.S. at 500). Careful adherence to such principles of judicial self-restraint is especially important when a court is asked to entertain a cause of action assertedly based on federal common law, which is itself fashioned by the Judiciary.

Plaintiffs' common-law claims here are precisely the kind of "generalized grievance[]" that is "more appropriately addressed in the representative branches." *Newdow*, 542 U.S. at 12. This would be a different case if there were, for example, a "constitutional or statutory provision" that "properly can be understood as granting persons in the plaintiff[s'] position a right to judicial relief." *Warth*, 422 U.S. at 500. Indeed, Congress has vested a federal agency, EPA, with the power to regulate emissions from power plants and carbon dioxide as an emission and has expressly provided for focused judicial review of EPA's actions. See *Massachusetts* v.

EPA, 549 U.S. 497, 516 (2007) (discussing 42 U.S.C. 7607(b)(1)). It has also provided for citizen enforcement of emissions standards that EPA establishes. 42 U.S.C. 7604. None of that is at issue here. Rather, plaintiffs proceed without relying on any statutory right or statutory cause of action, and have sued a handful of defendants from among a broad array of entities that emit greenhouse gases. Moreover, the types of harms they seek to redress could potentially be suffered by virtually any landowner, and to an extent, by virtually every citizen, in the United States (and, indeed, in most of the world). Prudential standing principles counsel in favor of leaving resolution of such claims to the representative Branches.

Plaintiffs' common-law nuisance claims are quintessentially fit for political or regulatory—not judicial—resolution, because they simultaneously implicate many competing interests of almost unimaginably broad categories of both plaintiffs and defendants. On the plaintiffs' side, the eight States, one city, and three land trusts in these suits are but a tiny subset of those who could allege they are injured by carbon-dioxide emissions that have contributed or will contribute to global climate change. The court of appeals focused largely on plaintiffs' asserted injuries as landowners. See Pet. App. 59a-67a. But plaintiffs' allegations are not unusual in that respect. Global climate change will potentially affect the property interests of most landowners. The court of appeals explained that global warming's effects come from the land, the sea, and the air, and will threaten the beaches, the fields, the hills—and almost

everywhere in between.[6] The court of appeals' analysis of the claims of the land-trust plaintiffs (Pet. App. 62a-63a) further confirms that nearly all landowners will suffer injuries of the types they allege here. Moreover, global warming's effects will not be limited to landowners; they will also be felt by governments, individuals, corporations, and interest groups throughout the Nation and around the world.

Parallel breadth and complexities also characterize the range of potential defendants in such common-law claims, because the categories of those who emit carbon dioxide (and thus contribute to global warming in the way plaintiffs allege) are equally capacious. Plaintiffs' complaints name a few entities that operate power plants in 20 States. But the electric-utility industry alone is far larger, to say nothing of many other sectors of the economy that are responsible for greenhouse-gas emissions. See 75 Fed. Reg. at 31,519 (discussing "important sources" of such emissions, including motor vehicles, "industrial processes (such as the production of cement, steel, and aluminum), agriculture, forestry, other land use, and waste management").

The multiplicity of potential plaintiffs and defendants is rendered especially troubling by the very nature of common-law public-nuisance claims seeking to slow

---

[6] See Pet. App. 61a-62a (cataloging alleged damage to "States with ocean coastlines" as well as States "bordering the Great Lakes"; noting that "a rise in sea level would * * * accelerate beach erosion," "[w]armer temperatures would threaten agriculture" in other States, and disruption of ecosystems would "affect[] State-owned hardwood forests and fish habitats"); see also *Massachusetts*, 549 U.S. at 521-522 & nn.18-19 (discussing New Orleans and Hurricane Katrina in the context of Massachusetts' claims of injury), note 5, *supra* (noting injuries alleged in other nuisance suits about global warming).

global warming. The problem is not simply that many plaintiffs could bring such claims and that many defendants could be sued. Rather, it is that essentially any potential plaintiff could claim to have been injured by any (or all) of the potential defendants. The medium that transmits injury to potential plaintiffs is literally the Earth's entire atmosphere—making it impossible to consider the sort of focused and more geographically limited effects characteristic of traditional nuisance suits targeted at particular nearby sources of water or air pollution. It is cases of the latter sort on which the court of appeals relied as examples of "the federal courts' masterful handling of complex public nuisance issues." Pet. App. 29a.[7]

Moreover, EPA has already begun taking actions to address carbon-dioxide emissions under the CAA, and a common-law proceeding would be a less efficient, effective, and manageable means for considering in the first instance (rather than on judicial review of an agency determination) how much of the burden of reducing the Nation's contributions to global climate change should be borne by the electric-utility industry, or for determining which segments of that industry should make which changes to accommodate the Nation's need to reduce carbon-dioxide emissions, or at what rate such re-

[7] This Court last recognized a federal common-law cause of action in the pollution context in *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972) (*Milwaukee I*), though it subsequently held that water-pollution suits recognized in *Milwaukee I* had been displaced by later statutory amendments, see *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 313, 315 n.8 (1981). The other nuisance cases discussed by the court of appeals long predated enactment of the Clean Air Act and—unlike this case—still involved only localized rather than global effects. Accordingly, the prudential standing argument advanced here would not alter the standing analysis for cases involving such localized grievances.

ductions should occur. Courts—when no statute is in place to provide guidance—are simply not well-suited to balance the various interests of, and the burdens to be borne by, the many entities, groups, and sectors of the economy that, although not parties to the litigation, would be affected by a grievance that spans the globe.

Establishing appropriate levels for the reduction of carbon-dioxide emissions from power plants "by a specified percentage each year for at least a decade" (as plaintiffs request, Pet. App. 178a) would inevitably entail multifarious policy judgments, which should be made by decision makers who are politically accountable, have expertise, and are able to pursue a coherent national or international strategy—either at a single stroke or incrementally, cf. *Massachusetts*, 549 U.S. at 524. For such reasons, courts often accord the highest levels of deference to Executive Branch agencies' application of their regulatory and scientific expertise to address such complex problems. See, *e.g.*, *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984); *NRDC* v. *EPA*, 571 F.3d 1245, 1251-1253 (D.C. Cir. 2009); *New Eng. Legal Found.* v. *Costle*, 666 F.2d 30, 33 (2d Cir. 1981).

In the CAA, Congress has created a regime under which EPA and state regulators determine the best means of regulating air pollutants. Since this Court held in 2007 that carbon dioxide falls within that regulatory authority, see *Massachusetts*, 549 U.S. at 528-535, EPA has taken several significant steps toward addressing the very question presented here. See pp. 25-30, *infra*. That regulatory approach is preferable to what would result if multiple district courts—acting without the benefit of even the most basic statutory guidance—could use common-law nuisance claims to sit as arbiters of scientific and technology-related disputes and *de facto*

regulators of power plants and other sources of pollution both within their districts and nationwide. Cf. *North Carolina* v. *TVA*, No. 09-1623, 2010 WL 2891572, at *1 (4th Cir. July 26, 2010) (suit involving a state common-law claim; "encourag[ing] courts to use vague public nuisance standards to scuttle the nation's carefully created system for accommodating the need for energy production and the need for clean air" would result in "a balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike").

The confluence in this case of several factors—including the myriad potential plaintiffs and defendants, the lack of judicial manageability, and the unusually broad range of underlying policy judgments that would need to be made—demonstrates that plaintiffs' global-warming nuisance claims should be resolved by the representative Branches, not federal courts. And here, the issue at hand is actually being addressed by the representative Branches, rendering resort to common-law remedies unnecessary and duplicative.

2. The prudential standing analysis articulated here would not alter this Court's settled approach to challenges that raise generalized grievances "about the conduct of government." *Lance* v. *Coffman*, 549 U.S. 437, 442 (2007) (per curiam). This Court has addressed the justiciability of claims of government misconduct brought by taxpayers or citizens as part of the inquiry into whether a plaintiff has alleged a sufficiently particularized and concrete stake in litigation to establish Article III injury. See *ibid.*[8] Here, plaintiffs are not as

---

[8] See also *Hein* v. *Freedom from Religion Found.*, 551 U.S. 587, 633-634 & n.5 (2007) (Scalia, J., concurring in the judgment) (concluding

serting the general interest of a taxpayer or citizen in having the government follow the law. Instead, they assert that their property interests—or those of their citizens, in the case of the States' *parens patriae* status[9]—have been damaged by the actions of private and governmental parties.

Thus, the issue here is not whether plaintiffs' alleged injuries are abstract or concrete. Even assuming that plaintiffs have sufficiently alleged individualized injuries for Article III purposes, questions about how to regulate and reduce carbon-dioxide emissions are, for the reasons discussed above, "more appropriately addressed in the representative branches." *Newdow*, 542 U.S. at 12.[10] Indeed, EPA has begun to address how and when to regulate carbon-dioxide emissions—decisions that the

---

that a taxpayer's "'generally available grievance about government'" fails to "satisfy Article III's requirement that the injury in fact be concrete and particularized," notwithstanding prior "dicta describ[ing] the prohibition on generalized grievances as merely a prudential bar") (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 573 (1992)); *DaimlerChrysler Corp* v. *Cuno*, 547 U.S. 332, 345-346 (2006) (describing federal-taxpayer-standing doctrine as based on Article III); *FEC* v. *Akins*, 524 U.S. 11, 23 (1998) (analyzing Article III injury and considering whether harm is "of an abstract and indefinite nature") (internal quotation marks omitted).

[9] Although TVA is a defendant, the court of appeals' analysis of the States' *parens patriae* interests did not address the rule that "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982) (citing *Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486 (1923)). Unlike in *Massachusetts* (see 549 U.S. at 520 n.17), the States here do not and cannot claim that their suits simply assert their quasi-sovereign rights under an Act of Congress that has dispensed with prudential standing limitations.

[10] Even widely shared environmental harms may establish injury for Article III purposes. See, *e.g.*, *Massachusetts*, 549 U.S. at 522.

CAA in turn makes subject to judicial review. Plaintiffs thus lack prudential standing to assert their claims under federal common law.

3. Like petitioners' Article III and political question arguments, prudential standing is a threshold non-merits issue that may be resolved at the outset of a case—and, indeed, may be resolved before Article III standing. See, *e.g.*, *Tenet* v. *Doe*, 544 U.S. 1, 7 n.4 (2005) ("[T]he prudential standing doctrine[] represents the sort of 'threshold question' we have recognized may be resolved before addressing jurisdiction."); *Kowalski* v. *Tesmer*, 543 U.S. 125, 129 (2004) (assuming Article III standing in order to address prudential standing); *Newdow*, 542 U.S. at 18 & n.8 (finding plaintiff "lack[ed] prudential standing to bring this suit in federal court," without addressing Article III standing).[11]

In this case, compelling reasons counsel in favor of addressing prudential standing before other threshold questions, such as Article III standing and the political question doctrine. It is a narrower ground for decision, because it can be based on the context of the claims here, which are asserted under federal common law that is itself fashioned by the courts, and which present a unique confluence of a vast category of potential plaintiffs who may sue any among a vast category of potential defendants by alleging that their actions affected the entire Earth.

Prudential standing also provides a more deferential and restrained basis for dismissing suits like plaintiffs' because the basis for dismissal can be revisited by Con-

---

[11] The concurring justices in *Newdow* disagreed with the conclusion that the plaintiff lacked prudential standing but did not criticize the decision to address prudential standing first. See 542 U.S. at 18-25 (Rehnquist, C.J., concurring in judgment).

gress. As this Court has explained, principles of prudential standing can, "unlike their constitutional counterparts, * * * be modified or abrogated by Congress." *Bennett* v. *Spear*, 520 U.S. 154, 162 (1997); see also *FEC* v. *Akins*, 524 U.S. 11, 20 (1998) (holding that the existence of a statute embodying Congress's intention to authorize the "kind of suit" at issue meant that the plaintiffs "satisf[ied] 'prudential' standing requirements"); *United Food & Commercial Workers* v. *Brown Group, Inc.*, 517 U.S. 544, 558 (1996) ("prudential limitations are rules of 'judicial self-governance' that 'Congress may remove . . . by statute'") (quoting *Warth*, 422 U.S. at 509).

The restraint and flexibility inherent in prudential standing doctrine complement petitioners' appropriate concerns that the representative Branches' active role in addressing global warming be taken into account. See Pet. 27, 31, 34; see also *Newdow*, 542 U.S. at 12 (noting that prudential standing prevents courts from deciding questions "of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights") (quoting *Warth*, 422 U.S. at 500).

Dismissal on prudential standing grounds also follows from this Court's recognition in *Massachusetts* that Congress's statutory "authorization" of the "type of challenge to EPA action" present there—but absent in the common-law action here—was "of critical importance to the standing inquiry." 549 U.S. at 516 (citing *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)). Had this case fallen within the bounds of a citizen-suit provision like 42 U.S.C. 7604, the existence of that statutory cause of ac-

tion would mean that Congress had eliminated *prudential* standing limitations and itself diminished the concern animating the prudential standing doctrine: that the representative Branches are otherwise better suited than are the federal courts to resolving such matters. When Congress has enacted a statute authorizing suit, the standing inquiry is different because Congress has "at the very least identifi[ied] the injury it [sought] to vindicate and relate[d] the injury to the class of persons entitled to bring suit." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment).[12]

4. To be sure, defendants (including TVA) did not present a prudential standing argument to the courts below. Nevertheless, "[t]he rules of standing, whether as aspects of the Art[icle] III case-or-controversy requirement *or as reflections of prudential considerations* defining and limiting the role of the courts, are threshold determinants of the propriety of judicial intervention" that must be established by "the complainant" who seeks "the exercise of the court's remedial powers." *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 546 n.8 (1986) (emphasis added). Thus, before considering the merits of this suit, courts should be assured that "judicially self-imposed limits on the exercise of federal

---

[12] Compared to Article III standing, prudential standing is also more susceptible to definitive resolution at the outset of the case. Even if plaintiffs have satisfied Article III standing at the pleading stage, as the court of appeals held, questions of injury, causation, and redressability would need to be revisited as the suit progressed. See *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 889 (1990), Pet. App. 43a (expressly relying upon "the lowered bar for standing at the pleading stage"). Plaintiffs would, for instance, need to produce evidence to support their assertion that "[e]ven if emissions increase elsewhere, the magnitude of [p]laintiffs' injury will be less if [d]efendants' emissions are reduced than they would be without a remedy." *Id.* at 76a.

jurisdiction" will not be transgressed. *Allen*, 468 U.S. at 751; see, *e.g.*, *Newdow*, 542 U.S. at 12-18 (dismissing for lack of prudential standing even though that issue was not raised in the lower courts or in the parties' briefs in this Court).

This Court could, of course, decide the question of prudential standing for itself, even though that question was not addressed by the district court or court of appeals. As a general matter, however, the Court does not decide questions that have not been answered by the court of appeals, because it is a court "of final review, 'not of first view.'" *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009) (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). Here, because there are independent reasons to remand, so that the court of appeals can consider whether any cognizable federal common-law claim has been displaced in light of recent regulatory developments (see pp. 22-32, *infra*), it would be appropriate for the court of appeals (or the district court on further remand) also to address, in the first instance, whether prudential standing principles bar consideration of plaintiffs' federal common-law claims, independent of Article III.[13]

B. Any Federal Common-Law Claims Here Have Been Displaced By EPA Actions Taken After The Court Of Appeals Issued Its Decision

The court of appeals held that plaintiffs' federal common-law actions for public nuisance had not been

---

[13] In the Second Circuit, prudential standing cannot be waived by the parties because the court's "independent obligation to examine subject matter jurisdiction * * * extends 'to the prudential rules of standing.'" *Thompson* v. *County of Franklin*, 15 F.3d 245, 248 (2d Cir. 1994) (citation and footnote omitted).

displaced by the CAA because "EPA does not currently regulate carbon dioxide under the CAA," and does not "regulate such emissions from stationary sources." Pet. App. 135a, 144a. Those predicates for the court of appeals' analysis of the displacement question are no longer true. In the 11 months since the court issued its decision, EPA has taken several affirmative steps to make carbon-dioxide emissions "subject to regulation" under the CAA as of January 2, 2011. Thus, even assuming the court's decision was correct when it was issued, it is now clear, in light of intervening developments, that any federal common-law cause of action against petitioners and TVA for their emissions has been displaced.

1. As the court of appeals recognized, federal common law is "subject to the paramount authority of Congress," which means that a "previously available federal common-law action" will be "displaced" whenever a "scheme established by Congress addresses the problem." Pet. App. 123a-124a (quoting *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 313, 315 n.8 (1981) (*Milwaukee II*)); see also, *e.g.*, *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625 (1978). Accordingly, federal common law is displaced when an administrative agency takes regulatory action, under the authority of a comprehensive statutory program, to address the particular issue raised in a putative common-law cause of action.

Displacement of common law occurs even when a plaintiff seeks relief that would address the same issue in a manner that is different in character or extent from what the regulatory program provides. See *Milwaukee II*, 451 U.S. at 324 ("the question is whether the field has been occupied, not whether it has been occupied in a particular manner"); see also *Mobil Oil Corp.*, 436 U.S.

at 623-625 (holding that any federal common-law damages remedy for loss of society had been displaced by the Death on the High Seas Act, which provided damages for pecuniary loss but not for loss of society).

Petitioners contend that Congress's enactment of the CAA, which is a comprehensive regulatory program to address air pollution, was sufficient to displace plaintiffs' common-law claims, without regard to any regulatory actions that EPA has taken pursuant to the CAA. See Pet. 21-22. While there can be little doubt that the CAA established a "comprehensive" regulatory program,[14] it is unnecessary to determine in this case whether the statute alone displaced plaintiffs' claims here, because, even if it did not, the regulatory actions that EPA has taken pursuant to the CAA have had that effect by speaking directly to the question of limiting carbon-dioxide emissions.

2. The court of appeals held that—as of September 21, 2009—plaintiffs' federal common-law claims had not been displaced because it concluded that "EPA does not currently regulate carbon dioxide under the CAA" and does not "regulate such emissions from stationary sources." Pet. App. 135a, 144a. In light of subsequent developments, neither of those propositions remains true. In the wake of this Court's decision in *Massachusetts*, EPA has already taken five significant actions addressing carbon-dioxide emissions. Four of those actions occurred entirely after the decision of the court of appeals, and the fifth was commenced prior to the court of appeals' decision and has progressed since then.

---

[14] See, *e.g.*, *Chevron U.S.A. Inc.*, 467 U.S. at 848; *Michigan* v. *United States EPA*, 581 F.3d 524, 526 (7th Cir. 2009); *American Farm Bureau Fed'n* v. *EPA*, 559 F.3d 512, 516 (D.C. Cir. 2009); *Latino Issues Forum* v. *United States EPA*, 558 F.3d 936, 938 (9th Cir. 2009).

a. First, on October 30, 2009, nearly six weeks after the court of appeals' decision, EPA issued a final rule that requires certain sources that annually emit more than 25,000 tons of greenhouse gases (and, in some instances, less) to report those emissions to EPA. 74 Fed. Reg. 56,264 (2009). EPA stated that the rule "does not require control of greenhouse gases," *id.* at 56,260, but that the data would inform decisions about whether to regulate greenhouse gas emissions under, *inter alia*, Section 111 or 202 of the CAA, *id.* at 56,265.

b. Second, on December 15, 2009, EPA published a final finding under Section 202 of the CAA that greenhouse gases in the atmosphere may reasonably be anticipated to endanger public health and welfare. 74 Fed. Reg. at 66,497. That "endangerment finding" also included a determination that carbon-dioxide and other greenhouse-gas emissions from new motor vehicles contribute to total greenhouse-gas air pollution; specifically, it determined that the portion of the transportation sector regulated by Section 202 is responsible for just over 23% of greenhouse-gas emissions in the United States, making it the "second largest emitter within the United States behind the electricity generating sector." *Id.* at 66,499.[15]

c. Third, on May 7, 2010, EPA (acting with the Department of Transportation's National Highway Traffic Safety Administration) published a joint final rule that will dramatically reduce greenhouse-gas emissions from light-duty vehicles. 75 Fed. Reg. 25,324. EPA's new emissions standards were required by Section 202 of the CAA as a result of EPA's December 2009 endangerment

---

[15] On July 29, 2010, EPA denied petitions for reconsideration of its December 2009 endangerment finding. See 75 Fed. Reg. at 49,556.

finding. See 42 U.S.C. 7521(a)(1); 75 Fed. Reg. at 25,327. Those standards will first take effect on January 2, 2011 (for vehicles of model year 2012), and will then become "increasingly stringent" until model year 2016. *Id.* at 25,329-25,330. EPA exercised its discretion to phase in those standards over that period to allow manufacturers to "incorporate technology to achieve [greenhouse-gas] reductions" and to "plan for compliance using a multi-year time frame, * * * consistent with normal business practice." *Id.* at 25,332.

Promulgation of the final light-duty-vehicle standards means that, as of January 2, 2011, EPA will, for the first time, consider greenhouse gases to be "pollutant[s] subject to regulation under [the CAA]," in the sense meant by 40 C.F.R. 52.21(b)(50)(iv), and therefore subject to Sections 165 and 169(1) of the CAA (42 U.S.C. 7475(a), 7479(1)). See 75 Fed. Reg. at 31,549-31,551. Those provisions—which apply to stationary sources—require any new or modified "major emitting facility" to obtain a so-called "PSD permit," under the provisions of the CAA designed to prevent significant deterioration of air quality. 42 U.S.C. 7470-7479.[16] In order to obtain such a permit, a facility must, among other things, be

---

[16] The CAA applies PSD requirements to a "major emitting facility," 42 U.S.C. 7475(a), which is defined to include any "source with the potential to emit" at least 250 tons per year of "any air pollutants," as well as certain "stationary sources of air pollutants" (including, as most relevant here, fossil-fuel-fired steam electric plants and boilers), if they emit or have the potential to emit at least 100 tons per year. 42 U.S.C. 7479(1). EPA's regulations implement those requirements by applying them to "major stationary source[s]," 40 C.F.R. 52.21(a)(2), which are defined to include stationary sources that emit at least 100 or 250 tons per year of a "regulated NSR pollutant," 40 C.F.R. 52.21(b)(2)(i), which includes "[a]ny pollutant * * * subject to regulation under the [CAA]." 40 C.F.R. 52.21(b)(50)(iv).

"subject to the best available control technology for each pollutant subject to regulation under [the CAA]." 42 U.S.C. 7475(a)(4). By the same token, the promulgation of the light-duty-vehicle standards means that EPA, for the first time, will consider greenhouse gases to be subject to the permitting requirements under Title V of the CAA. See 42 U.S.C. 7661a(a), 7661(2)(B), 7602(j); 75 Fed. Reg. 31,551-31,554 (describing EPA's interpretation of the applicability of Title V). As the D.C. Circuit has explained, the Title V permitting process "requires that certain air pollution sources, including every major stationary source of air pollution, each obtain a single, comprehensive operating permit to assure compliance with all emission limitations and other substantive CAA requirements that apply to the source." *Environmental Integrity Project* v. *EPA*, 425 F.3d 992, 993 (2005); see also *Virginia* v. *Browner*, 80 F.3d 869, 873 (4th Cir. 1996) (describing Title V permit as "a source-specific bible for [CAA] compliance"), cert. denied, 519 U.S. 1090 (1997).

d. The chain of regulatory consequences following the light-duty-vehicle standards led to EPA's fourth action. On June 3, 2010, EPA issued a final rule that tailors application of the PSD and Title V permitting requirements. 75 Fed. Reg. 31,514. That rule limits the scope and effective date of those requirements by providing an incremental phase-in process, applying in January 2011 to sources already obtaining permits for other pollutants, and later to additional sources. *Id.* at 31,516.[17]

---

[17] Pursuant to the first step of the tailoring rule, sources are subject to the PSD requirements on account of their carbon-dioxide emissions as of January 2, 2011, only if (1) they are already subject to such requirements due to emissions of non-greenhouse-gas air pollutants, and

As a result of the foregoing four developments—each of which occurred after the court of appeals' decision—it is no longer true that "EPA has yet to make any determination that such emissions are subject to regulation under the Act, much less endeavor *actually* to regulate the emissions." Pet. App. 144a. In fact, EPA has now taken final action that, as of January 2, 2011, makes carbon dioxide subject to regulation under the Act. Nor does it matter, for purposes of displacement analysis, that EPA has adopted an incremental approach that begins in a few months and expands over several years. In *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981), the Court held that the Marine Protection, Research, and Sanctuaries Act of 1972 displaced federal common law immediately and entirely, even though "Congress allowed some continued dumping of sludge" for nine years after the statute was enacted as a result of its "considered judgment that it made sense to allow entities like petitioners to adjust to the coming change." 453 U.S. at 22 n.32; see also *Massachusetts*, 549 U.S. at 533 (recognizing that EPA possesses "significant latitude as to the manner, timing, content, and coordination of its regulations"); *id.* at 524 ("Agencies, like legislatures, do not generally

---

(2) they undertake a modification that will increase their carbon-dioxide emissions by at least 75,000 tons per year while also significantly increasing emissions of non-greenhouse-gas pollutants. 75 Fed. Reg. at 31,516. The second step of the rule, beginning on July 1, 2011, "will phase in additional large sources of [greenhouse-gas] emissions." *Ibid.* Similar steps apply in the case of Title V. *Id.* at 31,523-31,524. The third step, beginning in July 2013, may phase in regulation of additional sources. *Ibid.* EPA also stated that no sources or modifications below a certain size (50,000 tons of carbon dioxide per year) would be made subject to PSD or Title V permitting requirements before April 30, 2016. *Ibid.*

resolve massive problems in one fell regulatory swoop. They instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more-nuanced understanding of how best to proceed.").

e. Although it is already clear that carbon-dioxide emissions from stationary sources will be subject to regulation under the CAA when the vehicle standards take effect on January 2, 2011, a fifth development is also relevant. Since 2007, EPA has repeatedly noted that it is engaged in the process of determining whether, in light of this Court's decision in *Massachusetts*, it should subject stationary sources—including the sectors that cover defendants' power plants—to new source performance standards for carbon-dioxide emissions under Section 111 of the CAA, 42 U.S.C. 7411.

In 2006, an EPA final rule revised new source performance standards for certain emissions by fossil-fuel-fired electric-utility steam-generating units of a certain size.[18] At the time, EPA stated that it lacked "authority to set NSPS to regulate CO_2 or other greenhouse gases that contribute to global climate change." 71 Fed. Reg. 9869 (2006). Several States and environmental organizations challenged that conclusion in a petition for review filed in the D.C. Circuit. See *New York* v. *EPA*, No. 06-1322 (D.C. Cir.). After this Court's decision in *Massachusetts*, expressly holding that Section 202 of the CAA authorizes EPA to regulate greenhouse-gas emissions, the agency sought a voluntary remand. It told the D.C.

---

[18] That source category includes defendants' power plants, which would be subject to any revised NSPS if they were reconstructed or modified, 40 C.F.R. 60.14-60.15, and would be covered by any emissions guidelines for existing sources required by CAA Section 111(d) as a result of the NSPS revision.

Circuit that, as the agency with the authority to establish emission limits for specific pollutants that may reasonably be anticipated to endanger public health or welfare (see 42 U.S.C. 7411), it should "be given the opportunity in the first instance to examine and decide the effect of *Massachusetts* in the [S]ection 111 context * * * and then to make appropriate policy decisions consistent with that analysis." EPA's Combined Mot. To Govern Further Proceedings & Resp. To Envtl. & State Pet'rs' Mot. To Govern Further Proceedings, 8-9, 10, *New York*, *supra* (filed June 18, 2007). The D.C. Circuit granted EPA's request for a remand without vacatur on September 24, 2007.[19]

Since then, EPA has stated that it is "in the process of responding to a remand from the D.C. Circuit requiring it to consider whether to add standards for [greenhouse gases] to the NSPS for utility boilers." 73 Fed. Reg. 44,487 (2008); see *ibid.* ("EPA has begun a review of the existing NSPS source categories to determine whether it would be appropriate to regulate [greenhouse-gas] emissions from sources in each category" under CAA Section 111); cf. EPA, *National Emission Standards for Hazardous Air Pollutants From the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants* 134-135 (Aug. 9, 2010), http://www.epa.gov/ttn/oarpg/t1/fr_notices/portland_cement_fr_080910.pdf (final rule revising NSPS for Portland-cement-manufacturing facilities, noting they are "the third highest U.S. source of CO_2 emissions" and that EPA "is working towards a proposal for [greenhouse-gas] standards" for them).

[19] The remand occurred between the oral argument and the decision in this case, but the parties did not bring that event—or EPA's associated commitment—to the Second Circuit's attention.

3. As the foregoing account demonstrates, after the Second Circuit issued its opinion, EPA took clear steps to regulate carbon-dioxide emissions, specifically including such emissions from stationary sources, under the authority granted to it by the comprehensive regulatory program established by Congress in the CAA. And EPA is also in the process of considering whether to take additional regulatory action. Thus, it is now clear that the CAA, as implemented by EPA, "speak[s] directly" (*Milwaukee II*, 451 U.S. at 315 (quoting *Mobil Oil*, 436 U.S. at 625)) to the particular issue presented by plaintiffs' nuisance claims about global warming: regulation of carbon-dioxide emissions, and in particular emissions from stationary sources (like defendants' power plants).

Although EPA has not done precisely what plaintiffs demand here (*i.e.*, cap defendants' carbon-dioxide emissions and require them to be reduced annually for at least a decade, Pet. App. 178a), that is not the relevant test. As this Court has stated: "Demanding specific regulations of general applicability before concluding that Congress has addressed the problem to the exclusion of federal common law asks the wrong question. The question is whether the field has been occupied, not whether it has been occupied in a particular manner." *Milwaukee II*, 451 U.S. at 324; see also *id.* at 323 ("Although a federal court may disagree with the regulatory approach taken by the agency with responsibility for issuing permits under the Act, such disagreement alone is no basis for the creation of federal common law."); *Illinois* v. *Outboard Marine Corp.*, 680 F.2d 473, 478 (7th Cir. 1982) (refusing "to find that Congress has not 'addressed the question' because it has not enacted a remedy against polluters," because that "would be no different from holding that the solution Congress chose

is not adequate," and "*Milwaukee II* * * * precludes the courts from scrutinizing the sufficiency of the congressional solution").

4. The displacement analysis in the decision below was predicated on the now-obsolete conclusion that EPA had not taken action under its CAA authority to regulate carbon-dioxide emissions from stationary sources. Stripped of that premise, the result reached by the court of appeals is no longer warranted (if indeed it was at the time of the decision).

Because a different answer to the displacement question would require the Second Circuit to affirm the dismissal of plaintiffs' complaints, and because there is a "reasonable probability" that the court "would reject" its former premise in light of "intervening developments," it would be "appropriate" for this Court to vacate the judgments below and remand for further proceedings to consider whether plaintiffs' common-law claims have been displaced by EPA's regulatory actions. *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam). Such a remand would also allow the court of appeals to consider in the first instance whether plaintiffs satisfy prudential standing requirements. See p. 22 & n.13, *supra*.[20]

CONCLUSION

The petition for a writ of certiorari should be granted, the judgments of the court of appeals should be vacated, and the case should be remanded for further proceedings to consider, *inter alia*, whether the non-

---

[20] TVA appeared through its own counsel in the district court and court of appeals, and its briefs and oral arguments did not reflect consultation with other Executive Branch agencies, including EPA and the Department of Justice.

federal respondents satisfy prudential standing requirements and the effect on the court's analysis of recent actions taken by the Environmental Protection Agency with respect to greenhouse-gas emissions.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
TONY WEST
Assistant Attorney General
IGNACIA S. MORENO
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ETHAN G. SHENKMAN
Deputy Assistant Attorney General
CURTIS E. GANNON
Assistant to the Solicitor General
LISA E. JONES
H. THOMAS BYRON
JUSTIN R. PIDOT
CHARLES R. SCOTT
Attorneys

RALPH E. RODGERS
Acting General Counsel
HARRIET A. COOPER
Assistant General Counsel
MARIA V. GILLEN
Attorney
Tennessee Valley Authority

AUGUST 2010

RESPONDENT'S BRIEF

No. 10-174

In the Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY INC., ET AL.,
PETITIONERS

v.

STATE OF CONNECTICUT, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE TENNESSEE VALLEY AUTHORITY AS RESPONDENT SUPPORTING PETITIONERS

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
IGNACIA S. MORENO
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ETHAN G. SHENKMAN
Deputy Assistant Attorney General
CURTIS E. GANNON
Assistant to the Solicitor General
DOUGLAS N. LETTER
LISA E. JONES
H. THOMAS BYRON
JUSTIN R. PIDOT
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

RALPH E. RODGERS
Acting General Counsel
HARRIET A. COOPER
Assistant General Counsel
MARIA V. GILLEN
Attorney
Tennessee Valley Authority
Knoxville, TN 37902

QUESTIONS PRESENTED

The court of appeals held that States and private plaintiffs may maintain actions under federal common law alleging that defendants—in this case, five electric utilities—have caused, contributed to, or maintained a "public nuisance" by contributing to global warming, and may seek injunctive relief capping defendants' carbon-dioxide emissions at judicially determined levels. The questions presented are:

1. Whether States and private parties have standing to seek judicially fashioned emissions caps on five utilities for their alleged contribution to harms claimed to arise from global climate change caused by more than a century of emissions by billions of independent sources.

2. Whether a cause of action to cap carbon-dioxide emissions can be implied under federal common law where no statute creates such a cause of action, and the Clean Air Act speaks directly to the same subject matter and assigns federal responsibility for regulating such emissions to the Environmental Protection Agency.

3. Whether claims seeking to cap defendants' carbon-dioxide emissions at "reasonable" levels based on a court's weighing of the potential risks of climate change against the socioeconomic utility of defendants' conduct, would be governed by "judicially discoverable and manageable standards" or could be resolved without "initial policy determination[s] of a kind clearly for nonjudicial discretion." *Baker* v. *Carr*, 369 U.S. 186, 217 (1962).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Summary of argument 11
Argument 13
I. Plaintiffs' common-law nuisance claims are not justiciable 13
A. Plaintiffs lack prudential standing because their suits are generalized grievances more appropriately addressed by the representative Branches 14
1. Federal courts must refrain from adjudicating generalized grievances like plaintiffs' common-law claims 14
2. It is appropriate to resolve this case on prudential-standing grounds before considering other threshold grounds 21
B. Under *Massachusetts* v. *EPA*, at least some of the State plaintiffs have Article III standing in their capacity as sovereign landowners 25
C. This case raises separation-of-powers concerns addressed by the political-question doctrine, but plaintiffs' lack of prudential standing provides a more appropriate basis for a dismissal on grounds of nonjusticiability 33
II. Any federal common-law claims have been displaced by EPA's regulatory actions under the Clean Air Act 42
Conclusion 53

TABLE OF AUTHORITIES

Cases: Page

Alden v. *Maine*, 527 U.S. 706 (1999) 27, 33
Allen v. *Wright*, 468 U.S. 737 (1984) 14, 24, 34
Alfred L. Snapp & Son, Inc. v. *Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982) 27
Baker v. *Carr*, 369 U.S. 186 (1962) 7, 12, 34, 35, 36, 37
Bender v. *Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986) 24
Bennett v. *Spear*, 520 U.S. 154 (1997) 22, 23
Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) .. 19, 45
City of Milwaukee v. *Illinois*, 451 U.S. 304 (1981) (*Milwaukee II*) ..... *passim*
Comer v. *Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), opinion vacated pending reh'g en banc, 598 F.3d 208, appeal dismissed, 607 F.3d 1049 (5th Cir. 2010), petition for mandamus denied *sub nom. In re Comer*, S. Ct. No. 10-294 (Jan. 10, 2011) 16
County of Oneida v. *Oneida Indian Nation*, 470 U.S. 226 (1985) 42
DaimlerChrysler Corp. v. *Cuno*, 547 U.S. 332 (2006) 21
Elk Grove Unified Sch. Dist. v. *Newdow*, 542 U.S. 1 (2004) 14, 15, 21, 22, 23, 24
Environmental Integrity Project v. *EPA*, 425 F.3d 992 (D.C. Cir. 2005) 48
FEC v. *Akins*, 524 U.S. 11 (1998) 21, 22
Georgia v. *Tennessee Copper Co.*, 206 U.S. 230 (1907) 18, 43
Gilligan v. *Morgan*, 413 U.S. 1 (1973) 36
Goldwater v. *Carter*, 444 U.S. 996 (1979) 35

Cases—Continued: Page

Hein v. *Freedom from Religion Found.*, 551 U.S. 587 (2007) 21

Illinois v. *City of Milwaukee*, 406 U.S. 91 (1972) (*Milwaukee I*) 17, 32, 43

Illinois v. *Outboard Marine Corp.*, 680 F.2d 473 (7th Cir. 1982) 53

Illinois ex rel. Scott v. *City of Milwaukee*, No. 72 C 1253, 1973 U.S. Dist. LEXIS 15607 (N.D. Ill. 1973), aff'd in part, rev'd in part, *Illinois* v. *City of Milwaukee*, 599 F.2d 151 (7th Cir. 1979), vacated on other grounds, *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981) 32

Kowalski v. *Tesmer*, 543 U.S. 125 (2004) 22, 25

Lance v. *Coffman*, 549 U.S. 437 (2007) 21

Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 8, 21, 23, 24, 31, 32

Lujan v. *National Wildlife Fed'n*, 497 U.S. 871 (1990) .. 30

Massachusetts v. *EPA*, 549 U.S. 497 (2007) ..... *passim*

Massachusetts v. *Mellon*, 262 U.S. 447 (1923) 27

Middlesex County Sewerage Auth. v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981) 45, 52

Missouri v. *Illinois*, 200 U.S. 496 (1906) 44

Mobil Oil Corp. v. *Higginbotham*, 436 U.S. 618 (1978) 42, 44, 51

Native Village of Kivalina v. *Exxon Mobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), appeal pending, No. 09-17490 (9th Cir.) 16

New Eng. Legal Found. v. *Costle*, 666 F.2d 30 (2d Cir. 1981) 19

Cases—Continued: Page

New Jersey v. *New York*, 283 U.S. 336 (1931) 42
Nixon v. *United States*, 506 U.S. 224 (1993) 35
North Carolina ex rel. Cooper v. *TVA*, 615 F.3d 291 (4th Cir. 2010) 20
NRDC v. *EPA*, 571 F.3d 1245 (D.C. Cir. 2009) 19
O'Shea v. *Littleton*, 414 U.S. 488 (1974) 41
Pearson v. *Callahan*, 129 S. Ct. 808 (2009) 25
PDK Labs. Inc. v. *United States DEA*, 362 F.3d 786 (D.C. Cir. 2004) 25
Poe v. *Ullman*, 367 U.S. 497 (1961) 34
Public Interest Research Group v. *Powell Duffryn Terminals Inc.*, 913 F.2d 64 (3d Cir. 1990), cert. denied, 498 U.S. 1109 (1991) 31
Quackenbush v. *Allstate Ins. Co.*, 517 U.S. 706 (1996) ... 42
Ruhrgas AG v. *Marathon Oil Co.*, 526 U.S. 574 (1999) .. 35
Rumsfeld v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) 33
Sanchez-Espinoza v. *Reagan*, 770 F.2d 202 (D.C. Cir. 1985) 42
Schlesinger v. *Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) 35
Sprint Communications Co. v. *APCC Servs., Inc.*, 554 U.S. 269 (2008) 32
Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998) 41
Summers v. *Earth Island Inst.*, 129 S. Ct. 1142 (2009) 26, 31
Tenet v. *Doe*, 544 U.S. 1 (2005) 21

Cases—Continued: Page

Thompson v. *County of Franklin*, 15 F.3d 245 (2d Cir. 1994) 24
TVA v. *Hill*, 437 U.S. 153 (1978) 39
United Food & Commercial Workers v. *Brown Group, Inc.*, 517 U.S. 544 (1996) 23
United States v. *Munoz-Flores*, 495 U.S. 385 (1990) 35
Vander Jagt v. *O'Neill*, 699 F.2d 1166 (D.C. Cir.), cert. denied, 464 U.S. 823 (1983) 34
Vieth v. *Jubelirer*, 541 U.S. 267 (2004) 36, 40
Virginia v. *Browner*, 80 F.3d 869 (4th Cir. 1996), cert. denied, 519 U.S. 1090 (1997) 48
Warth v. *Seldin*, 422 U.S. 490 (1975) 14, 15, 23, 24
Washington v. *General Motors Corp.*, 406 U.S. 109 (1972) 43
Winter v. *NRDC*, 129 S. Ct. 365 (2008) 41

Constitution, statutes, regulations and rule:

U.S. Const.:
Art. I, § 8 38
Cl. 3 (Commerce Clause) 7
Art. III ..... *passim*
Clean Air Act, 42 U.S.C. 7401 *et seq.* 2
42 U.S.C. 7408 (§ 108) 4
42 U.S.C. 7411 (§ 111) 4, 50
42 U.S.C. 7411(b)(1)(A) 4
42 U.S.C. 7411(b)(1)(B) 4
42 U.S.C. 7411(d) (§ 111(d)) 4, 51
42 U.S.C. 7412 (§ 112) 4

Statutes, regulations and rule—Continued: Page

42 U.S.C. 7470-7479 47
42 U.S.C. 7475 (§ 165) 5, 47
42 U.S.C. 7475(a) 47
42 U.S.C. 7475(a)(4) 5, 10, 46, 47, 48
42 U.S.C. 7479(1) (§ 169(1)) 5, 47
42 U.S.C. 7521 (§ 202) 3, 9, 46
42 U.S.C. 7521(a)(1) (§ 202(a)(1)) 3, 4, 47
42 U.S.C. 7602(g) 3
42 U.S.C. 7602(j) 48
42 U.S.C. 7604 ..... 15, 23
42 U.S.C. 7607(b)(1) 15
42 U.S.C. 7661-7661f (Tit. V) 5, 48, 49, 50
42 U.S.C. 7661(2)(B) 48
42 U.S.C. 7661a 5
42 U.S.C. 7661a(a) 48
Clean Water Act, 33 U.S.C. 1251 *et seq.* 45
33 U.S.C. 1311(a) 45
Sherman Act:
15 U.S.C. 1 31
15 U.S.C. 4 31
16 U.S.C. 831 5
16 U.S.C. 831a(a)(1) 5
16 U.S.C. 831c(b) 6
16 U.S.C. 831d(*l*) 5
16 U.S.C. 831n-4 5

Regulations and rule—Continued: Page

40 C.F.R.:
Pt. 50 4
Pt. 52:
Section 52.21(a)(2) 48
Section 52.21(b)(2)(i) 48
Section 52.21(b)(49)-(50) 47
Section 52.21(b)(50)(iv) 48
Pt. 60:
Section 60.20-60.29 4
Section 60.24(f) 4
Sup. Ct. R. 14.1(a) 24

Miscellaneous:

Exec. Order 13,514, 3 C.F.R. 248 (2009 Comp.) 2
73 Fed. Reg. 44,487 (2008) 50
74 Fed. Reg. (2009):
p. 66,497 ..... 19, 46
p. 66,499 46
p. 66,537 46
75 Fed. Reg. (2010):
p. 17,019 47
p. 25,324 46
p. 25,327 47
pp. 25,329-25,330 47
p. 25,332 47
p. 31,514 49
p. 31,516 49
p. 31,519 17

Miscellaneous—Continued: Page

pp. 31,520-31,521 5
p. 31,521 5
pp. 31,523-31,524 ..... 49, 50
pp. 31,549-31,551 47
pp. 31,551-31,554 48
pp. 31,606-31,607 47
p. 82,392 50
Restatement (Second) of Torts (1977) 8, 32
Settlement Agreement, *State of New York, et al.* v. *EPA*, D.C. Cir. No. 06-1322 (Dec. 2010), http://www.epa.gov/airquality/pdfs/boilerghgsettlement.pdf 51
U.S. Dep't of State, *U.S. Climate Action Report 2010*, http://unfcc.int/resource/docs/natc/usa_ncs.pdf 3
White House Council on Envt'l Quality, *Progress Report of the Interagency Climate Change Adaptation Task Force: Recommended Actions in Support of a National Climate Change Adaptation Strategy* (Oct. 2010), http://www.whitehouse.gov/sites/default/files/microsites/ceq/Interagency-Climate-Change-Adaptation-Progress-Report.pdf 2

In the Supreme Court of the United States

No. 10-174

AMERICAN ELECTRIC POWER COMPANY INC., ET AL., PETITIONERS

v.

STATE OF CONNECTICUT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE TENNESSEE VALLEY AUTHORITY AS RESPONDENT SUPPORTING PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-170a) is reported at 582 F.3d 309. The opinion of the district court (Pet. App. 171a-187a) is reported at 406 F. Supp. 2d 265.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 2009. Petitions for rehearing were denied on March 5, 2010, and March 10, 2010 (Pet. App. 188a-191a). On May 26, 2010, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including July 6, 2010. On June 28, 2010, Justice Ginsburg further extended the time to August 2, 2010, and the petition was filed on that date. The

petition for a writ of certiorari was granted on December 6, 2010. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

This case concerns the methods by which the United States will regulate carbon-dioxide emissions. The control of such emissions is of singular importance due to the pernicious effects of global climate change, and the United States Government is committed to combating climate change. In this case, the plaintiffs seek to maintain federal common-law actions against five electric utilities that have allegedly caused, contributed to, or maintained a public nuisance by contributing to global warming, and they seek injunctive relief to reduce defendants' carbon-dioxide emissions to judicially determined levels. When this case began (in July 2004) as well as when it was argued in the court of appeals (in June 2006), the Environmental Protection Agency (EPA) took the view that the Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.*, did not authorize it to issue mandatory regulations to address global climate change, and that, even if it did have the authority to set greenhouse-gas-emissions standards, it was, at least at that time, unwise to do so. See *Massachusetts* v. *EPA*, 549 U.S. 497, 511 (2007).

In the wake of this Court's decision in *Massachusetts* v. *EPA*, EPA's position has dramatically changed. EPA has taken substantial steps to regulate greenhouse-gas emissions under the CAA, consistent with other high-priority efforts by the Executive Branch to develop appropriate policies to combat climate change,[1] and with

---

[1] See, *e.g.*, Exec. Order 13,514, 3 C.F.R. 248 (2009 Comp.) (making "reduction of greenhouse gas emissions a priority for Federal agencies"); White House Council on Envt'l Quality, *Progress Report of the*

the United States' efforts to address climate change in recent international negotiations.[2] Plaintiffs' suits seeking restrictions on greenhouse-gas emissions through an injunction imposed by a district court should be dismissed, both because they are nonjusticiable and because any federal common-law nuisance action plaintiffs may once have had has been displaced by EPA's actions.

1. a. The CAA establishes a comprehensive framework for regulating air pollution and vests EPA, and to some extent the States and Indian Tribes, with implementing authority. It defines "air pollutant" to include "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive * * * substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S.C. 7602(g). Section 202(a)(1) of the CAA provides that the EPA Administrator "shall by regulation prescribe * * * standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. 7521(a)(1). In *Massachusetts* v. *EPA*, the Court held that Section 202 permits EPA to "regulate greenhouse-

---

Interagency Climate Change Adaptation Task Force: Recommended Actions in Support of a National Climate Change Adaptation Strategy 16 (Oct. 2010) (explaining that efforts "to reduce the impacts of climate change" include both mitigation of its causes and adaptation to its effects), http://www.whitehouse.gov/sites/default/files/microsites/ceq/Interagency-Climate-Change-Adaptation-Progress-Report.pdf.

[2] See, *e.g.*, U.S. Dep't of State, *U.S. Climate Action Report 2010*, at 3, http://unfccc.int/resource/docs/natc/usa_nc5.pdf (noting that as part of the 2009 Copenhagen Accord, the United States proposed to "reduce emissions in the range of 17 percent from 2005 levels by 2020").

gas emissions from new motor vehicles in the event that it forms a 'judgment'" that they "'cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.'" 549 U.S. at 528 (quoting 42 U.S.C. 7521(a)(1)).

Section 111 of the CAA authorizes EPA to list categories of stationary sources that "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. 7411(b)(1)(A). Once EPA exercises its discretion to list a category of stationary sources, Section 111 directs it to establish performance standards for the emission of pollutants specified by EPA from new (or modified) sources in that category. 42 U.S.C. 7411(b)(1)(B). Furthermore, in some circumstances, once EPA has established such new source performance standards (NSPS) for a particular category of sources, States are required by Section 111(d) to issue performance standards—in accordance with EPA guidelines—for *existing* sources in that category.[3] 42 U.S.C. 7411(d). EPA may issue such standards if a State does not do so. *Ibid.*; see also 40 C.F.R. 60.20-60.29 (establishing procedures for the adoption of state plans).

---

[3] Section 111(d) standards for existing sources are required if the NSPS regulate emissions of an air pollutant that is not regulated under Section 112 (42 U.S.C. 7412) and not subject to national ambient air quality standards (NAAQS) by virtue of being a pollutant listed under Section 108 (42 U.S.C. 7408). (Only six pollutants—carbon monoxide, lead, nitrogen dioxide, ozone, particulate matter, and sulfur dioxide—have been listed under Section 108. See 40 C.F.R. Pt. 50.) Under Section 111(d), States may apply standards less stringent than those identified in EPA's guidelines if they demonstrate that the application of the guidelines to a facility or class of facilities imposes unreasonable costs, is physically impossible, or presents some other factor that makes less-stringent requirements more reasonable. 40 C.F.R. 60.24(f).

Section 165 of the CAA requires that any new "major emitting facility" (or one to which a major modification is made) must obtain a pre-construction permit to ensure the prevention of significant deterioration (PSD) of air quality. 42 U.S.C. 7475; see generally 75 Fed. Reg. 31,520-31,521 (2010) (discussing PSD provisions pertinent to greenhouse-gas emissions). Such PSD requirements apply to any "pollutant subject to regulation under [the CAA]." 42 U.S.C. 7475(a)(4). The definition of "major emitting facility" includes stationary sources that exceed specified amounts of emissions of any pollutant. 42 U.S.C. 7479(1). A permit application must show that the facility will employ "the best available control technology for each pollutant subject to regulation under [the CAA]." 42 U.S.C. 7475(a)(4).

Finally, Title V of the CAA (42 U.S.C. 7661-7661f) requires operators of major stationary sources to apply for operating permits. Title V generally does not add substantive emissions-control requirements, but a Title V permit must contain all otherwise-applicable requirements imposed by the CAA, and a major stationary source must follow EPA-prescribed procedures in applying for an operating permit. 42 U.S.C. 7661a; see generally 75 Fed. Reg. at 31,521 (discussing Title V permitting provisions pertinent to greenhouse-gas emissions).

b. The Tennessee Valley Authority (TVA) is an Executive Branch agency with responsibility for the multipurpose development of the Tennessee Valley region. 16 U.S.C. 831. Members of its board of directors are appointed by the President with the advice and consent of the Senate. 16 U.S.C. 831a(a)(1). TVA is expressly authorized by federal statute to "produce, distribute, and sell electric power," 16 U.S.C. 831d(*l*), and all of its power programs are self-financed, 16 U.S.C. 831n–4. It

provides electricity to citizens in seven States, 55% of which is generated by fossil-fuel-fired power plants in Tennessee, Alabama, Kentucky, and Mississippi. TVA "[m]ay sue and be sued in its corporate name." 16 U.S.C. 831c(b).

2. Petitioners and TVA (collectively, defendants) are six entities that operate fossil-fuel-fired electric power generation facilities in 20 States. Pet. App. 2a. Respondents are eight States, the City of New York, and three land trusts (collectively, plaintiffs). *Ibid.*

In July 2004, plaintiffs filed two similar complaints in the United States District Court for the Southern District of New York. J.A. 56-116 (States' Compl.); J.A. 117-154 (land trusts' Compl.). Both complaints allege that defendants are substantial contributors to carbon-dioxide emissions—amounting to 10% of such emissions caused by human activities in the United States—and thereby contribute to global warming. J.A. 57, 118. Plaintiffs claim that defendants are liable for creating, contributing to, or maintaining a public nuisance under federal common law (or, in the alternative, state law). J.A. 103-110, 145-153. They seek permanent injunctive relief requiring defendants to abate the alleged nuisance by capping and then reducing their emissions "by a specified percentage each year for at least a decade." J.A. 110, 153.

Defendants moved to dismiss the complaints for lack of jurisdiction and for failure to state a claim upon which relief can be granted. Pet. App. 178a-179a. In September 2005, the district court granted defendants' motions. *Id.* at 171a-187a. It held that both cases "present non-justiciable political questions" because their resolution would "require[] identification and balancing of eco-

nomic, environmental, foreign policy, and national security interests." *Id.* at 187a.

3. On September 21, 2009, a two-judge panel of the Second Circuit reversed. Pet. App. 1a-170a.

a. The court of appeals discussed the six indicia of a political question articulated in *Baker* v. *Carr*, 369 U.S. 186, 217 (1962), and held that plaintiffs' lawsuits do not present a nonjusticiable political question. Pet. App. 23a-41a. With respect to the first *Baker* factor, it held that defendants had forfeited any argument that limiting carbon-dioxide emissions is textually committed to the political Branches under the Commerce Clause, and further held that the case would not interfere with the President's foreign-policy prerogatives because a single court decision in a common-law nuisance action could not "establish a *national* or *international* emissions policy." *Id.* at 24a-25a, 26a. With respect to the second factor—whether there is a "lack of judicially discoverable and manageable standards for resolving" an issue, 369 U.S. at 217—the court reasoned that "federal courts have successfully adjudicated complex common law public nuisance cases for over a century" and that there would be judicially manageable standards here because "[w]ell-settled principles of tort and public nuisance law provide appropriate guidance," Pet. App. 28a, 34a. With respect to the third factor—whether it is impossible to decide an issue "without an initial policy determination of a kind clearly for nonjudicial discretion," 369 U.S. at 217—the court found that there would be no need for any such "policy determination" because this case "appears to be an ordinary tort suit." Pet. App. 38a-39a (internal quotation marks omitted). Finally, the court held that the last three *Baker* factors—which involve the potential for disagreement between the judicial and

political Branches—would not apply because the United States had "no unified policy on greenhouse gas emissions." *Id.* at 40a.

b. The court of appeals then considered three other issues that had not been decided by the district court but that defendants had raised as alternative grounds for affirmance: (1) whether plaintiffs have Article III standing; (2) whether their complaints state a claim under federal common law; and (3) whether the CAA has displaced any such federal common-law claim.

With respect to standing, the court of appeals held that the State plaintiffs have *parens patriae* standing based on their interest in safeguarding public health and natural resources within their borders. Pet. App. 44a-55a. The court also concluded that the States and the land trusts have met the Article III standard articulated in *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992), because (1) they alleged injury in fact as a result of the effects of climate change on their property and proprietary interests, Pet. App. 58a-67a; (2) their allegations that defendants' emissions contribute to climate change satisfy the causation requirement, at least at the motion-to-dismiss stage, *id.* at 67a-73a; and (3) a court could provide effective relief, because reducing defendants' emissions would "*slow* or *reduce*" climate change, *id.* at 75a (quoting *Massachusetts* v. *EPA*, 549 U.S. at 525); see also *id.* at 76a (agreeing that "[e]ven if emissions increase elsewhere, the magnitude of [p]laintiffs' injuries will be less if [d]efendants' emissions are reduced than they would be without a remedy").

Next, the court of appeals held that plaintiffs have stated a claim under federal common law. Pet. App. 77a-123a. Applying Section 821B of the Restatement (Second) of Torts (1977), the court concluded that plaintiffs

stated a claim by alleging that defendants contribute to an "unreasonable interference with public rights," Pet. App. 82a-84a, 121a, including "the right to public comfort and safety, the right to protection of vital natural resources and public property, and the right to use, enjoy, and preserve the aesthetic and ecological values of the natural world," *id.* at 83a-84a.

Finally, the court of appeals held that the CAA had not displaced a federal common-law public-nuisance cause of action seeking to cap and reduce carbon-dioxide emissions that contribute to climate change. Pet. App. 137a-144a. The court's discussion of displacement drew a line between the actual "regulation" of greenhouse-gas emissions and mere "study" or "monitor[ing]" of such emissions. *Id.* at 135a & n.46, 156a. It discussed EPA's 2009 proposed finding in the context of Section 202 of the CAA that greenhouse gases endanger public health and welfare, but said that "[u]ntil EPA completes the rulemaking process, we cannot speculate as to whether the hypothetical regulation of greenhouse gases under the Clean Air Act would in fact speak directly to the particular issue raised" by plaintiffs. *Id.* at 142a (internal quotation marks and alterations omitted). The court observed that "EPA has yet to make any determination that [greenhouse-gas] emissions are subject to regulation under the Act, much less endeavor *actually* to regulate the emissions." *Id.* at 144a. In the absence of "the requisite findings" from EPA, the court concluded that the CAA "does not (1) regulate greenhouse gas emissions or (2) regulate such emissions from stationary sources." *Ibid.* As a result, the court held that plaintiffs' federal common-law claim had not yet been displaced. *Ibid.*

Petitioners and TVA filed petitions for panel or en banc rehearing. The court of appeals denied those petitions on March 5 and 10, 2010. Pet. App. 188a-191a.

4. As discussed in greater detail below (see pp. 46-51, *infra*) in the 15 months since the court of appeals issued its decision, EPA has taken several substantial actions pursuant to its CAA authority to address greenhouse-gas emissions. EPA finalized the proposed rule that the court of appeals discussed—the "endangerment finding" (*i.e.*, that greenhouse-gas emissions are reasonably anticipated to endanger public health and welfare). It also adopted standards governing emissions of greenhouse gases from certain motor vehicles. As a result of those regulations, which took effect on January 2, 2011, carbon dioxide is now a "pollutant subject to regulation under [the CAA]." 42 U.S.C. 7475(a)(4).[4] On December 23, 2010, EPA announced a proposed settlement agreement, under which it would commit to complete, by May 26, 2012, a rulemaking relating to NSPS for greenhouse gases emitted by fossil-fuel-fired electric-utility steam-generating units (*i.e.*, the category of stationary sources at issue in this case).

Thus, EPA's actions have triggered a regulatory cascade that will result in the application of PSD requirements to new and modified stationary sources that emit greenhouse gases. EPA will be required to assess what, if any, NSPS it should issue for various categories of stationary sources and what guidelines it should issue and thus require States to implement with respect to emissions from existing facilities within those categories

---

[4] On December 10, 2010, the D.C. Circuit denied motions to stay the new regulations pending that court's consideration of petitions for review. See *Coalition for Responsible Regulation* v. *EPA*, Nos. 09-1322, 10-1073, 10-1092.

of stationary sources. As those actions demonstrate, EPA is actively exercising its statutory discretion to determine when and how greenhouse gases from stationary sources (including defendants' power plants) will become subject to emissions standards under the CAA.

SUMMARY OF ARGUMENT

I. A. Plaintiffs' complaints should be dismissed for lack of prudential standing. Plaintiffs bring claims under the federal common law of public nuisance against six defendants alleged to emit greenhouse gases contributing to climate change. But virtually every person, organization, company, or government across the globe also emits greenhouse gases, and virtually everyone will also sustain climate-change-related injuries. Principles of prudential standing do not permit courts to adjudicate such generalized grievances absent statutory authorization, particularly because EPA, which is better-suited to addressing this global problem, has begun regulating greenhouse gases under the CAA. As a result, plaintiffs' suits must be dismissed.

B. Because plaintiffs cannot establish prudential standing, the Court need not—and thus should not—consider whether their allegations satisfy Article III standing requirements at the pleading stage. In any event, although the issue is not free from doubt, plaintiffs' allegations are sufficient to survive a motion to dismiss. The coastal State plaintiffs' allegations closely mirror those the Court found sufficient to establish Article III standing in *Massachusetts* v. *EPA*, 549 U.S. 497 (2007). Those plaintiffs have Article III standing based on their interest in preventing the loss of sovereign territory for which they are also the landowners.

C. The Court also need not, and should not, decide whether plaintiffs' suits are barred by the political-question doctrine. This case does raise separation-of-powers concerns highlighted by the second and third factors used in *Baker* v. *Carr*, 369 U.S. 186 (1962), to describe the political-question doctrine: "a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Id.* at 217. In the circumstances of this case, however, the principle of prudential standing that bars judicial consideration of generalized grievances, and the recognition that any common-law claims have been displaced by EPA's regulatory actions under the CAA, are more restrained and appropriate grounds on which to rest a decision to dismiss.

II. Any claim for public nuisance that federal common law may otherwise provide to plaintiffs has been displaced by regulatory actions taken by EPA pursuant to the CAA. EPA has issued an endangerment finding and promulgated emissions standards for light-duty motor vehicles, actions which rendered greenhouse gases (including carbon dioxide) subject to regulation under the CAA. EPA has also promulgated a rule to phase in the application of PSD requirements to greenhouse-gas emissions from new and modified stationary sources. EPA has, therefore, spoken directly to the question plaintiffs ask the courts to resolve through federal common law.

ARGUMENT

I. PLAINTIFFS' COMMON-LAW NUISANCE CLAIMS ARE NOT JUSTICIABLE

Petitioners advance two nonmerits grounds for dismissing these suits: that plaintiffs lack standing (Pet. 13-20), and that their suits present nonjusticiable political questions (Pet. 26-31). Those arguments are both rooted in petitioners' legitimate concerns about the unprecedentedly broad nature of plaintiffs' nuisance suits, which would require a federal court, in the course of resolving asserted federal common-law claims against six defendants, to make numerous significant scientific, technical, and policy determinations about whether and how to slow climate change—even though that phenomenon is, by plaintiffs' own account, a result of the actions of innumerable sources of various kinds of emissions from around the world over many decades.

The United States, including TVA, agrees that plaintiffs' common-law nuisance suits present serious concerns regarding the role of an Article III court under the Constitution's separation of powers—especially in light of the representative Branches' ongoing efforts to combat climate change by formulating and implementing domestic policy and participating in international negotiations. Those concerns are, however, best addressed under principles of prudential standing, which constrain federal courts from entertaining generalized grievances that are more appropriately addressed by the representative Branches.

A. Plaintiffs Lack Prudential Standing Because Their Suits Are Generalized Grievances More Appropriately Addressed By The Representative Branches

As this Court has explained, standing doctrine comprises two parts: "Article III standing, which enforces the Constitution's case-or-controversy requirement, and prudential standing, which embodies judicially self-imposed limits on the exercise of federal jurisdiction." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 11 (2004) (citation and internal quotation marks omitted). While prudential standing limitations are "closely related to Art[icle] III concerns," they are not constitutionally compelled and are "essentially matters of judicial self-governance." *Id.* at 12 (quoting *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975)). "Without such limitations * * * the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Ibid.* (quoting *Warth*, 422 U.S. at 500). Careful adherence to such principles of judicial self-restraint is especially important when, as here, a court is asked to entertain a cause of action based on federal common law, which is itself fashioned by the Judiciary.

1. Federal courts must refrain from adjudicating generalized grievances like plaintiffs' common-law claims

One principle of prudential standing requires federal courts to refrain from adjudicating "generalized grievances more appropriately addressed in the representative branches." *Newdow*, 542 U.S. at 12 (quoting *Allen* v. *Wright*, 468 U.S. 737, 751 (1984)). Here, plaintiffs' common-law claims are precisely that kind of "general-

ized grievance[]." *Ibid.* This is not a situation in which plaintiffs have invoked a "constitutional or statutory provision" that could "properly * * * be understood as granting persons in the plaintiff[s'] position a right to judicial relief." *Warth*, 422 U.S. at 500. Congress, rather, has vested a federal agency with the power to regulate emissions from power plants and to regulate carbon dioxide as a pollutant, and it has expressly provided for judicial review of EPA's actions in exercising those regulatory powers. See *Massachusetts* v. *EPA*, 549 U.S. at 516 (discussing 42 U.S.C. 7607(b)(1)). Congress has also provided for citizen suits to enforce the emissions standards that EPA establishes or to challenge the agency's failure to perform any nondiscretionary act or duty. See 42 U.S.C. 7604. But those statutory provisions and remedies are not at issue here.

Instead of relying on any CAA standards or cause of action, plaintiffs have elected to sue a handful of defendants from among an almost limitless array of entities that emit greenhouse gases. Moreover, the types of injuries that plaintiffs seek to redress, even if concrete, could potentially be suffered by virtually any landowner, and to an extent, by virtually every person, in the United States (and, indeed, in most of the world). Even if plaintiffs were found to have Article III standing to raise such claims—an issue the Court need not reach—principles of prudential standing counsel strongly in favor of leaving the resolution of such widely shared claims to the representative Branches.

a. Plaintiffs' common-law nuisance claims are quintessentially fit for political or regulatory—not judicial—resolution, because they simultaneously implicate many competing interests of almost unimaginably broad categories of both potential plaintiffs and potential defen-

dants. On the plaintiffs' side, the eight States, one city, and three land trusts in these suits are a tiny subset of those who could allege they are injured by greenhouse-gas emissions that have contributed or will contribute to global climate change. The court of appeals focused largely on plaintiffs' asserted injuries as landowners. See Pet. App. 59a-67a. But plaintiffs' allegations are not unusual in that respect. Global climate change will potentially affect the property interests of most landowners. The court of appeals explained that the effects of climate change come from the land, the sea, and the air, and they will threaten the beaches, the fields, the hills—and almost everywhere in between.[5] Indeed, the court of appeals' analysis of the claims of the land-trust plaintiffs (*id.* at 62a-63a) confirms that nearly all landowners will suffer injuries of the types they allege. And the effects of climate change will not be limited to landowners; they will also be felt by individuals, corporations, and governmental entities throughout the Nation and around the world.

---

[5] See Pet. App. 10a, 61a-62a (cataloging alleged "reduction of California's mountain snowpack" and damage to "States with ocean coastlines" and those "bordering the Great Lakes"; noting that "a rise in sea level would * * * accelerate beach erosion," "[w]armer temperatures would threaten agriculture" in other States, and disruption of ecosystems would "affect[] State-owned hardwood forests and fish habitats"). See also *Native Village of Kivalina* v. *Exxon Mobil Corp.*, 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009) (nuisance claims based on allegation that climate change requires relocation of Eskimo village), appeal pending, No. 09-17490 (9th Cir.); *Comer* v. *Murphy Oil USA*, 585 F.3d 855, 861 (5th Cir. 2009) (nuisance claims based on allegation that climate change contributed to property damage caused by Hurricane Katrina), opinion vacated pending reh'g en banc, 598 F.3d 208, appeal dismissed, 607 F.3d 1049 (5th Cir. 2010), petition for mandamus denied *sub nom. In re Comer*, S. Ct. No. 10-294 (Jan. 10, 2011).

Parallel breadth and complexities also characterize the range of potential defendants in suits presenting such common-law claims, because the categories of those who emit carbon dioxide and other greenhouse gases (and thus contribute to climate change as plaintiffs allege) are equally capacious. Plaintiffs' complaints name a few entities that operate power plants in 20 States. But the electric-utility industry comprises many more companies in the United States and abroad, to say nothing of many other sectors of the economy that are also responsible for significant shares of greenhouse-gas emissions. See 75 Fed. Reg. at 31,519 (listing "important sources" of such emissions, including motor vehicles, "industrial processes (such as the production of cement, steel, and aluminum), agriculture, forestry, other land use, and waste management").

b. The multiplicity of potential plaintiffs and defendants is rendered especially troubling by the very nature of common-law public-nuisance claims seeking to slow climate change. The problem is not simply that many plaintiffs could bring such claims and that many defendants could be sued. It is also that essentially any potential plaintiff could claim to have been injured by any (or all) of the potential defendants. The medium that transmits injury to potential plaintiffs is literally the Earth's entire atmosphere—making it impossible to consider the sort of focused and more geographically proximate effects that were characteristic of traditional nuisance suits targeted at particular nearby sources of water or air pollution.[6]

---

[6] It is cases of the latter sort on which the court of appeals relied as examples of "the federal courts' masterful handling of complex public nuisance issues." Pet. App. 29a. This Court last recognized a federal common-law cause of action in the pollution context in *Illinois* v. *City*

In the context of climate change, a regulatory solution will be far better suited to addressing the scope of the problem and to fashioning an appropriately tailored set of remedies than a potentially open-ended series of common-law suits in far-flung district courts. Even a single common-law proceeding would be a less efficient, effective, manageable, and accountable means for considering in the first instance (rather than on judicial review of an expert agency's determination) how much the Nation's greenhouse-gas emissions should be reduced to address global climate change, how much of the burden of reducing the Nation's contributions should be borne by the electric-utility industry, which segments of that industry should make which changes, and at what rate such reductions should occur. A court—when no statute or regulation is in place to provide guidance—is simply not well-suited to balance the various interests of, and the burdens reasonably and fairly to be borne by, the many entities, groups, and sectors of the economy that, although not parties to the litigation, are affected by a phenomenon that spans the globe.

c. Establishing appropriate levels for the reduction of carbon-dioxide emissions from power plants "by a specified percentage each year for at least a decade" (as

---

of Milwaukee, 406 U.S. 91 (1972) (*Milwaukee I*), which concerned discharges into a particular body of water (Lake Michigan), though it subsequently held that a water-pollution suit recognized in *Milwaukee I* had been displaced by later statutory amendments, see *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 317 (1981) (*Milwaukee II*). The other nuisance cases discussed by the court of appeals long predated the CAA and—unlike this case—also involved only localized rather than global effects. See, *e.g.*, *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230 (1907). Accordingly, the prudential-standing argument advanced here would not alter the standing analysis for traditional nuisance cases involving such localized grievances.

plaintiffs request, J.A. 110, 153) would inevitably entail multifarious policy judgments, which should be made by decisionmakers who are politically accountable, have expertise, and are able to pursue a coherent national or international strategy—either at a single stroke or incrementally. Cf. *Massachusetts* v. *EPA*, 549 U.S. at 524 ("[Agencies] whittle away at [massive problems] over time, refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed."). For such reasons, courts often accord the highest levels of deference to Executive Branch agencies' application of their regulatory and scientific expertise and policy judgment to address such complex problems. See, *e.g.*, *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984); *NRDC* v. *EPA*, 571 F.3d 1245, 1251-1253 (D.C. Cir. 2009); *New Eng. Legal Found.* v. *Costle*, 666 F.2d 30, 33 (2d Cir. 1981).

EPA has recognized the complexity and resulting uncertainty that exists about many of the localized effects of climate change. See 74 Fed. Reg. 66,497 (2009) ("[I]n light of existing knowledge * * * not all risks and potential impacts can be quantified or characterized with uniform metrics. There is variety not only in the nature and potential magnitude of risks and impacts, but also in our ability to characterize, quantify and project such impacts into the future."). Although plaintiffs ask the courts to cap and reduce defendants' emissions, the myriad questions associated with developing a judgment about reasonable levels of greenhouse-gas emissions from defendants and the broader industry of which they are a part are more properly answered by EPA. EPA is, after all, the regulatory agency charged by Congress with the responsibility for setting standards for air-pollutant emissions and with significant expertise in the

scientific disciplines that must be brought to bear in establishing appropriate limitations on emissions.

In the CAA, Congress has created a regime under which EPA and state regulators determine the best means of regulating air pollutants. Since this Court held in *Massachusetts* v. *EPA* in 2007 that carbon dioxide falls within that regulatory authority, EPA has taken several significant steps toward addressing the very question presented here. See pp. 46-51, *infra*. That regulatory approach is preferable to what would result if multiple district courts—acting separately and without the benefit of even the most basic statutory or regulatory guidance—were to use common-law nuisance cases as opportunities to sit as arbiters of scientific and technology-related disputes and *de facto* regulators of power plants and other sources of pollution, not just within their districts but nationwide. Cf. *North Carolina ex rel. Cooper* v. *TVA*, 615 F.3d 291, 296 (4th Cir. 2010) (observing, in a suit involving a state common-law claim, that "encourag[ing] courts to use vague public nuisance standards to scuttle the nation's carefully created system for accommodating the need for energy production and the need for clean air" would result in "a balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike").

The confluence in this case of several factors—including countless potential plaintiffs and defendants, the lack of judicial manageability, and the unusually broad range of underlying policy judgments that would need to be made—demonstrates that plaintiffs' concerns about climate change should be resolved by the representative Branches, not federal courts. Questions about how to regulate and reduce carbon-dioxide emissions are thus

the kind of generalized grievances that are "more appropriately addressed in the representative branches." *Newdow*, 542 U.S. at 12.[7] And EPA is actively addressing how and when to regulate carbon-dioxide emissions —decisions that the CAA in turn makes subject to judicial review. Plaintiffs thus lack prudential standing to assert their claims directly in federal court by seeking to invoke judge-made federal common law.

2. It is appropriate to resolve this case on prudential-standing grounds before considering other threshold grounds

Prudential standing is an issue that may be resolved at the outset of a case. See *Tenet* v. *Doe*, 544 U.S. 1, 7

---

[7] Despite a similarity in terminology, the prudential-standing analysis articulated here is distinct from, and would not alter, this Court's settled approach to challenges that raise "undifferentiated, generalized grievance[s] about the conduct of government." *Lance* v. *Coffman*, 549 U.S. 437, 442 (2007) (per curiam). This Court has addressed the justiciability of challenges to government action brought by taxpayers or citizens as part of the inquiry into whether a plaintiff has alleged a sufficiently particularized and concrete stake in litigation to establish Article III injury. See *ibid.*; see also *Hein* v. *Freedom from Religion Found.*, 551 U.S. 587, 633-634 & n.5 (2007) (Scalia, J., concurring in the judgment) (concluding that a taxpayer's "'generally available grievance about government'" fails to "satisfy Article III's requirement that the injury in fact be concrete and particularized," notwithstanding prior "dicta describ[ing] the prohibition on generalized grievances as merely a prudential bar") (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 573 (1992)); *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 345-346 (2006) (describing federal-taxpayer-standing doctrine as based on Article III); *FEC* v. *Akins*, 524 U.S. 11, 23 (1998) (analyzing Article III injury and considering whether harm is "of an abstract and indefinite nature"). Here, plaintiffs are not asserting the "generalized" interest of a taxpayer or citizen in having the government follow the law. Instead, they assert that their property interests have been damaged largely by the actions of private parties.

n.4 (2005) ("[T]he prudential standing doctrine[] represents the sort of 'threshold question' we have recognized may be resolved before addressing jurisdiction."). Indeed, it is well established that prudential standing may be resolved before Article III standing. See, *e.g.*, *Kowalski* v. *Tesmer*, 543 U.S. 125, 129 (2004) (assuming without deciding the existence of Article III standing in order to address prudential standing); *Newdow*, 542 U.S. at 18 & n.8 (finding that plaintiff "lack[ed] prudential standing to bring this suit in federal court," without addressing Article III standing).[8]

In this case, compelling reasons counsel in favor of addressing prudential standing before other threshold questions, such as Article III standing and the political-question doctrine. It provides an appropriately narrower ground for decision, because a prudential-standing decision would be based on the particular context and circumstances of the claims here, which are asserted under federal common law that is itself fashioned by the courts. Prudential standing also provides a more deferential and restrained basis for dismissing suits like plaintiffs' because that basis for dismissal could be revisited by Congress, to the extent consistent with Article III. As this Court has explained, principles of prudential standing can, "unlike their constitutional counterparts, * * * be modified or abrogated by Congress." *Bennett* v. *Spear*, 520 U.S. 154, 162 (1997); see also *FEC* v. *Akins*, 524 U.S. 11, 20 (1998) (holding that the existence of a statute embodying Congress's intention to authorize the "kind of suit" at issue meant that the plaintiffs

---

[8] The concurring Justices in *Newdow* disagreed with the conclusion that the plaintiff lacked prudential standing but did not criticize the Court's decision to address prudential standing first. See 542 U.S. at 18-25 (Rehnquist, C.J., concurring in the judgment).

"satisf[ied] 'prudential' standing requirements"); *United Food & Commercial Workers* v. *Brown Group, Inc.*, 517 U.S. 544, 558 (1996) ("prudential limitations are rules of 'judicial self-governance' that 'Congress may remove . . . by statute'") (quoting *Warth*, 422 U.S. at 509).

The restraint and flexibility inherent in prudential-standing doctrine also respond to petitioners' proper insistence that the representative Branches' active role in addressing climate change must be respected. See Pet. 27, 31, 34; see also *Newdow*, 542 U.S. at 12 (prudential-standing restrictions prevent courts from deciding questions "of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights") (quoting *Warth*, 422 U.S. at 500).

The appropriateness of dismissing this case on prudential-standing grounds follows as well from this Court's recognition in *Massachusetts* v. *EPA* that Congress's statutory "authorization" of the "type of challenge to EPA action" present there—but absent in the common-law action here—was "of critical importance to the standing inquiry." 549 U.S. at 516 (citing *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in the judgment)). Had this case fallen within the bounds of a citizen-suit provision like 42 U.S.C. 7604, the existence of that statutory cause of action would mean that Congress had itself eliminated *prudential*-standing limitations (see *Bennett*, 520 U.S. at 162) and had itself diminished to that extent an important concern animating the prudential-standing doctrine: that the representative Branches are otherwise better suited than the federal courts to resolve such matters. When Congress has en-

acted a statute authorizing suit, the prudential-standing inquiry is different because Congress presumably has "at the very least identif[ied] the injury it seeks to vindicate and relate[d] the injury to the class of persons entitled to bring suit." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment).

"The rules of standing, whether as aspects of the Art[icle] III case-or-controversy requirement *or as reflections of prudential considerations* * * *, are threshold determinants of the propriety of judicial intervention" that must be established by "the complainant" who seeks "the exercise of the court's remedial powers." *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 546 n.8 (1986) (quoting *Warth*, 422 U.S. at 517-518) (emphasis added). Thus, before considering the merits of plaintiffs' suits, this Court must assure itself that, quite aside from the requirements of Article III, "judicially self-imposed limits on the exercise of federal jurisdiction" would not be transgressed, *Allen*, 468 U.S. at 751.[9] Plaintiffs' suits would transgress those limits.

---

[9] As noted in TVA's brief at the certiorari stage (at 21), the parties did not expressly address the question of prudential standing in the lower courts. Neither did the court of appeals, even though the Second Circuit has held that prudential-standing limitations cannot be waived by the parties. See *Thompson* v. *County of Franklin*, 15 F.3d 245, 248 (1994) (the court's "independent obligation to examine subject matter jurisdiction * * * extends 'to the prudential rules of standing' ") (citation and footnote omitted). In any event, the question is "fairly included" (Sup. Ct. R. 14.1(a)) in the first question presented, which refers to "standing" but is not limited to Article III standing, see Pet. i. And because the question is jurisdictional, this Court could address it even if it had never been raised by the parties. See, *e.g.*, *Newdow*, 542 U.S. at 12-18 (dismissing for lack of prudential standing even though that issue was not raised in the lower courts or in the parties' briefs in this Court).

B. Under *Massachusetts* v. *EPA*, At Least Some Of The State Plaintiffs Have Article III Standing In Their Capacity As Sovereign Landowners

If the Court concludes, as urged above, that plaintiffs lack prudential standing, then the Court need not—and therefore should not—reach the issue of their standing under Article III of the Constitution. See *Pearson* v. *Callahan*, 129 S. Ct. 808, 821 (2009) (following "the older, wiser judicial counsel not to pass on questions of constitutionality unless such adjudication is unavoidable") (internal quotation marks and ellipsis omitted); *PDK Labs. Inc.* v. *United States DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment) ("[I]f it is not necessary to decide more, it is necessary not to decide more."). If, however, the Court reaches the Article III question, we believe that, although the question is not free from doubt, the allegations advanced by the coastal States in their capacity as sovereign landowners are sufficient to survive a motion to dismiss under this Court's recent decision in *Massachusetts* v. *EPA*. Some of the coastal States' allegations of potential injuries here are materially similar to those that were found sufficient in *Massachusetts* v. *EPA* to satisfy the requirements for Article III standing. While there are differences between that case and this one, the differences cut both ways and on balance do not deprive plaintiffs of Article III standing at the pleading stage.

1. Like its prudential counterpart, Article III standing serves as a means of determining whether "a litigant is entitled to have a federal court resolve his grievance." *Kowalski*, 543 U.S. at 128. In order to establish Article III standing "[t]o seek injunctive relief," a plaintiff must make three showings: (1) "that he is under threat of

suffering 'injury in fact' that is concrete and particularized [and] actual and imminent, not conjectural or hypothetical"; (2) that the threat is "fairly traceable to the challenged action of the defendant"; and (3) that it is "likely that a favorable judicial decision will prevent or redress the injury." *Summers* v. *Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009).

In *Massachusetts* v. *EPA*, the Court held that the Commonwealth of Massachusetts had established Article III standing to petition for judicial review of EPA's decision under the CAA not to regulate greenhouse gases emitted by motor vehicles. See 549 U.S. at 516-526. The Court concluded that "[t]he harms associated with climate change are serious and well recognized," that there is "a causal connection between man-made greenhouse gas emissions and global warming," and that "[a] reduction in domestic emissions would slow the pace of global emissions increases" and thus "reduce[] to some extent" the "risk of catastrophic harm" from "the rise in sea levels associated with global warming." *Id.* at 521, 523, 526.

The Court's standing analysis in *Massachusetts* v. *EPA* was carefully limited in two ways. The Court considered only a single kind of plaintiff (a sovereign State) and relied on only a single kind of injury (the loss of state-owned land). With respect to the first limitation, the Court explained that it was "of considerable relevance that the party seeking review here is a sovereign State and not * * * a private individual," and it acknowledged that Massachusetts' "quasi-sovereign interests" entitled it to "special solicitude in [the Court's]

standing analysis." 549 U.S. at 518, 520.[10] The second limitation on the Court's analysis revealed that the "quasi-sovereign interests" it invoked were not of a traditional *parens patriae* nature (*i.e.*, brought on behalf of citizens who had their own injuries).[11] Those interests were instead associated with land over which Massachusetts was *both* the sovereign *and* the owner. When the Court addressed the nature of Massachusetts' concrete injury in fact, it did not rely on anything other than the injury Massachusetts would suffer "in its capacity as a landowner" as "rising seas" swallowed "coastal land" that was not only owned by the Commonwealth but also its "sovereign territory." *Id.* at 522-523 & n.21; see also *id.* at 519 (noting that Massachusetts had a "well-founded desire to preserve its sovereign territory") (citing *Alden* v. *Maine*, 527 U.S. 706, 715 (1999)); *id.* at 523 n.21 (stating that "[o]ur cases require nothing more" than the allegation that rising seas "will lead to the loss of Massachusetts' sovereign territory"); *id.* at 539 (Roberts, C.J., dissenting) (explaining that the majority's decision "applies our Article III standing test to the as-

---

[10] The Court did not separately consider the standing of the non-State petitioners in that case, which included local governments and private organizations. See 549 U.S. at 505.

[11] The Court has recognized that "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982) (citing *Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486 (1923)). Here, although TVA is a defendant, the Court, as in *Massachusetts* v. *EPA*, need not consider whether the States' *parens patriae* allegations would suffice to confer standing apart from the allegations of direct injuries to state-owned property, including the erosion of coastal beaches, because finding that the States have standing in their proprietary capacity is sufficient. See 549 U.S. at 522.

serted injury of the Commonwealth's loss of coastal property").

2. In this case, some of the plaintiff States—including Massachusetts' neighbors, Connecticut and Rhode Island—allege injuries that are materially identical to the one the Court found sufficient to support standing in *Massachusetts* v. *EPA*. The States' complaint alleges that they have suffered and will suffer numerous injuries from climate change, including the same array of threatened injuries catalogued in the National Research Council report cited in *Massachusetts* v. *EPA*. See 549 U.S. at 521. In particular, the complaint contains several allegations about injuries associated with sea-level rise, including allegations that it will inundate coastal property, will "cause billions of dollars of damage to property, including state-owned" property, and will lead to increased erosion of beaches. J.A. 89-92. The complaint specifically alleges that "[a]ccelerated sea-level rise due to unrestrained global warming" threatens to erode beaches "owned by" the coastal States. J.A. 91-92 (identifying state-owned parks and beaches in New York, California, Connecticut, and Rhode Island). Connecticut and Rhode Island border Massachusetts, and it is reasonable to assume at the pleading stage that climate change would affect public coastal property to a similar extent in all three States. Accordingly, like Massachusetts in the earlier case, the coastal States here have adequately alleged a concrete injury in their capacities as sovereign owners of land that is threatened with destruction by sea-level rise associated with climate change.

3. *Massachusetts* v. *EPA* is also instructive with respect to the other two prongs of Article III standing analysis: causation and redressability. With respect to

causation, the Court first explained that agencies, like legislatures, frequently approach problems incrementally, and "[t]hat a first step might be tentative does not by itself support the notion that federal courts lack jurisdiction to determine whether that step conforms to law." 549 U.S. at 524. But the Court then further explained that, in any event, "reducing domestic automobile emissions is hardly a tentative step," because "[j]udged by any standard, U. S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations and hence, according to petitioners, to global warming." *Id.* at 524-525.

Unlike *Massachusetts* v. *EPA*, this case does not involve a challenge to a discrete agency action addressing a problem in an incremental way pursuant to a statutory directive or authorization to proceed in such a manner. Rather, it is plaintiffs themselves, through their choice of defendants, who seek to proceed incrementally, and thereby to have the courts do so in the adjudication of an asserted public nuisance under federal common law. The aspect of the Court's rationale in *Massachusetts* v. *EPA* that focuses on the particular authority and ability of agencies to proceed incrementally therefore is not directly applicable here.

The Court's further reasoning about causation in *Massachusetts* v. *EPA*, focusing on the amount of emissions, however, does appear to be applicable to this case. Under that reasoning, plaintiffs have adequately alleged that defendants' emissions constitute a "meaningful contribution * * * to global warming." 549 U.S. at 525. The States' complaint alleges that defendants annually emit approximately 650 million tons of carbon dioxide. J.A. 84. Although that figure is about one-third of the amount that the Court mentioned in *Massachusetts* v.

EPA, 549 U.S. at 524 (referring to emissions from the entire "transportation sector," not just the smaller amount of automobile emissions that were actually at issue in the case), the Court's conclusion that "more than 1.7 billion metric tons" was a meaningful contribution when "[j]udged by any standard" (*id.* at 524-525) indicates that that amount was not at the outer limit of what would satisfy the causation element of Article III standing in a suit brought by a State alleging substantial loss of sovereign lands.

With respect to redressability, the Court in *Massachusetts* v. *EPA* reasoned that "[w]hile it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming," it did not follow that the Court "lack[ed] jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it." 549 U.S. at 525. The Court concluded that the redressability requirement had been satisfied because "[a] reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere" in the world with other emitters. *Id.* at 526. In light of that discussion, the court of appeals here was correct in concluding that plaintiffs have adequately alleged—at least under "the lowered bar for standing at the pleading stage"—that "[e]ven if emissions increase elsewhere, the magnitude of [p]laintiffs' injuries will be less if [d]efendants' emissions are reduced than they would be without a remedy." Pet. App. 43a, 76a.[12]

4. Petitioners contend (Pet. 16) that *Massachusetts* v. *EPA* is distinguishable. They stress that the opinion

---

[12] If the suit were to progress past the pleading stage, questions of injury, causation, and redressability would of course need to be revisited in light of the evidence. See *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 889 (1990).

noted that the statute authorizing judicial review of EPA decisions was "of critical importance to the standing inquiry" in that case because "'Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.'" 549 U.S. at 516 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)). Here, by contrast, there is no Act of Congress authorizing this cause of action. Plaintiffs have not invoked the CAA's citizen-suit provision. Cf. *Public Interest Research Group* v. *Powell Duffryn Terminals Inc.*, 913 F.2d 64, 71-73 (3d Cir. 1990) (suit for pollutant discharges in excess of amounts allowed by Clean Water Act permit), cert. denied, 498 U.S. 1109 (1991). Nor is there any statute akin, for example, to the Sherman Act (15 U.S.C. 1, 4), authorizing federal courts, at the behest of certain injured parties, to enjoin unreasonable emissions of greenhouse gases.

As the Court has recently explained, Congress's ability to "loosen the strictures of the redressability prong" in the context of a challenge to agency action accounts for the inability to predict with assurance whether the plaintiff would, after securing judicial vindication of his claimed procedural right before the agency, ultimately "be successful in persuading the [agency] to avoid impairment of [the plaintiff's] concrete interests." *Summers*, 129 S. Ct. at 1150; see also *Massachusetts* v. *EPA*, 549 U.S. at 517-518. This case does not involve that kind of uncertainty, because plaintiffs are not challenging an agency's action or failure to act to limit emissions by third parties. Plaintiffs' chains of causation and redressability are *shorter* than the ones in *Massachusetts*, because they seek judicial relief directly from the entities responsible for the allegedly unlawful emissions. For

the same reason, their chains are also shorter than the ones in *Lujan*, because their standing does not "hinge on the response of [a] regulated (or regulable) third party to * * * government action." 504 U.S. at 562.[13]

5. If the Court agrees that, in light of *Massachusetts* v. *EPA*, the coastal States here have adequately alleged Article III standing at the pleading stage be-

---

[13] Plaintiffs' Article III standing also finds some support in the background proposition that the common law provides for claims against those who contribute to a public nuisance, even when a particular defendant is not the exclusive contributor to the nuisance. See Restatement (Second) of Torts § 840E at 177 (1977) ("[T]he fact that other persons contribute to a nuisance is not a bar to the defendants' liability for his own contribution."); *id.* cmt. b at 177 (public nuisance claim may lie where "each of several persons contributes to a nuisance to a relatively slight extent, so that his contribution taken by itself would not be an unreasonable one and so would not subject him to liability"); *Sprint Communications Co.* v. *APCC Servs., Inc.*, 554 U.S. 269, 274 (2008) ("We have often said that history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider.").

In *Milwaukee I*, for example, the Court recognized that Illinois could sue Milwaukee for releasing untreated sewage into Lake Michigan. See 406 U.S. at 103-108. In the suit that followed on that claim, the district court discussed the existence of harmful nutrients released into the lake by non-point sources and by point sources in Illinois and Michigan, and held that it would be "sufficient for plaintiffs to show that defendants' nutrient discharges constitute a significant portion of the total nutrient input to the lake." *Illinois ex rel. Scott* v. *City of Milwaukee*, No. 72 C 1253, 1973 U.S. Dist. LEXIS 15607, at *21-*22 (N.D. Ill. 1973), aff'd in part, rev'd in part, *Illinois* v. *City of Milwaukee*, 599 F.2d 151 (7th Cir. 1979), vacated on other grounds, *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981). To be sure, *Milwaukee I* involved discharges into a particular body of water, through which the pollution reached the plaintiffs—not, as here, emissions into the Earth's atmosphere that affect plaintiffs only to the extent they add to all other emissions of greenhouse gases worldwide in a manner that allegedly visits harm on plaintiffs. But that distinction goes more to prudential than to Article III standing.

cause, like Massachusetts, they are the owners of sovereign territory that could be destroyed by rising sea levels associated with global warming, then constitutional standing principles would pose no further barrier to this Court's consideration of whether the common-law nuisance claims asserted by plaintiffs have been displaced by the CAA or regulatory actions taken by EPA. See *Massachusetts* v. *EPA*, 549 U.S. at 518 ("Only one of the petitioners needs to have standing to permit us to consider the petition for review."); *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement.").[14]

C. This Case Raises Separation-Of-Powers Concerns Addressed By The Political-Question Doctrine, But Plaintiffs' Lack Of Prudential Standing Provides A More Appropriate Basis For A Dismissal On Grounds Of Nonjusticiability

Concluding that judicial resolution of the merits of plaintiffs' common-law nuisance claims would present substantial separation-of-powers concerns, the district court dismissed both complaints on the ground that they "present non-justiciable political questions." Pet. App.

---

[14] Of course, if the Court were to conclude that the coastal States lack Article III standing here, then the other plaintiffs would, *a fortiori*, lack standing, whether they are private land trusts that have no "quasi-sovereign interests" (*Massachusetts* v. *EPA*, 549 U.S. at 520), or inland States that allege many potential injuries from climate change but not the actual "loss of * * * sovereign territory" that they own (*id.* at 523 n.21), or a locality (the City of New York) that does not have the same "dignity * * * of sovereignty" that States possess in our federal system (*id.* at 519 (quoting *Alden*, 527 U.S. at 715)). Accordingly, we do not further discuss the other injuries alleged by plaintiffs.

187a. The political-question doctrine, however, is only one mechanism for identifying cases that are not fit for judicial resolution; in the circumstances of this case, the principle of prudential standing that bars judicial consideration of generalized grievances is a more restrained and appropriate ground on which to rest such a decision.

1. The political-question doctrine is animated by separation-of-powers principles. See *Baker* v. *Carr*, 369 U.S. 186, 210 (1962) ("The nonjusticiability of a political question is primarily a function of the separation of powers."). But the same concerns undergird other doctrines, including prudential standing, which, as discussed above, is dispositive here. As this Court has observed:

> All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.

Allen v. *Wright*, 468 U.S. 737, 750 (1984) (quoting *Vander Jagt* v. *O'Neill*, 699 F.2d 1166, 1178-1179 (D.C. Cir.) (Bork, J., concurring), cert. denied, 464 U.S. 823 (1983)); see also, *e.g.*, *Poe* v. *Ullman*, 367 U.S. 497, 508-509 (1961) (plurality opinion) ("Justiciability is of course not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures, including the appropriateness of the issues for decision by this Court and the actual hardship to the litigants of denying them the relief sought."). Like the prudential-standing doctrine, the political-

question doctrine is "deriv[ed] in large part from prudential concerns about the respect [courts] owe the political departments." *Nixon* v. *United States*, 506 U.S. 224, 252-253 (1993) (Souter, J., concurring in the judgment) (citing *Goldwater* v. *Carter*, 444 U.S. 996, 1000 (1979) (Powell, J., concurring in the judgment)). Indeed, the Court could conclude that, in certain gray areas that "cluster about Article III" and call for judicial self-restraint, the political-question doctrine has a distinct, self-imposed prudential component akin to prudential standing. But if this Court finds that plaintiffs lack prudential standing, as we argue above, there is no need to determine whether the political-question doctrine also bars a decision on the merits of their claims.[15]

2. In applying the political-question doctrine, there is no simple and precise test for identifying which questions courts should refrain from addressing lest they "inappropriate[ly] interfere[] in the business of the other branches of Government." *United States* v. *Munoz-Flores*, 495 U.S. 385, 394 (1990). But in *Baker* v. *Carr*, *supra*, the Court identified six guiding factors:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding with-

---

[15] Precedent supports resolving questions of standing before those of political question, see *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974), and the Court should follow that practice here. Cf. *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 585, 588 (1999) (in choosing "among threshold grounds for denying audience to a case on the merits," it is appropriate to decide a "straightforward" question before a more "difficult and novel" one).

> out an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217. *Baker* emphasized the "necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloging." *Ibid.* This Court's subsequent cases have not provided much additional guidance. A plurality of the Court recognized that the six *Baker* factors "are probably listed in descending order of both importance and certainty," *Vieth* v. *Jubelirer*, 541 U.S. 267, 278 (2004), but the two cases since *Baker* in which the Court found a political question relied upon the first factor.[16]

---

[16] See *Nixon*, 506 U.S. at 229 (questions about the procedures for trying an impeachment are textually committed to the Senate); *Gilligan* v. *Morgan*, 413 U.S. 1, 7 (1973) (powers over "the training, weaponry, and orders of the [National] Guard" are vested in the Legislative and Executive Branches). In *Vieth*, a four-Justice plurality concluded that "political gerrymandering claims are nonjusticiable" under the second *Baker* factor because there are "no judicially discernible and manageable standards for adjudicating" them. 541 U.S. at 281. Justice Kennedy's opinion concurring in the judgment in *Vieth* concluded only that the Court was "require[d] [to] refrain from intervention in this instance" because the plaintiffs had not proposed a suitable "standard[] for measuring the burden a [partisan] gerrymander imposes on representational rights," and it remained possible that a standard could "emerge in the future," *id.* at 311, 317.

3. As the district court held (Pet. App. 187a) and as petitioners argue (Pet. 28), this case does raise concerns highlighted by the second and third *Baker* factors: "a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." 369 U.S. at 217. Plaintiffs' theory of liability could provide virtually every person, organization, company, or government with a claim against virtually every other person, organization, company or government, presenting unique and difficult challenges for the federal courts. And resolving such claims would require each court to consider numerous and far-reaching technological, economic, scientific, and policy issues, and to make difficult predictive judgments, in determining whether and to what extent each defendant should be deemed liable under general principles of nuisance law for some share of the injuries associated with global climate change—and therefore be ordered by a court to limit its emissions to some extent.

Those potential difficulties are compounded by the prospect that different district courts entertaining such suits could reach widely divergent results, based, *inter alia*, on different findings of fact that would be subject to appellate review only for clear error, or on different assessments of what is "reasonable," or on different exercises of equitable discretion in fashioning relief. Such suits would lack the benefits of centralized decisionmaking that characterize Executive agency action. Moreover, a judicial decision in one case brought by particular plaintiffs would not assure a final resolution for the defendants involved because other potential plaintiffs would not be bound by the judgment and could instead bring their own suits. Such suits would therefore lack

the certainty and repose that the political Branches can afford through legislative and regulatory action.

The separation-of-powers concerns in this case arise from a confluence of factors, including the unique breadth of plaintiffs' claims; the complex and multifarious policy judgments implicated by the claim that greenhouse-gas emissions from the particular sources selected by plaintiffs unreasonably interfere with public rights; and Congress's enactment, pursuant to its enumerated powers under Article I, Section 8 of the Constitution, of the CAA provisions that authorize EPA to regulate air-pollutant emissions, coupled with EPA's decisions rendering greenhouse-gas emissions subject to regulation under the CAA. Determining appropriate restrictions on greenhouse-gas emissions is a task best suited for resolution by the representative Branches, which possess the requisite scientific and technical expertise and centralized decisionmaking authority, and are politically accountable. Development by the Judiciary of a parallel system of common-law regulation of greenhouse-gas emissions would frustrate and complicate those ongoing regulatory undertakings.

The claims (and defenses) in this case would thus present unique problems for the Judiciary. The difficulty of those claims for judicial resolution—particularly in the absence of a statute adopted by the political Branches assigning such a role to the Judiciary—is more marked in light of the steps that *have* been taken by the political Branches to regulate in this area. The consequence of those steps is that any judicial remedy that might otherwise have existed for a federal common-law nuisance has been displaced by the actions of Congress and EPA. See pp. 42-53, *infra*. Such displacement of federal common law through the actions of the

political Branches is itself a manifestation of the separation of powers. See *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 315 (1981) (*Milwaukee II*) ("Our 'commitment to the separation of powers is too fundamental' to continue to rely on federal common law 'by judicially decreeing what accords with "common sense and the public weal"' when Congress has addressed the problem.") (quoting *TVA* v. *Hill*, 437 U.S. 153, 195 (1978)).

4. Notwithstanding the foregoing, if this case did not involve a challenge to a phenomenon that is so widely caused and has an impact that is so widely experienced (which in this case separately demonstrates that plaintiffs lack prudential standing), and if EPA had not commenced regulating greenhouse gases under the CAA (which demonstrates that any common-law claim has been displaced), the separation-of-powers concerns it presents would markedly diminish.[17] Thus, we believe that, although the Court could properly rely on the political-question doctrine to direct dismissal of this case, a decision on prudential-standing grounds (discussed above) or the displacement analysis (discussed below) would be a more appropriate and tailored means of recognizing why it is appropriate to withhold judicial relief. Those other grounds would also better account for the principal way in which this case differs from

[17] Just as Congress has the power to alter the prudential-standing analysis and the displacement analysis, action by the political Branches can bear on aspects of the political-question doctrine. Congress could, for instance, make the initial policy determinations to allow for adjudication of a common-law nuisance action to address climate change. And EPA could prescribe emissions standards that would—if such standards did not displace federal common law—provide discernible and manageable standards for courts to apply in resolving such cases. Plaintiffs here, however, have relied on the purported *absence* of action by the political Branches as justification for their claims.

most cases presenting a political question: Plaintiffs are not asking the courts to enforce a constitutional or another external standard or norm that is typically in the domain of nonjudicial actors. Compare, *e.g.*, *Vieth*, *supra*. Instead, they ask the judiciary to act in its own domain by applying judicially fashioned federal common law in a new context. While it is of course true, as the court of appeals observed, that "federal common law of nuisance claim[s] * * * have been adjudicated in federal courts for over a century," Pet. App. 38a, this case is of a different order, in the ways discussed above.[18]

The applicability of the political-question doctrine will, to be sure, often be a threshold, non-merits question that should be resolved before a court would otherwise decide a question beyond the proper scope of judicial power. In this case, however, a determination that any common-law cause of action has been displaced (see pp. 42-53, *infra*) would not actually require the Court to do what the political-question doctrine would forbid (*i.e.*, to decide an asserted common-law public-nuisance claim based on alleged contributions to global climate change in the absence of "judicially discoverable and manageable standards" or "an initial policy determination of a kind clearly for nonjudicial discretion"). Such a determination would not involve the impermissible assertion

---

[18] Declining to address the political-question doctrine's applicability in the circumstances of this case would be analogous to the approach in Justice Kennedy's concurring opinion in *Vieth*. "[E]rr[ing] on the side of caution" because "another case" might propose a suitable standard for evaluating whether a partisan gerrymander burdens representational rights, Justice Kennedy did not find a political question, but nevertheless concluded that the appellants (who proposed no suitable standard of their own) had failed to state a claim on which relief could be granted. 541 U.S. at 311-313 (opinion concurring in the judgment).

of judicial power, but would instead simply acknowledge that, in light of actions already taken by the political Branches, there is no place for judicial relief under the mantle of federal common law. Cf. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 101-102 (1998) ("For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.").

Moreover, there is another aspect of this case that would support dismissal. Plaintiffs seek only injunctive relief, which "is a matter of equitable discretion" that "does not follow from success on the merits as a matter of course." *Winter* v. *NRDC*, 129 S. Ct. 365, 381 (2008). Especially because the political-question doctrine involves prudential concerns, the Court could determine that plaintiffs' complaints, because they are not based on any statutory cause of action but rather invoke federal common law, should be dismissed at the outset on equitable grounds that do not require the Court to resolve whether a political question is presented or to decide any political question. Cf. *O'Shea* v. *Littleton*, 414 U.S. 488, 499 (1974) ("[Article III standing] considerations obviously shade into those determining whether the complaint states a sound basis for equitable relief; and even if we were inclined to consider the complaint as presenting an existing case or controversy, we would firmly disagree with the Court of Appeals that an adequate basis for equitable relief against petitioners had been stated."). Such a disposition, in the unique circumstances of a federal common-law claim, would rest on the

distinct separation-of-powers concerns that the case presents.[19]

II. ANY FEDERAL COMMON-LAW CLAIMS HAVE BEEN DISPLACED BY EPA'S REGULATORY ACTIONS UNDER THE CLEAN AIR ACT

If the Court reaches the question, it should hold that plaintiffs cannot state a claim for public nuisance under federal common law because any such claim has been displaced by the actions that EPA has taken under the CAA to regulate carbon-dioxide emissions.

As this Court has explained, even in those few areas where a federal common-law action has already been recognized and persists, it is necessarily "'subject to the paramount authority of Congress,'" which means that a "previously available federal common-law action" will be "displaced" whenever a "scheme established by Congress addresses the problem formerly governed by federal common law." *Milwaukee II*, 451 U.S. at 313, 315 n.8 (quoting *New Jersey* v. *New York*, 283 U.S. 336, 348 (1931)); see also, *e.g.*, *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625 (1978). To assess whether federal common law has been displaced in a given context, "the relevant inquiry is whether the statute '[speaks] *directly* to [the] question' otherwise answered by federal common law." *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 236-237 (1985) (quoting *Milwaukee II*, 451

---

[19] See *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 731 (1996) ("[F]ederal courts have the power to dismiss or remand cases based on abstention principles * * * where the relief being sought is equitable or otherwise discretionary."); *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985) (Scalia, J.) ("Whether or not this is * * * a matter so entirely committed to the care of the political branches as to preclude our considering the issue at all, we think it at least requires the withholding of discretionary relief.").

U.S. at 315) (alterations and emphasis in *Oneida*). Here, regulatory actions that EPA has taken pursuant to its authority under the CAA—largely after the court of appeals' decision in this case—meet that test and have displaced any common-law nuisance claims that plaintiffs might once have had.

This case differs from *Milwaukee II* because there this Court had already recognized the availability of a federal common-law cause of action in *Milwaukee I*, which the Court then found in *Milwaukee II* to have been displaced. Here, the Court has not determined whether a federal common-law cause of action would otherwise be available if justiciability obstacles could be overcome. Whether to recognize in the first instance a federal common-law cause of action to abate emissions that contribute to global warming is a decision that might be informed by the enactment of the CAA, this Court's decision in *Massachusetts* v. *EPA*, and any implementing measures taken by EPA. Because any federal common-law claim that might otherwise have been advanced by plaintiffs has so clearly been displaced, however, the Court need not determine whether federal common law should, absent displacement, provide a cause of action for public nuisance against persons and entities that contribute to climate change.[20]

---

[20] Whether global climate change should be regarded as a public nuisance cognizable under domestic common law is a novel question, apparently decided for the first time by the court of appeals in this case. In prior public nuisance cases, there was a geographic nexus between those liable and those injured. See, *e.g.*, *Milwaukee I*, 406 U.S. at 93 (defendant's sewage discharges into Lake Michigan, the waters of which were used by Illinois); *Georgia* v. *Tennessee Copper*, 206 U.S. at 238 (noxious gases traveling from defendant's plants "over great tracts of Georgia land"). Cf. *Washington* v. *General Motors Corp.*, 406 U.S. 109, 114, 116 (1972) (calling air pollution a "public nuisance" and noting

1. Federal common law is displaced when an administrative agency takes regulatory action, under the authority of a comprehensive statutory program, to address the issue raised in a putative common-law action. Such displacement can occur when a plaintiff seeks relief that would address the same issue, but in a manner different in character or extent from what the regulatory program provides. See *Milwaukee II*, 451 U.S. at 324 ("The question is whether the field has been occupied, not whether it has been occupied in a particular manner."); see also *Mobil Oil*, 436 U.S. at 623-625 (holding that any federal common-law damages remedy for loss of society had been displaced by the Death on the High Seas Act, which provided damages for pecuniary loss but not for loss of society). And displacement also occurs when an agency, whose comprehensive statutory authority to regulate the subject matter has been triggered, decides to postpone or even forgo the imposition of regulatory standards, where the decision is made

---

that "corrective remedies for air pollution * * * necessarily must be considered in the context of localized situations"). The Court has never addressed whether such a nexus is a prerequisite for a public nuisance. In *Missouri* v. *Illinois*, 200 U.S. 496 (1906), the Court recognized that public nuisance law adapts to changing scientific and factual circumstances. In that case, determining whether sewage discharged by Chicago could cause typhoid fever in St. Louis after traveling 357 miles over eight to eighteen days was at the frontier of scientific understanding. See *id.* at 523. The Court acknowledged there was "no pretense" that Missouri had alleged "a nuisance of the simple kind that was known to the older common law," and that the suit "almost necessarily would have failed" if it "had been brought fifty years ago." *Id.* at 522. It held that the then-present evidence did not support Missouri's allegations, *id.* at 526, but it did not suggest that the novel nature of the claim, the difficulty of the scientific question, or the physical attenuation between the release of sewage in Chicago and the alleged spread of disease in St. Louis had placed that claim beyond the common law's reach.

through the exercise of that authority on the basis of a weighing of relevant considerations under the statutory scheme. Courts may not substitute their judgment, under the guise of common law, for the determinations made by federal agencies as to how, when, and whether regulation is appropriate.

Petitioners contend (Pet. 21) that Congress's enactment of the CAA was itself sufficient to displace plaintiffs' common-law claims, without regard to any regulatory actions that EPA has taken pursuant to the CAA. While there is little doubt that the CAA established a "comprehensive" regulatory program, see, *e.g.*, *Chevron U.S.A.*, 467 U.S. at 848, the CAA differs in important respects from the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, which was found to have displaced federal common-law limits on the discharge of pollutants into the waters of the United States. See *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 11, 14-15 (1981); *Milwaukee II*, 451 U.S. at 317-320. The terms of the CWA directly prohibit the discharge of pollutants into the waters of the United States without authorization from a proper permitting authority. See 33 U.S.C. 1311(a). The terms of the CAA, by contrast, impose few restrictions on the emissions of air pollutants in the absence of regulations promulgated by EPA. This case, however, does not involve the mere enactment of the CAA.

Exercising its regulatory authority under the CAA, EPA has directly entered the field plaintiffs would have governed by common-law nuisance suits. Since January 2, 2011, greenhouse gases have been subject to regulation under the CAA, and EPA is actively exercising its judgment and statutory discretion to determine when and how emissions from different categories of sources

of greenhouse gases will be regulated. As a result, the CAA, as implemented by EPA, speaks directly to the question of how carbon-dioxide emissions should be limited and thus displaces any common-law claims pertaining to that question.

2. In the wake of this Court's decision in *Massachusetts* v. *EPA*, the agency has taken several significant actions to address greenhouse-gas emissions.

a. Two of EPA's recent regulatory actions worked in concert to render greenhouse gases "pollutant[s] subject to regulation under [the CAA]" for purposes of the PSD permitting process that applies to new and modified emitting facilities. 42 U.S.C. 7475(a)(4). First, on December 15, 2009, EPA published a final finding under Section 202 of the CAA that "greenhouse gases in the atmosphere may reasonably be anticipated both to endanger public health and to endanger public welfare." 74 Fed. Reg. at 66,497. That so-called "endangerment finding" also included a determination that carbon-dioxide and other greenhouse-gas emissions from new motor vehicles contribute to the greenhouse-gas air pollution that endangers public health and welfare. *Id.* at 66,537. In making that determination, EPA found that the portion of the transportation sector regulated by Section 202 is responsible for just over 23% of greenhouse-gas emissions in the United States, making it the "second largest emitter within the United States behind the electricity generating sector." *Id.* at 66,499.

Second, on May 7, 2010, EPA (acting with the Department of Transportation's National Highway Traffic Safety Administration) published a joint final rule requiring reductions in greenhouse-gas emissions from light-duty motor vehicles. 75 Fed. Reg. at 25,324. Under Section 202(a)(1) of the CAA, the promulgation of

those new emissions standards followed from EPA's December 2009 endangerment finding. See 42 U.S.C. 7521(a)(1); 75 Fed. Reg. at 25,327. Those standards took effect on January 2, 2011 (for vehicles of model year 2012), and they will become increasingly stringent until model year 2016. *Id.* at 25,329-25,330. EPA exercised its discretion to phase in those standards over that period to allow manufacturers to "incorporate technology to achieve [greenhouse-gas] reductions" and to "plan for compliance using a multi-year time frame, * * * consistent with normal business practice." *Id.* at 25,332.

Because the final light-duty-vehicle standards have taken effect (as of January 2, 2011), EPA now considers greenhouse gases to be "pollutant[s] subject to regulation under [the CAA]," in the sense meant by 42 U.S.C. 7475(a)(4), and therefore subject to Sections 165(a) and 169(1) of the CAA (42 U.S.C. 7475(a) and 7479(1)). See 75 Fed. Reg. at 31,606-31,607 (to be codified at 40 C.F.R. 52.21(b)(49)-(50), effective January 2, 2011) (specifying when greenhouse gases are "subject to regulation"); 75 Fed. Reg. at 17,019, 31,549-31,551 (explaining EPA's construction of the phrase "pollutant subject to regulation"). Those provisions—which apply to stationary sources—require any new or modified "major emitting facility" to obtain a so-called "PSD permit" under the provisions of the CAA designed to prevent significant deterioration of air quality. 42 U.S.C. 7470-7479.[21] In

---

[21] The CAA applies PSD requirements to a "major emitting facility," 42 U.S.C. 7475(a), which is defined to include any "source with the potential to emit" at least 250 tons per year of "any air pollutant," as well as certain "stationary sources of air pollutants" (including, as most relevant here, fossil-fuel-fired steam electric plants and boilers), if they emit or have the potential to emit at least 100 tons per year. 42 U.S.C. 7479(1). EPA's regulations implement those requirements by applying

order to obtain such a permit, a facility must, among other things, be "subject to the best available control technology for each pollutant subject to regulation under [the CAA]." 42 U.S.C. 7475(a)(4).

The promulgation of the light-duty-vehicle standards also means that EPA considers greenhouse gases to be subject to the permitting requirements under Title V of the CAA. See 42 U.S.C. 7661a(a), 7661(2)(B), 7602(j); 75 Fed. Reg. at 31,551-31,554 (describing EPA's interpretation of Title V's applicability). As the D.C. Circuit has explained, the Title V permitting process "requires that certain air pollution sources, including every major stationary source of air pollution, each obtain a single, comprehensive operating permit to assure compliance with all emission limitations and other substantive CAA requirements that apply to the source." *Environmental Integrity Project* v. *EPA*, 425 F.3d 992, 993 (2005); see also *Virginia* v. *Browner*, 80 F.3d 869, 873 (4th Cir. 1996) (describing Title V permit as "a source-specific bible for [CAA] compliance"), cert. denied, 519 U.S. 1090 (1997). Defendants' power plants are "major stationary source[s] of air pollution" and thus subject to Title V permitting requirements.

By issuing the endangerment finding and light-duty-vehicle rule, and thereby rendering greenhouse gases "subject to regulation" under the existing statutory scheme of the CAA, EPA displaced any federal common-

---

them to "major stationary source[s]," 40 C.F.R. 52.21(a)(2), which are defined to include stationary sources that emit at least 100 or 250 tons per year of a "regulated NSR pollutant," 40 C.F.R. 52.21(b)(2)(i), which includes "[a]ny pollutant * * * subject to regulation under the [CAA]." 40 C.F.R. 52.21(b)(50)(iv).

law requirements imposing alternative or additional emissions standards for greenhouse gases.[22]

b. Additional EPA regulatory actions reinforce the conclusion that plaintiffs' common-law claims have been displaced. Recognizing that the light-duty-vehicle rule was going to cause greenhouse gases to be regulated pollutants subject to PSD and Title V permitting requirements, EPA issued a so-called "tailoring rule" on June 3, 2010. See 75 Fed. Reg. at 31,514. That tailoring rule phases in the applicability of PSD requirements to greenhouse gases emitted by stationary sources, discussed above (see pp. 5, 47-48, *supra*), applying those requirements in January 2011 to sources already obtaining permits for other pollutants, and later to additional sources. 75 Fed. Reg. at 31,516.[23] In the tailoring rule,

---

[22] As noted above (see note 4, *supra*), on December 10, 2010, the D.C. Circuit denied several motions to stay EPA's endangerment finding, its motor-vehicle-emissions standards for greenhouse gases, its tailoring rule, and its decision addressing the date on which greenhouse-gas emissions became "subject to regulation" under the CAA. The parties in those pending challenges submitted briefing-format proposals to the D.C. Circuit on January 10, 2011.

[23] Pursuant to the first phase of the tailoring rule, sources became subject to the PSD requirements on account of their carbon-dioxide emissions as of January 2, 2011, only if (1) they were already subject to such requirements due to emissions of non-greenhouse-gas air pollutants, and (2) they undertook a modification that would increase their carbon-dioxide emissions by at least 75,000 tons per year while also significantly increasing emissions of non-greenhouse-gas pollutants. 75 Fed. Reg. at 31,516. The second phase of the tailoring rule, beginning on July 1, 2011, "will phase in additional large sources of [greenhouse-gas] emissions." *Ibid.* Similar phases apply in the case of Title V. *Id.* at 31,523-31,524. In the third phase, beginning in July 2013, EPA may regulate additional sources. *Ibid.* The tailoring rule specifies that EPA will engage in further rulemaking to address any remaining PSD requirements, but indicates that no sources or modifications below a

EPA clarified that, in its considered judgment, regulation of greenhouse-gas emissions from stationary sources should proceed in an orderly and phased fashion based on a variety of considerations. Cf. *Massachusetts* v. *EPA*, 549 U.S. at 524. Plaintiffs' attempt to secure court-ordered emissions reductions from emitters of their choosing on their own schedule would be plainly inconsistent with EPA's systematic, phased approach.

In another significant step indicating EPA's active engagement in the process of determining how and when greenhouse-gas emissions will be regulated, EPA announced on December 23, 2010 that it had entered into a proposed settlement agreement in an earlier case about whether the new source performance standards (NSPS) for utility boilers (*i.e.*, power plants like defendants') should include standards for greenhouse-gas emissions.[24] That proposed settlement (which was subject to a 30-day public-comment period that expired on January 31, 2011, see 75 Fed. Reg. at 82,392) would commit EPA to complete a NSPS rulemaking under Section 111 of the CAA (42 U.S.C. 7411). If the settlement is adopted by EPA, the purpose of the ensuing rulemaking would be to consider standards applicable to new and modified facilities; it would simultaneously consider standards under which States would be required (under

---

certain size would be made subject to PSD or Title V permitting requirements before April 30, 2016. *Ibid.*

[24] The case—which was brought by, *inter alia*, several of the plaintiffs here—is on voluntary remand from the D.C. Circuit. See *New York* v. *EPA*, No. 06-1322 (Sept. 24, 2007). As discussed in TVA's certiorari-stage brief in this case (at 29-30 & n.19), EPA had previously announced it was "in the process of responding to a remand from the D.C. Circuit requiring it to consider whether to add standards for [greenhouse gases] to the NSPS for utility boilers." 73 Fed. Reg. 44,487 (2008).

42 U.S.C. 7411(d)) to impose regulatory limitations on emissions from *existing* facilities. See p. 4, *supra*. Under the settlement, EPA would issue a proposed rule by July 26, 2011 and promulgate final regulations by May 26, 2012.[25] Thus, if the settlement is formally adopted, EPA will have established a precise time line for deciding whether and to what extent emissions standards under the CAA will apply to the very carbon-dioxide emissions at issue in this case.

3. As the foregoing discussion demonstrates, EPA now regulates greenhouse-gas emissions under the currently existing statutory scheme of the CAA, and it may soon be specifically committed to completing a rulemaking to address greenhouse-gas-emissions standards applicable to defendants' already-existing power plants, even if they are not modified. Thus, it is abundantly clear that the CAA, as it is now being implemented by EPA, "speak[s] directly" (*Milwaukee II*, 451 U.S. at 315 (quoting *Mobil Oil*, 436 U.S. at 625)) to the particular issue presented by plaintiffs' federal common-law nuisance claims about climate change: regulation of greenhouse-gas emissions, and in particular emissions from stationary sources (like defendants' power plants).

The conclusion that EPA's actions have displaced any common-law emissions standards is unaffected by EPA's decision to adopt an incremental approach that will not necessarily lead to standards specifically governing greenhouse-gas emissions from defendants' already-existing power plants (unless they are modified and thus

---

[25] The text of the settlement agreement is available at http://www.epa.gov/airquality/pdfs/boilerghgsettlement.pdf. A commitment to complete a rulemaking will not mean that EPA has prejudged the question of what, if any, NSPS will be appropriate; EPA could ultimately exercise its judgment to find the imposition of such standards inappropriate.

require a PSD permit under the new regulations), at least until some time after May 26, 2012. In *Middlesex County Sewerage Authority*, the Court held that the Marine Protection, Research, and Sanctuaries Act of 1972 displaced federal common law immediately and entirely, even though "Congress allowed some continued dumping of sludge" for nine years after the statute was enacted based on its "considered judgment that it made sense to allow entities like petitioners to adjust to the coming change." 453 U.S. at 22 n.32; see also *Massachusetts* v. *EPA*, 549 U.S. at 533 (recognizing that EPA possesses "significant latitude as to the manner, timing, content, and coordination of its regulations"); *id.* at 524 ("Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop. They instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed.").

Although EPA has not yet done precisely what plaintiffs demand here (*i.e.*, cap defendants' carbon-dioxide emissions and require them to be reduced annually for at least a decade, J.A. 110, 153), that is not the relevant test. As this Court has stated: "Demanding specific regulations of general applicability before concluding that Congress has addressed the problem to the exclusion of federal common law asks the wrong question. The question is whether the field has been occupied, not whether it has been occupied in a particular manner." *Milwaukee II*, 451 U.S. at 324; see also *id.* at 323 ("Although a federal court may disagree with the regulatory approach taken by the agency with responsibility for issuing permits under the Act, such disagreement alone is no basis for the creation of federal common law.");

Illinois v. *Outboard Marine Corp.*, 680 F.2d 473, 478 (7th Cir. 1982) (refusing "to find that Congress has not 'addressed the question' because it has not enacted a remedy against polluters," because that "would be no different from holding that the solution Congress chose is not adequate," and "*Milwaukee II* * * * precludes the courts from scrutinizing the sufficiency of the congressional solution").

Because EPA's regulatory activities speak directly to the issue of greenhouse-gas emissions, any common-law claims seeking to reduce such emissions have been displaced.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
IGNACIA S. MORENO
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ETHAN G. SHENKMAN
Deputy Assistant Attorney General
CURTIS E. GANNON
Assistant to the Solicitor General
DOUGLAS N. LETTER
LISA E. JONES
H. THOMAS BYRON
JUSTIN R. PIDOT
Attorneys

RALPH E. RODGERS
Acting General Counsel
HARRIET A. COOPER
Assistant General Counsel
MARIA V. GILLEN
Attorney
Tennessee Valley Authority

JANUARY 2011

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
MAR 11 2011
OFFICE OF THE CLERK

No. 10-174

IN THE
Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY INC., ET AL.,
Petitioners,

v.

STATE OF CONNECTICUT, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS OPEN SPACE INSTITUTE, INC., OPEN SPACE CONSERVANCY, INC., AND AUDUBON SOCIETY OF NEW HAMPSHIRE

MICHAEL K. KELLOGG
GREGORY G. RAPAWY
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

MATTHEW F. PAWA
Counsel of Record
LAW OFFICES OF MATTHEW F. PAWA, P.C.
1280 Centre Street
Suite 230
Newton Centre, MA 02459
(617) 641-9550

DAVID D. DONIGER
GERALD GOLDMAN
NATURAL RESOURCES DEFENSE COUNCIL
1200 New York Avenue, N.W.
Washington, D.C. 20005
(202) 289-6868

March 11, 2011

QUESTIONS PRESENTED

1. Whether plaintiffs have stated claims under the federal common law of public nuisance in an action for injunctive relief to require defendants to reduce their massive, ongoing contributions to the pollution that causes global warming.

2. Whether at least one plaintiff in this case has standing to seek that relief.

3. Whether plaintiffs' common law claims present a political question that the courts may not resolve.

4. Whether plaintiffs' common law claims have been displaced by the Clean Air Act or Environmental Protection Agency regulation, notwithstanding the fact that at this time neither imposes any emissions limits on defendants' existing power plants at issue in this case.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondents Open Space Institute, Inc., Open Space Conservancy, Inc., and Audubon Society of New Hampshire state the following:

Respondents Open Space Institute, Inc., Open Space Conservancy, Inc., and Audubon Society of New Hampshire certify that they are their own corporate parents and that they are non-stock corporations.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT 4

SUMMARY OF ARGUMENT 11

ARGUMENT 16

I. RESPONDENTS HAVE STATED A CLAIM UNDER THE FEDERAL COMMON LAW OF PUBLIC NUISANCE 16

A. The Private Action for Public Nuisance Is Long Established by Precedent 17

B. A Public Nuisance Claim for Ambient, Interstate Air or Water Pollution Arises Under Federal Common Law 22

C. The Land Trusts State a Private Claim for Public Nuisance 29

II. RESPONDENTS' CLAIMS ARE JUSTICIABLE 35

A. Respondents Have Article III Standing 36

B. Respondents Have Prudential Standing 42

C. Respondents' Claims Raise No Political Question 44

III. RESPONDENTS' FEDERAL COMMON LAW CLAIMS HAVE NOT BEEN DISPLACED 46

A. Neither the Clean Air Act nor EPA Regulations Presently Limit Petitioners' Emissions 47

B. The Clean Air Act Does Not of Its Own Force Displace Respondents' Claims 50

C. Regulatory Action by EPA Has Not Yet Displaced Respondents' Claims 52

CONCLUSION 54

TABLE OF AUTHORITIES

Page

CASES

Alden v. Maine, 527 U.S. 706 (1999) 25

Alexander v. Sandoval, 532 U.S. 275 (2001) 27

Allen v. Wright, 468 U.S. 737 (1984) 38, 41, 42

Arkansas v. Oklahoma, 503 U.S. 91 (1992) 24

ASARCO Inc. v. Kadish, 490 U.S. 605 (1989) 40, 41

Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) 2, 5

Baker v. Carr, 369 U.S. 186 (1962) 9, 16, 45, 46

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) 22, 26

Bond's Case, Moore 238 (1587) 18

Burlington Northern & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870 (2009) 13, 33

Chapman v. City of Rochester, 110 N.Y. 273 (1888) 20

Coleman v. Miller, 307 U.S. 433 (1939) 36

Corning v. Lowerre, 6 Johns. Ch. 439 (N.Y. Ch. 1822).....19, 36

County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) 51

Cox v. City of Dallas, 256 F.3d 281 (5th Cir. 2001)..... 32

DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006) 37

Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) 42

Empire HealthChoice Assur., Inc. v. McVeigh, 547 U.S. 677 (2006) 25

Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) 22, 23

Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008) 51

FEC v. Akins, 524 U.S. 11 (1998) 43

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000) 40

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990) 42

Georgia v. Tennessee Copper Co.:

206 U.S. 230 (1907) 11, 21, 23, 25, 28, 29, 30, 44, 46

237 U.S. 474 (1915), *decree modified*, 240 U.S. 650 (1916) 3, 21, 28, 30, 35

Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) 22, 25, 26

Hodel v. Irving, 481 U.S. 704 (1987) 37

Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997) 25

Illinois v. City of Milwaukee:

406 U.S. 91 (1972) 1, 12, 22, 23, 24, 25, 27, 28, 29, 50, 53, 54

451 U.S. 304 (1981) 15, 24, 26, 46, 50, 51, 52, 53

International Paper Co. v. Ouellette, 479 U.S. 481 (1987) 3, 24, 26

International Primate Prot. League v. Administrators of Tulane Educ. Fund, 500 U.S. 72 (1991) 16

Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221 (1986) 45

Lance v. Coffman, 549 U.S. 437 (2007) 43, 44

Lane v. Halliburton, 529 F.3d 548 (5th Cir. 2008) 45

Lockwood Co. v. Lawrence, 77 Me. 297 (1885) 20

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 17

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 37, 39, 41

Massachusetts v. EPA, 549 U.S. 497 (2007).....1, 5, 9, 13, 14, 15, 30, 37, 38, 39, 41, 47, 51

Mayor of Georgetown v. Alexandria Canal Co., 37 U.S. (12 Pet.) 91 (1838) 19, 27, 31

Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) 53

Missouri v. Illinois:

180 U.S. 208 (1901) 11, 20, 29, 34

200 U.S. 496 (1906) 20, 21, 27, 28

Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978) 50

New Jersey v. City of New York, 283 U.S. 473 (1931) 21, 29

New York v. New Jersey, 256 U.S. 296 (1921) 21, 28

Nixon v. United States, 506 U.S. 224 (1993)..... 44

North Carolina ex rel. Cooper v. TVA, 615 F.3d 291 (4th Cir. 2010), *pet. for cert. pending*, No. 10-997 (filed Feb. 2, 2011) 29

Ohio v. Wyandotte Chems. Corp., 401 U.S. 493 (1971) 44

Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518 (1852) 19

People v. Gold Run Ditch & Mining Co., 66 Cal. 138 (1884).....19, 20, 32

Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495 (1988)..... 54

Secretary of the Interior v. California, 464 U.S. 312 (1984) 36

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 23

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004)..... 22

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) 16, 36

Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) 24

Trail Smelter Case (U.S. v. Can.), 3 Rep. Int'l Arb. Awards 1905 (U.N. Arb. Trib. 1941)..... 21

Tull v. United States, 481 U.S. 412 (1987) 17

United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983) 33

United States v. Richardson, 418 U.S. 166 (1974) 43

United States Dep't of Commerce v. Montana, 503 U.S. 442 (1992) 45

United Steelworkers v. United States, 361 U.S. 39 (1959) 17

Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765 (2000) 36

Village of Pine City v. Munch, 42 Minn. 342 (1890) 20

Washington v. General Motors Corp., 406 U.S. 109 (1972) 29

Wisconsin Dep't of Revenue v. William Wrigley, Jr., 505 U.S. 214 (1992) 33

Woodyear v. Schaefer, 57 Md. 1 (1881) 19, 32

Zivotofsky v. Secretary of State, 571 F.3d 1227 (D.C. Cir. 2009), *pet. for cert. pending*, No. 10-699 (filed Nov. 24, 2010) 45

CONSTITUTION, STATUTES, AND REGULATIONS

U.S. Const.:

Art. III 9, 12, 13, 35, 36

§ 1 16

§ 2 ..... 35, 36

Clean Air Act, 42 U.S.C. § 7401 *et seq.* ..... *passim*

§ 111, 42 U.S.C. § 7411 ..... 49, 52, 54

§ 111(a)(1), 42 U.S.C. § 7411(a)(1) 49

§ 111(b)(1)(A), 42 U.S.C. § 7411(b)(1)(A) 49

§ 111(d)(1), 42 U.S.C. § 7411(d)(1) 49

§ 111(d)(2)(B), 42 U.S.C. § 7411(d)(2)(B) 50

§ 116, 42 U.S.C. § 7416 26

§ 165, 42 U.S.C. § 7475 ..... 48, 53

§ 165(a), 42 U.S.C. § 7475(a) 53

§ 165(a)(4), 42 U.S.C. § 7475(a)(4) 48

§ 202, 42 U.S.C. § 7521 47

§ 202(a), 42 U.S.C. § 7521(a) 51

§ 202(a)(1), 42 U.S.C. § 7521(a)(1) 47

§ 302(g), 42 U.S.C. § 7602(g) 47

§ 502, 42 U.S.C. § 7661a 48

Clean Water Act of 1977, 33 U.S.C. § 1251 *et seq.* ..... *passim*

33 U.S.C. § 1370 26

Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.* 33

40 C.F.R. § 51.166(b)(2) 48

LEGISLATIVE MATERIALS

Energy Tax Prevention Act of 2011, H.R. 910, 112th Cong. (introduced Mar. 3, 2011) 54

H.R. 1, 112th Cong., div. B, tit. VII (2011) 50

ADMINISTRATIVE MATERIALS

EPA, Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) 47

EPA, Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010) 47

OTHER MATERIALS

William Blackstone, *Commentaries*:

Vol. 3 ..... 18, 31

Vol. 4 18

3 Barney L. Capehart, *Encyclopedia of Energy Engineering and Technology* (2007) 8

Robert Henley Eden, *A Treatise on the Law of Injunctions* (1821) 17

Henry J. Friendly, *In Praise of* Erie – *And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964) 22

Intergovernmental Panel on Climate Change:

Climate Change 2007: Impacts, Adaptation and Vulnerability (2007), *available at* http://www.ipcc.ch/publications_and_data/ar4/wg2/en/contents.html 7

Climate Change 2007: Synthesis Report (2008), *available at* http://www.ipcc.ch/publications_and_data/ar4/syr/en/contents.html 5, 6

Climate Change 2007: The Physical Science Basis (2007), *available at* http://www.ipcc.ch/publications_and_data/ar4/wg1/en/contents.html 6

Petition for a Writ of Certiorari, *North Carolina ex rel. Cooper v. TVA*, No. 10-997 (U.S. filed Feb. 2, 2011) 30

William L. Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997 (1966) 18, 31

Restatement (Second) Torts (1979) 18, 29, 30, 32, 33, 40

Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) 33

2 Joseph Story, *Commentaries on Equity Jurisprudence* (2d ed. 1839) 17

INTRODUCTION

This case involves the application of old law to new facts. Both English and American courts have recognized for centuries the right of one who suffers special injury from a public nuisance to bring a private action seeking injunctive relief. This Court has itself heard public nuisance actions and fashioned relief under federal common law in cases involving interstate air and water pollution. And this Court and others have continuously applied these well-established principles to changing technology and changing threats to a common environment.

Petitioners cannot and do not deny that global warming poses extraordinary risks to the public. Indeed, this Court acknowledged in *Massachusetts v. EPA*, 549 U.S. 497 (2007), that "[t]he harms associated with climate change are serious and well recognized," *id.* at 521, and the scientific evidence supporting that conclusion has only grown more compelling since 2007. Nor can petitioners overcome the clear holding of *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee I*"), recognized in subsequent cases as well, that, "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Id.* at 103.

Instead, petitioners contend that, because there are so many other contributors to global warming, because the harms are so widespread, and because the task of completely solving the problem is so large, respondents' claims are nonjusticiable and not cognizable under federal common law. These arguments are unsupported by precedent; they consist of repackaged objections that this Court and others have consistently rejected.

First, it has been settled since at least the nineteenth century that, where multiple polluters contribute to a nuisance, each may be enjoined regardless of whether the conduct of any one would have caused the nuisance alone and regardless of others' contributions. Petitioners ("the Utilities") and respondent Tennessee Valley Authority ("TVA") are the five largest U.S. emitters of carbon dioxide, the primary greenhouse gas, and were responsible in 2004 for 650 million tons of carbon dioxide – 10 percent of *all* U.S. anthropogenic emissions. Despite having reasonable ways to reduce their emissions and ample knowledge of their effects on the environment, these five entities have emitted such staggering amounts of carbon dioxide as to set them apart from the vast majority of other emitters.

Second, it is equally settled that the limited set of persons who suffer special injury from a public nuisance has the right to bring a private action seeking injunctive relief. The respondent land trusts fit within that set because they own properties of unusual ecological value and because the trusts' mission is to conserve those properties permanently for public benefit and use. The land trusts' "well-pleaded factual allegations" about the special injuries they will suffer from global warming are both entitled to an "assum[ption of] . . . veracity," *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009), and well-grounded in widely accepted science.

Finally, this Court and many others have repeatedly applied nuisance principles to changing environmental threats and have taken into account scientific advances in understanding those threats. Courts have, for example, assessed complex scientific evidence in cases involving typhoid contamination of

the Mississippi River and oxygen levels in New York Bay; and they have issued orders limiting pollution in a variety of contexts that do not differ qualitatively from the situation here, where many sources of pollution contribute to newly emerging environmental harms. A Court that a century ago was able to provide injunctive relief against destructive sulfur dioxide emissions causing acid rain, *see Georgia v. Tennessee Copper Co.*, 237 U.S. 474, 477-78 (1915) ("*Tennessee Copper II*"), *decree modified*, 240 U.S. 650 (1916), should not now accept the notion that relief against destructive carbon dioxide emissions from some of the world's largest polluters exceeds judicial competence.

Petitioners' argument that federal common law should not apply in this context is beset by a fundamental paradox. Petitioners concede that interstate air pollution and global warming are matters of preeminently federal concern. Yet, in the absence of a public nuisance claim under *federal* common law, the same injured parties would have *state* common law claims under multiple and potentially conflicting sources of law. *See International Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987) (explaining that "state common law [is] preempted" only where federal common law applies). That result would defeat the goal of having uniform federal common law to govern interstate issues on which federal regulators have not yet spoken.

No federal statute or regulation currently limits the carbon dioxide emissions of the Utilities and TVA. The U.S. Environmental Protection Agency ("EPA") has begun a rulemaking that may (or may not) lead to enforceable limits on carbon dioxide emissions by the Utilities and TVA. Without any

limits in place, claims that new regulations have displaced the old remedy are premature. Meanwhile, federal common law governs this vital issue.

STATEMENT

1. Respondents Open Space Institute, Inc., Open Space Conservancy, Inc., and Audubon Society of New Hampshire (together, "Land Trusts") are private nonprofit corporations organized to conserve land permanently for environmental and aesthetic purposes, public access and enjoyment, and scientific research. JA118, 139-40, 141 (¶¶ 5, 67, 74).[1] To carry out these purposes, the Land Trusts have acquired properties of unique ecological value. JA140, 142 (¶¶ 68, 75).

The Land Trusts' properties provide rare habitat for various animals and plants, including ecologically sensitive areas of coastline, riverfront land, wetlands, and hardwood forest. JA140-41, 142-43 (¶¶ 69-73, 76-79). For example, a property at Bellamy River in Dover, New Hampshire, includes an estuary that provides wintering ground for bald eagles, as well as habitat for migratory birds and numerous fish species. JA142 (¶ 76). Another property, the Sam's Point Preserve in Ulster County, New York, includes the only extensive community of dwarf pine trees on bedrock known to exist. JA140-41 (¶ 71). The Land Trusts have made their properties available to the public in perpetuity for hiking, recreation, and education, and to researchers for scientific purposes. JA139-40, 141 (¶¶ 67, 74).

---

[1] "JA__ (¶ __)" refers to paragraphs in the Land Trusts' operative complaint, reproduced in the Joint Appendix. "App. __" refers to the appendix to the certiorari petition.

2. The Land Trusts' complaint contains "well-pleaded factual allegations" about the extraordinarily damaging and potentially catastrophic effects of global warming – on the world generally and on their property specifically – that are entitled to an "assum[ption of] . . . veracity." *Iqbal*, 129 S. Ct. at 1950. Because of their particular location and ecological value, the Land Trusts' properties are especially vulnerable to the ongoing and anticipated effects of global warming. As sea levels rise, some coastal and riverfront areas are threatened with permanent flooding, and others with periodic flooding from higher storm surges. JA143-44 (¶¶ 80-83). Marshes that are not flooded entirely will be destroyed as habitat for wildlife as freshwater is replaced by saltwater. JA144 (¶ 84). The hardwood forests (primarily beech, birch, and maple) on the Land Trusts' properties will die out as temperatures rise. *Id.* (¶ 85). Ground-level smog will intensify, causing further damage to the plants and animals on those properties. JA144-45 (¶¶ 87-88).

Those allegations are supported by compelling scientific evidence. Since the complaint was filed in 2004 – indeed, since this Court's decision in *Massachusetts v. EPA* – that evidence has only grown stronger. In November 2007, the Intergovernmental Panel on Climate Change ("IPCC") reported that evidence of an overall warming trend now "is unequivocal." *2007 Synthesis Report*[2] 30. Eleven of the 12 years from 1995 to 2006 were among the 12 warmest recorded since 1850. *Id.* Depending largely on the future carbon emissions levels projected under vari-

---

[2] IPCC, *Climate Change 2007: Synthesis Report* (2008) ("*2007 Synthesis Report*"), *available at* http://www.ipcc.ch/publications_and_data/ar4/syr/en/contents.html.

ous economic and technological scenarios, the IPCC's estimates for average global temperature changes over the twenty-first century range from 1.8 to 4.0 degrees Celsius. *Id.* at 45 & tbl. 3.1. For comparison, an ice age is a drop in global average temperature of about 4.0 to 7.0 degrees Celsius. *2007 Physical Science Report*[3] 114.

"Most of the observed increase in global average temperatures since the mid-20th century is *very likely* due to the observed increase" in human-caused greenhouse gas[4] emissions. *2007 Synthesis Report* 39.[5] Carbon dioxide is the most important greenhouse gas. *Id.* at 39, fig. 2.4. Emissions of carbon dioxide continue to affect the climate for hundreds or thousands of years. *2007 Physical Science Report* 25.

The IPCC's findings confirm that global warming is already having profound consequences, which are projected to continue and to worsen over time. Discussing North America, the IPCC has found:

> Sea level is rising along much of the coast, and the rate of change is likely to increase in the future, exacerbating the impacts of progressive inundation, storm surge flooding, and shoreline erosion. Storm impacts are likely to be more severe, especially along the Gulf and Atlantic

---

[3] IPCC, *Climate Change 2007: The Physical Science Basis* (2007) ("*2007 Physical Science Report*"), *available at* http://www.ipcc.ch/publications_and_data/ar4/wg1/en/contents.html.

[4] Greenhouse gases heat the planet by "increas[ing] the atmospheric absorption of outgoing radiation," thus "alter[ing] the global energy budget of the earth." *Id.* at 21.

[5] The IPCC uses italicized terms of art to summarize certain probabilistic findings: "*very likely*" means a greater than 90% probability, "*likely*" means greater than 66%, and "*more likely than not*" means greater than 50%. *2007 Synthesis Report* 27.

> coasts. Salt marshes, other coastal habitats and dependent species are threatened now and increasingly in future decades by sea-level rise, fixed structures blocking landward migration, and changes in vegetation.[6]

3. The Utilities are a group of four holding companies whose subsidiaries own and operate electric power plants. JA121-25 (¶¶ 14-28). In 2004, when this case was filed, the Utilities were four of the five largest emitters of carbon dioxide in the United States; respondent TVA is the fifth. JA118 (¶ 3). The five together emitted approximately 650 million tons of carbon dioxide in 2004 alone. *Id.* That was approximately 25 percent of the carbon emitted by the electric power sector in the United States; approximately 10 percent of *all* carbon emitted by the United States; and approximately 2.5 percent of human-caused carbon emissions worldwide. JA118, 136, 137 (¶¶ 3, 53, 55); App. 8a, 72a.

Those 2004 emissions were only a small fraction of the Utilities' and TVA's past contribution to the problem of global warming. JA137 (¶ 56). Those emissions were also only a small fraction of their projected future contribution if their emissions continue to grow unchecked. From 1994 to 2001, electric power companies in the United States increased their carbon dioxide emissions by 24 percent. JA136 (¶ 54).

The Utilities and TVA, if they chose, could generate the same amount of electricity they do now but emit substantially less carbon dioxide. JA119, 146

---

[6] IPCC, *Climate Change 2007: Impacts, Adaptation and Vulnerability* 55 (2007) (citations omitted), *available at* http://www.ipcc.ch/publications_and_data/ar4/wg2/en/contents.html.

(¶¶ 9, 98). Economically viable options are available that would permit them to do so without significantly increasing the cost of electricity to their customers. *Id.* These options, set forth in the Land Trusts' complaint, include "using alternative fuels; improving generation efficiency; increasing generation from zero- or low-carbon energy sources such as wind, solar, and gasified coal with emissions capture; co-firing wood or other biomass in coal plants; employing demand-side management techniques; [and] altering the dispatch order of their plants." JA119 (¶ 9).[7]

4. On July 21, 2004, the Land Trusts brought this case against the Utilities and TVA in the Southern District of New York, alleging that, by emitting hundreds of millions of tons of carbon dioxide annually, the Utilities and TVA were contributing to the public nuisance of global warming. The Land Trusts alleged public nuisance claims under federal law and, in the alternative, under the laws of the 20 states in which the Utilities and TVA operate. JA145-53 (¶¶ 91-103, 105-126).

The Land Trusts further alleged that this public nuisance threatens them with special injury: the properties they have purchased and sought to protect in perpetuity for public use will be damaged by global warming, preventing them from maintaining and using those properties as intended. *E.g.*, JA145-46 (¶ 93). On the same day, a group of eight states and

---

[7] A power company's "dispatch order" is the "order in which [generating stations are] . . . brought on- and off-line in response to changing load requirements." 3 Barney L. Capehart, *Encyclopedia of Energy Engineering and Technology* 1499 (2007). By meeting demand using power plants that generate less carbon dioxide per kilowatt-hour, a power company can reduce carbon emissions without new investments.

the City of New York (collectively, for convenience, "States") brought a similar action.

The district court dismissed both complaints on the ground that respondents' federal common law claims presented a political question. Relying on *Baker v. Carr*, 369 U.S. 186 (1962), the court concluded that reaching the merits of respondents' claims would require "an initial policy determination of a kind clearly for nonjudicial discretion," App. 181a-182a (internal quotation marks omitted).

On September 21, 2009, the Second Circuit reversed. The court of appeals first held that the district court had erred in determining that this case presented a political question. Examining the considerations set forth by this Court in *Baker*, the court concluded that none supported the district court's ruling. App. 23a-41a. As for the problem of an "initial policy determination" that had troubled the district court, the court of appeals concluded that the States and Land Trusts "need not await an 'initial policy determination' in order to proceed on this federal common law of nuisance claim, as such claims have been adjudicated in federal courts for over a century." App. 38a.

Because the Utilities had presented several alternative grounds for affirmance, the court of appeals went on to dispose of them. Relying in significant part on *Massachusetts v. EPA*, the court held that the States and Land Trusts had Article III standing, having shown injury-in-fact, traceability, and redressability; and that the States had *parens patriae* standing. App. 41a-76a. It held that the States and Land Trusts had successfully stated a public nuisance claim under federal common law, rejecting the Utilities' contentions that such claims were limited to

instances of "constitutional necessity" or to nuisances of a "simple type." App. 77a-123a. It held that the Land Trusts could bring public nuisance claims as private parties because they had properly alleged the common law requisite of a special injury from the nuisance. App. 114a-118a.

Finally, the court of appeals considered and rejected the Utilities' claim that the Clean Air Act had displaced the States' and Land Trusts' cause of action under federal common law. At the time, EPA had not yet "regulate[d] [carbon dioxide] emissions from stationary sources" or even found that such emissions endangered the public health and welfare – a prerequisite to any regulation. App. 139a-140a. Reasoning that EPA's merely "proposed finding[s] ha[d] no effect in law," App. 140a, the court declined to hold that they displaced the common law remedy. It "express[ed] no opinion" on the effect that "actual regulation of greenhouse gas emissions under the [Clean Air Act] by EPA" would have on federal common law claims. App. 144a. It then rejected the Utilities' further claim that the federal common law remedy was displaced by other statutes that Congress had passed authorizing "research, reports, technology development, and monitoring" related to global warming. App. 154a.

SUMMARY OF ARGUMENT

I. The private action to enjoin a public nuisance is well established in the precedent of this Court and of other courts as well. The Utilities have raised threshold jurisdictional issues that the Court must decide before reaching the merits. Nevertheless, because such issues must be determined in light of the specific claims that a party presents, the Land Trusts first set forth the history and nature of their cause of action to provide the background necessary for those threshold determinations.

A. Courts of equity have heard public nuisance cases since at least the sixteenth century, and this Court has recognized nuisance principles as fundamental to the common law understanding of property. Public nuisance cases are discussed in Blackstone and other authorities, and were heard by early American courts. This Court itself heard public nuisance cases as early as 1838 and recognized their availability not only to the sovereign, but also to private parties who had suffered a special injury that distinguished them from the rest of the public.

State courts began to hear public nuisance cases arising from industrial water and air pollution by the mid-nineteenth century. This Court heard its first major water-pollution nuisance case in *Missouri v. Illinois*, 180 U.S. 208 (1901) ("*Missouri I*"), and its first major air-pollution case in *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) ("*Tennessee Copper I*") (Holmes, J.). With these cases, and others that followed them, the Court considered pressing problems of public health and safety that affected large numbers of people; involved expansive geographic areas affected by numerous pollution sources; and addressed then-novel scientific issues, such as acid

rain (as it is now called) and typhoid contamination in the Mississippi River.

B. In *Milwaukee I*, the Court held that public nuisance claims involving interstate pollution of water or air arise under federal common law. That holding is controlling precedent to which the Court should adhere. *Milwaukee I* is fully consistent with the principles that this Court has applied to recognize limited enclaves of federal common law: interstate pollution involves strong, uniquely federal interests, and also inevitably involves conflicting interests among the several states even where the parties to a particular case are private entities.

C. The Land Trusts have stated a claim for public nuisance. The emissions of carbon dioxide at issue in this case threaten massive harm to the public. Allowing the Land Trusts' suit to continue, moreover, would not open the door to suits by a limitless number of plaintiffs. The historical special injury rule was developed to prevent just such problems, and the Land Trusts meet the rigorous demands of that rule because the ecologically valuable property they have acquired for long-term conservation and public use is particularly vulnerable to global warming.

Nor would this case open the door to suits against a limitless number of defendants: the Utilities and TVA are the largest emitters of carbon dioxide in the United States. Few if any other potential defendants can match their enormous and avoidable contributions to global warming. Moreover, an equitable remedy for those contributions is not beyond judicial competence.

II. The Court need not consider either the Article III standing or the prudential standing of the Land Trusts. Because at least one State has standing, this

case may proceed. Nevertheless, the Land Trusts will address standing because the Court granted certiorari on that question.

A. The Land Trusts have Article III standing. The historical pedigree of the private cause of action for public nuisance brings it well within the judicial power of the United States as traditionally understood. Further, the Land Trusts are threatened by injury-in-fact to their property interests; that injury is traceable to the actions of the Utilities and TVA because their enormous volumes of emissions have contributed to the problem of global warming; and the Land Trusts' injury is redressable because an order requiring the Utilities and TVA to reduce their emissions would reduce or slow the injuries that otherwise threaten the Land Trusts. *Massachusetts v. EPA* further supports the Land Trusts' Article III standing. In fact, there is a *stronger* case for causation here than there was in that case because the relief the Land Trusts seek would decrease the Utilities' and TVA's emissions directly, without intervening administrative action.

The Utilities' argument that respondents cannot show causation is contrary to the accepted common law rule under which defendants may be held liable for contributions that add up to an injurious whole. Indeed, this Court recognized and applied that rule as a matter of federal common law in a pollution case as recently as 2009, in *Burlington Northern & Santa Fe Railway Co. v. United States*, 129 S. Ct. 1870 (2009). Because the Utilities directly contribute to the alleged injury, cases in which the Court has declined to find standing because of independent actions by third parties that break a causal chain do not apply here. Further, the Utilities' argument that

harms caused by global warming are not redressable fails because, as the Court recognized in *Massachusetts v. EPA*, the "reduc[tion] to some extent" of a "real" (though "remote") "risk of catastrophic harm" counts as meaningful relief. 549 U.S. at 526.

B. The Land Trusts also have prudential standing. They meet the requirements of the special injury rule, which in public nuisance cases serves the same function as prudential standing by narrowing the class of permissible plaintiffs. The Land Trusts have more than "generalized grievances" because they seek to protect their interests in particular properties that they acquired for purposes not shared by the public as a whole. Further, TVA's arguments invoking the generalized-grievance line of cases seek to stretch those cases beyond their bounds: each of those cases involved mere concerned citizens seeking to overturn government action, while this is a traditional common law action to protect property rights.

C. This case does not fall within the political question doctrine. There is no argument here that questions are textually committed to another branch. Rather, these claims are well within the historical scope of the judicial power. There is no initial policy decision that must be made, because the Land Trusts are merely invoking venerable common law rights. Nor is the case judicially unmanageable: the courts are competent to answer even difficult questions about what conduct may be enjoined to protect private landowners from special and irreparable injury.

III. The federal common law of public nuisance applicable to disputes over the pollution of interstate, ambient air has not been displaced by action under the Clean Air Act. Actual, not just possible, regula-

tion of the facilities and emissions at issue is necessary for displacement.

A. The Clean Air Act does not currently place any limits on the carbon dioxide emissions from the Utilities' and TVA's existing power plants. After *Massachusetts v. EPA*, EPA has acted to limit emissions from some sources of carbon dioxide – motor vehicles, and certain newly constructed or modified stationary sources – but those sources are not at issue in this case. The existing power plants that *are* at issue are not subject to any federal limit on their carbon dioxide emissions. EPA has begun a process that may lead to regulation of the carbon dioxide emissions of existing large power plants, but that regulation has not yet occurred and may never occur.

B. The Utilities' contention that the Clean Air Act displaces federal common law regulation without any need for agency action overreads *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) ("*Milwaukee II*"), which analyzed in detail the actual regulatory limits placed on discharges of sewage by the Clean Water Act before concluding that Congress and EPA had spoken directly to the regulation of those discharges and that no role remained for federal common law. The Court's careful approach cannot be squared with the Utilities' categorical argument that the mere existence of the Clean Air Act is enough. That Act of its own force places no limits on the Utilities' carbon dioxide emissions.

C. TVA's narrower argument that the particular regulatory activities that EPA has so far undertaken displace federal common law also misses the mark. The regulatory activity that TVA cites falls short of placing actual limits of any kind on the emissions of Utilities' or TVA's existing sources.

ARGUMENT

I. RESPONDENTS HAVE STATED A CLAIM UNDER THE FEDERAL COMMON LAW OF PUBLIC NUISANCE

The Land Trusts have stated a federal common law claim for public nuisance. The private action to enjoin a public nuisance has a long history; the circumstances in which a claim lies for interstate air and water pollution are firmly established by this Court's precedent, and those circumstances are present here. In beginning with this issue, the Land Trusts acknowledge that the question whether they have stated a claim goes to the merits of the action and that this Court must determine whether the present action is a case or controversy within the "judicial Power of the United States," U.S. Const. art. III, § 1, before it can reach the merits. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-102 (1998).[8]

Standing, however, is determined in light of "the specific common-law, statutory or constitutional claims that a party presents." *International Primate Prot. League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991). Similarly, as the Utilities agree (at 46), the argument that a case presents a political question requires a "discriminating inquiry into the precise facts and posture of the particular case." *Baker*, 369 U.S. at 217. Here, the Utilities'

---

[8] The Court may, however, turn to the merits of the case before addressing the prudential standing argument raised by TVA. *Cf. Steel Co.*, 523 U.S. at 96-97 (merits issues may be decided before statutory standing). Indeed, the Court need not address prudential standing at all because the issue was neither pressed before nor passed upon by the lower courts. *See infra* p. 42.

arguments against justiciability rest primarily on the limits of the traditional judicial role and the alleged lack of judicially manageable standards for resolving a case. The history and contours of the Land Trusts' common law cause of action rebut those arguments.

A. The Private Action for Public Nuisance Is Long Established by Precedent

1. A sovereign's action to enjoin a common or public nuisance traces to "at least as early as the sixteenth century [in] the English courts" and has been a "commonplace of jurisdiction in American judicial history." *United Steelworkers v. United States*, 361 U.S. 39, 60, 61 (1959) (Frankfurter & Harlan, JJ., concurring).[9] This Court has identified a "public nuisance action [as] a classic example of the kind of suit that relied on the injunctive relief provided by courts in equity." *Tull v. United States*, 481 U.S. 412, 423 (1987). It has further described the law of nuisance, including a state's "power to abate nuisances that affect the public generally," as one of the "background principles" that "define[s] the range of interests that qualify for protection as 'property'" in federal constitutional law. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029-30 (1992).

The definition of a public nuisance was traditionally broad. Blackstone, for example, identifies a "common nuisance" as "either the doing of a thing to the annoyance of all the king's subjects, or the

---

[9] *See also, e.g.*, 2 Joseph Story, *Commentaries on Equity Jurisprudence* § 921 (2d ed. 1839) ("In regard to public nuisances, the jurisdiction of Courts of Equity seems to be of a very ancient date; and has been distinctly traced back to the reign of Queen Elizabeth."); Robert Henley Eden, *A Treatise on the Law of Injunctions* 224-25 (1821) (discussing *Bond's Case*, Moore 238 (1587)).

neglecting to do a thing which the common good requires." William Blackstone, 4 *Commentaries* *167. Case-by-case development gave the law of nuisance more specific content. Among other things, Blackstone describes as nuisances obstructions of "highways, bridges, and public rivers" and "offensive trades and manufactures" that cause injury to the public generally. *Id.* He also includes examples of environmental nuisances, such as placing "a smelting house for lead so near the land of another, that the vapor and smoke kills his corn and grass and damages his cattle"; failing to "scour a ditch . . . whereby [another's] land is overflowed"; and "corrupt[ing] or poison[ing] a water-course." 3 *Commentaries* *217-18.[10]

Most actions for public nuisance were brought by the sovereign – indeed, originally, public nuisance was a common law misdemeanor. As early as 1536, however, the English courts recognized that "a tort action could be maintained by a person who could show that he had suffered particular harm, over and above that caused to the public at large." Restatement (Second) Torts § 821C cmt. a (1979) (citing an anonymously reported case from 1536); *see* William L. Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 1004-07 (1966) (describing the history of this requirement). This need for a greater harm than that caused to the public is commonly referred to as the "special injury" rule.

---

[10] The smelting-house, flooding, and water-poisoning examples appear in Blackstone's discussion of nuisances to private individuals. He makes clear that such private nuisances become public ones when the offensive conduct is "detrimental to the public" as a whole. 4 *Commentaries* *167.

Both the action for public nuisance and the special injury rule that limited the class of plaintiffs who could bring such actions were adopted by early American cases. By 1838, this Court pronounced it "settled[] that a court of equity may take jurisdiction in cases of public nuisance, by an information filed by the attorney general," and recognized that a private party could invoke that jurisdiction if (but only if) he "aver[red] and prove[d] some special injury." *Mayor of Georgetown v. Alexandria Canal Co.*, 37 U.S. (12 Pet.) 91, 98, 99 (1838) (citing *Corning v. Lowerre*, 6 Johns. Ch. 439 (N.Y. Ch. 1822) (Kent, Ch.)); *see also Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 566 (1852) ("[A] public nuisance is also a private nuisance, where a special and an irremediable mischief is done to an individual.").

2. This Court's earliest public nuisance cases, including *Alexandria Canal* and *Wheeling & Belmont*, involved obstruction of interstate waterways. During the second half of the nineteenth century, numerous American courts applied the law of public nuisance to cases in which private actors contributed to air and water pollution.

In *Woodyear v. Schaefer*, 57 Md. 1 (1881), the Maryland Court of Appeals held a slaughterhouse liable for public nuisance when it discharged blood into a public river, contributing to an "atmosphere filled with [a] stench [that] [wa]s not only disagreeable and uncomfortable to health, but . . . caus[ing] and tend[ing] to create disease." *Id.* at 5. Similarly, in *People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138 (1884), the California Supreme Court held a mining company liable for public nuisance because it had been "dump[ing] . . . debris into [a] river, to the endangerment of habitation and cultivation of large

tracts of country, upon which are cities, towns, and villages, and to the impairment of . . . navigation." *Id.* at 146.[11]

In *Missouri I*, this Court recognized and itself applied for the first time "'the general rule which gives to a person injured by the pollution of air or water, to the use of which, in its natural condition, he is entitled, an action against the party . . . who causes that pollution.'" 180 U.S. at 247 (quoting *Chapman v. City of Rochester*, 110 N.Y. 273, 277 (1888)). *Missouri I* involved the discharge of sewage from Chicago into the Mississippi River, which the State of Missouri believed would "poison the water supply of the inhabitants of Missouri, and injuriously affect th[e] portion of the bed or soil of the Mississippi river . . . within [Missouri's] territory." *Id.* at 243. The Court overruled Illinois' demurrer, holding that Missouri had stated a claim for public nuisance. *See id.* at 248-49. After hearing evidence, including descriptions of what it called "the most ingenious experiments, . . . [and] subtle speculations, of modern science," the Court concluded that Missouri had failed to prove its allegations and ruled for Illinois on the merits. *Missouri v. Illinois*, 200 U.S. 496, 518, 526 (1906) ("*Missouri II*") (Holmes, J.).

---

[11] *See also, e.g.*, *Lockwood Co. v. Lawrence*, 77 Me. 297, 311 (1885) ("Nuisances and injuries affecting waters, including the obstruction, diversion or pollution of streams, afford frequent ground for equitable interference, on the principle of restraining irreparable mischief."); *Village of Pine City v. Munch*, 42 Minn. 342, 343 (1890) (holding the owners of a dam liable for public nuisance when they drained a pond so as to cause decomposing vegetable matter to "fill[] the air with malaria and miasma, which causes wide-spread sickness and death among the inhabitants of [a nearby] village").

In *Tennesee Copper I*, the Court considered a claim by Georgia "that the air over its territory should not be polluted on a great scale by sulphurous acid gas," produced by two private copper companies based in Tennessee. 206 U.S. at 238. The pollution threatened "damage on so considerable a scale to the forests and vegetable life, if not to health, within the plaintiff state, as to make out a case within the requirements of Missouri [I]." *Id.* at 238-39. Based on the evidence and the severity of the harm, the Court concluded that it had "no alternative to issuing an injunction." *Id.* at 239. After appointing a special master, the Court issued orders placing specific quantitative limits on one of the copper companies' emissions (the other had settled) to ensure "adequate relief." *Tennessee Copper II*, 237 U.S. at 477-78.

The Court has dealt with the merits of actions for public nuisance involving interstate environmental harm several times since *Tennessee Copper*. *See, e.g.*, *New York v. New Jersey*, 256 U.S. 296 (1921) (denying relief for New Jersey's discharge of sewage into New York Harbor); *New Jersey v. City of New York*, 283 U.S. 473 (1931) (enjoining New York City's discharge of sewage into the ocean). State and federal courts have continued to decide many cases applying the common law principles of public nuisance to a variety of environmental harms. Those principles – and this Court's reasoning in *Missouri II* and *Tennessee Copper I* – also have significantly affected the field of international environmental law. *See Trail Smelter Case* (U.S. v. Can.), 3 Rep. Int'l Arb. Awards 1905, 1963-66 (U.N. Arb. Trib. 1941).

B. A Public Nuisance Claim for Ambient, Interstate Air or Water Pollution Arises Under Federal Common Law

1. In *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) (Brandeis, J.), a diversity case, this Court held that "[t]here is no federal *general* common law." *Id.* at 78 (emphasis added). But in a case decided the same day and written by the same author, the Court recognized that *specialized* federal common law applies to interstate disputes. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) ("[W]hether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive."). The Court has adhered to this principle that federal common law persists in certain "enclaves" that pose "intrinsically federal" problems, where permitting the law of a particular state to govern would "undermine the federal interest." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426-27 (1964) (giving examples).[12]

In *Milwaukee I*, this Court, relying on *Hinderlider*, held that common law claims dealing with "ambient or interstate" air or water pollution fall within one of those remaining enclaves of federal common law. 406 U.S. at 105 & n.7. "When we deal with air and

---

[12] *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004) ("[P]ost-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way."); Henry J. Friendly, *In Praise of* Erie – *And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 407 (1964) ("*Erie* caused the principle of a specialized federal common law . . . to develop within a quarter century into a powerful unifying force.").

water in their ambient or interstate aspects," the Court explained, "there is a federal common law." *Id.* at 103. The Court also interpreted *Tennessee Copper I*, "[t]he leading air case," as a proper, pre-*Erie* application of this specialized federal common law. *Id.* at 104. We know of no case that has suggested that *Milwaukee I*'s holding is not good law.

The Utilities nevertheless call *Milwaukee I*'s declaration that interstate pollution is an enclave of federal common law "plainly *dicta*" and urge this Court to "disavow" it. Pet. Br. 36-38 & n.11. They argue that, because *Milwaukee I* involved "conflicting rights of States," its holding should be limited to cases in which both parties are state entities. *Id.* at 36. They argue in the alternative that *Milwaukee I* should be read as authorizing federal common law only in the interstices of the Clean Water Act. *See id.* at 36-37.

The Utilities disregard this Court's actual words: "The question is whether pollution of interstate or navigable waters creates actions arising under the 'laws' of the United States within the meaning of [former 28 U.S.C.] § 1331(a). We hold that it does." 406 U.S. at 99. This express holding was necessary to the Court's result; the Court declined original jurisdiction because Illinois had the right to bring its suit in federal district court under federal question jurisdiction. *Id.* at 98, 108. "When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which [this Court is] bound." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996).

2. *Milwaukee I* was correct when decided and should not be cast aside. After *Erie*, the vast majority of nuisance law, like the vast majority of American common law, is state law. Federal common law

nevertheless still plays an important role in a few areas, such as where the "interstate or international nature of the controversy makes it inappropriate for state law to control." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 & n.13 (1981) (citing *Milwaukee I*). "[T]he control of interstate pollution," as one of those areas, "is primarily a matter of federal law." *Ouellette*, 479 U.S. at 492.[13]

There is a compelling federal interest in protecting the integrity of interstate water and air – an interest fully represented by no one state alone. The Utilities conceded this point below:

> Indeed, the Supreme Court has recognized that "air and water in their ambient or *interstate* aspects" are the concern of federal, not state, law. *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) ("*Milwaukee I*") (emphasis added). This is so not merely because it is inappropriate to allow any one State's law to govern a dispute between two States. States Br. at 49. It is also because the very interstate nature of the affected air or water creates "an overriding federal interest in the need for a uniform rule of decision or . . . touches basic interests of federalism." *Milwaukee I*, 406 U.S. at 105 n.6.[14]

---

[13] *See also Arkansas v. Oklahoma*, 503 U.S. 91, 98-101, 110 (1992) ("[W]e have long recognized that interstate water pollution is controlled by *federal* law."); *Milwaukee II*, 451 U.S. at 319 n.14 (federal common law applies where "problems requiring federal answers are not addressed by federal statutory law").

[14] Brief for Defendants-Appellees Cinergy Corporation and Xcel Energy, Inc. at 25, No. 05-5119-cv (2d Cir. filed Feb. 20, 2006) (omission in original). All the Utilities either joined the quoted brief or adopted its arguments. *See* Brief for Defendants-Appellees American Electric Power Company, Inc., American

In addition to that core federal interest, the use of federal common law also protects the states' interests – both dignitary and practical. As this Court has explained, the states retain "a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status." *Alden v. Maine*, 527 U.S. 706, 714 (1999). For this reason, "the federal courts play an indispensable role in maintaining the structural integrity of the constitutional design" because a "federal forum assures the peaceful resolution of disputes between the States." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 275-76 (1997) (plurality opinion). The Court's recognition in *Tennessee Copper I* that the common law rule it was applying was grounded in the "still remaining quasi-sovereign interests" of the states, 206 U.S. at 237, is accordingly a strong reason for that rule to be federal.

Federal common law does and should also govern claims brought by private litigants such as the Land Trusts here. Where the conflicting interests of different states justify the application of federal common law, it is unimportant whether the relevant states are nominal parties to the case. *See Milwaukee I*, 406 U.S. at 105 n.6 ("[I]t is not only the character of the parties that requires us to apply federal law."); *Empire HealthChoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 707, 709 (2006) (Breyer, J., dissenting) (discussing cases in which federal common law governs suits between "private parties"). *Hinderlider*, for example, was a suit brought by a Colorado corpo-

---

Electric Power Service Corporation, and Southern Company at 4, No. 05-5119-cv (2d Cir. filed Feb. 20, 2006); Brief of Defendant-Appellee Tennessee Valley Authority at 3 n.1, No. 05-5119-cv (2d Cir. filed Feb. 20, 2006).

ration against a Colorado state officer in the Colorado state courts; but because the suit involved the allocation of water between Colorado and New Mexico under an interstate compact, the Court applied federal common law. *See* 304 U.S. at 95, 110; *Sabbatino*, 376 U.S. at 427 ("[N]o State can undermine the federal interest in equitably apportioned interstate waters even if it deals with private parties.").

Further, in the absence of a public nuisance claim under *federal* common law, the same private parties would have *state* common law claims, which is why the Land Trusts pleaded such claims in the alternative. JA147-53 (¶¶ 105-126). *See Milwaukee II*, 451 U.S. at 313 n.7 ("If state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used."); *Ouellette*, 479 U.S. at 499 (holding that, after the Clean Water Act has displaced the federal common law of nuisance, the common law of the state of the source of the pollution still applies).[15] In a case such as this one, with a mixture of state and private parties, it would be anomalous if the district court had to consider whether the operation of the same power plants constituted a nuisance under multiple, potentially conflicting sources of law. Such a result would defeat the purpose of having uniform federal common law govern interstate issues.

3. The Utilities rely heavily on cases concerning this Court's modern, restrictive approach to the creation of new private rights of action in cases involving federal constitutional and statutory rights. *See* Pet.

---

[15] The Clean Water Act's savings clause that *Ouellette* held to preserve state common law remedies is virtually identical to the Clean Air Act's saving clause. *See Ouellette*, 479 U.S. at 497; *compare* 33 U.S.C. § 1370 *with* 42 U.S.C. § 7416.

Br. 32-33, 36 (citing, *e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001)). Those cases, however, dealt with an entirely different problem: the need to "interpret [a] statute Congress has passed to determine whether it displays an intent to create . . . a private remedy." *Sandoval*, 532 U.S. at 286. Here, it has been "settled" for centuries that a cause of action exists for public nuisance for a private party who "avers and proves some special injury." *Alexandria Canal*, 37 U.S. (12 Pet.) at 98, 99. And it has been settled for decades that interstate disputes generally and, under *Milwaukee I*, common law public nuisance cases involving interstate pollution in particular arise under federal law.

As we have explained, even if the Court were to depart from that settled precedent, *state* common law claims for public nuisance based on interstate pollution would continue to be litigated in both state and federal courts. *See supra* p. 26. The effect of *Milwaukee I* is thus not to create new litigation where none would have existed, but to enable the resolution of inevitable disputes under uniform law in a federal forum that treats the states as equals.

4. The Utilities further argue (at 39) that this Court's precedent has recognized federal common law claims only for "nuisances 'of simple type.'" That is not so. In *Missouri II*, Justice Holmes explained that there was "no pretense" that Missouri had advanced "a nuisance of the simple kind that was known to the older common law" – and then went on to discuss in exacting detail the "subtle" and "ingenious" evidence of "modern science," including a "striking experiment with typhoid germs suspended in the Illinois river in permeable sacs." 200 U.S. at 518, 522-26. The Court ultimately found that Missouri had not proven its

case, but the way in which it made that finding shows that it was not afraid to hear complex scientific evidence in a common law nuisance case.[16]

5. Finally, the Utilities claim (at 35-36) that *Tennessee Copper* rested on a "perceived constitutional necessity wholly lacking here" because it was decided "at a time when Congress was thought to lack the power" to regulate interstate pollution. They concede (at 36-37), as they must, that this theory cannot explain *Milwaukee I*, which is why they must urge this Court to disavow that case. They overlook, however, that it also cannot explain *Missouri II*, where the Court reached the merits of a public nuisance claim without deciding "whether Congress could act or not" to regulate the conduct at issue. 200 U.S. at 519. If the Court had thought that Congress's lack of power were a prerequisite to it hearing a nuisance claim, it would have decided that question first.

Indeed, the *Missouri II* Court explained that the possibility that Congress might lack power to act was a reason to be particularly cautious in hearing Missouri's claim, because it could mean that the Court's decision would "establish[] . . . a rule which would be irrevocable by any power except that of this court to reverse its own decision, an amendment of the Constitution, or possibly an agreement between the States, sanctioned by" Congress. *Id.* at 520. Here, where Congress undoubtedly can act to regulate the carbon

---

[16] Similarly, *New York v. New Jersey* includes a lengthy discussion of expert testimony concerning the levels of "dissolved oxygen" in the "water adjacent to New York City," which this Court described as "the best index or measure of the degree to which [water] is polluted by organic substances" under "the present state of learning." 256 U.S. at 311-12.

dioxide emissions at issue, that concern has no weight. The Utilities have their history backwards.

C. The Land Trusts State a Private Claim for Public Nuisance

1. The requirements of a cause of action for public nuisance arising from air or water pollution are straightforward: one who emits into the common air (as in *Tennessee Copper I*) or discharges into the common water (as in *Missouri I* or *New Jersey v. City of New York*) pollutants that endanger the public health or safety or that threaten property damage on a "great scale," *Tennessee Copper I*, 206 U.S. at 238, acts at risk of liability. These cases, and the many others that came before and after them, establish that massively harmful pollution is "an unreasonable interference with a right common to the general public" because it amounts to a "significant interference with the public health [and] the public safety." Restatement (Second) of Torts § 821B(1), 2(a); *see id.* § 826 cmt. e (discussing the "crystallization of legal opinion" that certain conduct is unreasonable as a "result of a series of judicial decisions"). Indeed, in *Washington v. General Motors Corp.*, 406 U.S. 109 (1972), decided the same day as *Milwaukee I*, the Court declared that "[a]ir pollution is . . . one of the most notorious types of public nuisance in modern experience." *Id.* at 114.[17]

---

[17] The Utilities' attack on the common law of nuisance relies heavily on *North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291 (4th Cir. 2010), *pet. for cert. pending*, No. 10-997 (filed Feb. 2, 2011), in which the Fourth Circuit held the nuisance laws of the source states at issue there did not extend beyond the emissions limits for sulfur dioxide and other traditional pollutants regulated under the federal Clean Air Act. *See id.* at 306-10, *cited in* Pet. Br. 5, 24, 39, 42. The Court will have its own opportunity

Modern public nuisance law also includes the traditional special injury rule: a suit to enjoin a public nuisance may be brought only by a public official, or by a private party who has "suffered harm of a kind different from that suffered by other members of the public." Restatement (Second) of Torts § 821C(1)-(2). This rule serves "to relieve the defendant of the multiplicity of actions that might follow, if everyone were free to sue for the common wrong." *Id.* cmt. a.[18]

2. The Utilities cannot and do not deny that global warming poses extraordinary risks to the public. This Court acknowledged in *Massachusetts v. EPA* that "[t]he harms associated with climate change are serious and well recognized," 549 U.S. at 521, and the scientific evidence supporting that conclusion has only grown more compelling since 2007. *See supra* pp. 5-7. Instead, the Utilities contend (at

---

to decide on the correctness of that case. Regardless, it is irrelevant here, where there are no federal statutory limits on the Utilities' and TVA's pollution. Moreover, it is a telling indication of how broadly the Utilities' argument sweeps that it would eliminate the nuisance cause of action even with respect to traditional pollutants of the kind involved in the *Tennessee Copper* cases, and even when they have contributed to premature deaths and widespread illness. *See* Pet. for Cert. at 26-27, No. 10-997.

[18] Where it is unclear whether particular conduct constitutes a public nuisance, the Second Restatement counsels also taking into account whether that conduct "is of a continuing nature or has produced a permanent or long-lasting effect" and whether the defendant "knows or has reason to know" of its conduct's "effect upon the public right." Restatement (Second) of Torts § 821B(2)(c) & cmt. e. As shown in the text, this case involves conduct that is firmly established as unlawful. Regardless, the Utilities and TVA did know of the long-lasting harm caused by their continuing conduct, *see* JA127, 133-34, 137 (¶¶ 33, 43, 56), and this further buttresses respondents' claims against them.

39) that, because there are so many contributors to the problem of global warming and because so many throughout the world will ultimately be harmed by it, the traditional common law rule would "result[] in an essentially limitless set of potential plaintiffs and defendants." These concerns are exaggerated.

The concern that a private cause of action for public nuisance would result in a limitless number of *plaintiffs* is as old as the action itself. *See* Prosser, 52 Va. L. Rev. at 1007 (describing the concern, stated "many times" in the cases, that "[d]efendants are not to be harassed, and the time of the courts taken up, with complaints about public matters from a multitude who claim to have suffered"); Blackstone, 3 *Commentaries* *219 ("[I]t would be extremely hard, if every subject in the kingdom were allowed to harrass the offender with separate actions."). The courts have addressed this concern through the "special injury" requirement, *see* Prosser, 52 Va. L. Rev. at 1007, which this Court recognized as part of a private action for public nuisance at least as early as *Alexandria Canal*.

The Land Trusts have properly alleged a special injury. They own types of property – coastal areas, riverfront property, marshes, estuaries, and other types of unique wildlife habitat – that are particularly vulnerable to global warming. JA143-44 (¶¶ 80-87). Their reason for acquiring that property, moreover, is the special purpose of permanently conserving that property for environmental and aesthetic purposes, public access and enjoyment, and scientific research, JA118, 139-40, 141 (¶¶ 5, 67, 74), all of which global warming will prevent them from pursuing – for example, by inundating their land under rising seas. As long-lived organizations whose pri-

vate property rights are permanently and inextricably bound up with public purposes, the Land Trusts are uniquely well-situated to claim a special injury from global warming.

3. The Utilities' argument that a private cause of action for public nuisance would result in a limitless number of *defendants* is a variation on the argument that a defendant should escape liability for contributing to a public nuisance because many others have done the same and because it is impossible to pick out any particular defendant's contribution. This position, too, has been long rejected:

> It is no answer to a complaint of nuisance that a great many others are committing similar acts of nuisance upon the stream. . . . Each standing alone, might amount to little or nothing. But it is when all are united together, and contribute to a common result, that they become important as factors, in producing the mischief complained of. . . . One drop of poison in a person's cup, may have no injurious effect. But when a dozen, or twenty, or fifty, each put in a drop, fatal results may follow.

Woodyear, 57 Md. at 9-10. Other nuisance cases (both public and private) take a similar position, as does the Second Restatement.[19]

---

[19] *See, e.g., Cox v. City of Dallas*, 256 F.3d 281, 292 n.19 (5th Cir. 2001) ("[N]uisance liability at common law has been based on actions which 'contribute' to the creation of a nuisance."); *Gold Run Ditch & Mining*, 66 Cal. at 144, 148 (following *Woodyear* in a case where defendant's waste was intermingled with a "vast amount" of waste from other polluters on a river and with "still other material which is the product of natural erosion") (collecting cases) (internal quotation marks omitted); Restatement (Second) of Torts § 840E & cmt. b (discussing liability for an "aggregate nuisance resulting from the contributions of all").

That common law rule has been recognized and reaffirmed by recent cases involving multiple polluters. Courts often resolve claims that a defendant has *contributed* to a pollution-based injury even though the defendant's conduct would not alone have *caused* that injury. The best example is the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"). CERCLA actions commonly involve very large numbers of potentially responsible parties, yet Congress left it to the judiciary to apply "'traditional and evolving principles of common law'" for responsibility in tort "'when two or more persons acting independently cause a distinct or single harm.'" *Burlington Northern*, 129 S. Ct. at 1881 (quoting *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808 (S.D. Ohio 1983), and Restatement (Second) of Torts §§ 433A, 881)) (alteration omitted).

Nor must the established principle of common liability for a collectively created nuisance be pushed to the absurd length that the Utilities suggest, so that "any entity on the planet could sue any other." Pet. Br. 19. "[T]he venerable maxim *de minimis non curat lex* ('the law cares not for trifles') is part of the established background of legal principles," *Wisconsin Dep't of Revenue v. William Wrigley, Jr.*, 505 U.S. 214, 231 (1992), and the district courts know how to apply it. The most recent Restatement of Torts adopts this maxim as a matter of proximate cause doctrine. *See* Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 36 (2010) ("[w]hen an actor's negligent conduct constitutes only a trivial contribution to a causal set that is a factual cause of harm," there is no liability).

In this case, the contribution of the Utilities and TVA to global warming is *not* trifling. When the complaint was filed, they were responsible for one-tenth of all carbon dioxide emissions of the United States and more than one-fiftieth of all human-caused carbon dioxide emissions. *See supra* p. 7. That is enough to make this case worth bringing and hearing.

4. The Utilities further contend that the federal common law of public nuisance should not extend to their conduct because "[d]ifferent jurists would . . . impose different forms of relief against different sources of greenhouse gas emissions." Pet. Br. 40 (citing App. 35a). That concern goes to the available remedy, not to liability; but any extended debate about remedy here would be premature, because the States and Land Trusts have not yet had an opportunity to make the record that would support it. Once that record is made, the burden will be on the States and Land Trusts to show the appropriateness of a particular remedy.

As the Court observed in *Missouri I*, however, "such observations are not relevant" on motion to dismiss. 180 U.S. at 248-49. Further, this is not a case in which the complaint shows on its face that no meaningful relief can be granted. On the contrary, the complaint alleges that the Utilities and TVA have "available . . . practical and economically viable options for reducing their carbon dioxide emissions without significantly increasing the cost of electricity to their customers." JA119 (¶ 9) (giving examples). If found liable, they should at a minimum be required to employ such measures.

The Utilities assert (at 15-16, 47-48) that respondents' public nuisance claims will require the district

court to set a reasonable level for *all* global emissions and then parcel out the needed reductions among nations and industrial sectors. That assertion is incorrect. The appropriate remedy will turn on the reasonable remedial measures that these particular defendants should be required to take, in light of evidence about their technological and economic capabilities and their past knowing contributions to an enormous public problem.

In *Tennessee Copper II*, this Court issued an injunction that it found would provide "adequate relief" without "ascertain[ing] with certainty" the full relief "necessary to render the territory of Georgia immune from injury." 237 U.S. at 477-78. A Court that in 1915 was able to provide relief against destructive sulfur dioxide emissions should not accept a century later the notion that providing meaningful relief against destructive carbon dioxide emissions is beyond judicial competence.

II. RESPONDENTS' CLAIMS ARE JUSTICIABLE

The Utilities and TVA argue that the claims brought by the States and the Land Trusts are not justiciable. The Utilities contend that all respondents lack standing under Article III, § 2 of the Constitution and also that this case presents a political question. Pet. Br. 16-29, 46-51. TVA concedes that at least some States have Article III standing, TVA Br. 25-33, but contends that all respondents lack prudential standing because they are seeking relief for "generalized grievances," TVA Br. 13-24; *see also* Pet. Br. 30-31. These arguments lack merit.

If the Court concludes that the States have standing, it need not address the standing of the Land Trusts. One respondent with standing to seek

injunctive relief is enough. *See, e.g., Secretary of the Interior v. California*, 464 U.S. 312, 319 n.3 (1984); TVA Br. 32-33. Nevertheless, the Land Trusts will address their own standing because it is among the questions on which the Court granted certiorari.

A. Respondents Have Article III Standing

1. The judicial power of the United States extends only to resolving "Cases" and "Controversies." U.S. Const. art. III, § 2. These terms take their meaning from a historical understanding of the kind of "cases and controversies [that have] traditionally [been] amenable to, and resolved by, the judicial process." *Steel Co.*, 523 U.S. at 102; *see Coleman v. Miller*, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.) (explaining that the "[j]udicial power . . . come[s] into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies'"). Because of these historical roots to the doctrines that have grown up around Article III, this Court has treated "history [as] well nigh conclusive" of the inquiry into standing when a particular type of action was indeed the traditional concern of the English courts. *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 777 (2000).

As we have shown in Part I.A, this case involves just the kind of long history that the Court found "well nigh conclusive" in *Vermont Agency*. Lawyers of the founding generation would have been thoroughly familiar with the concept of a public nuisance, which was established by many English cases and discussed in authoritative references. They would have been (as Chancellor Kent was in *Corning*) equally familiar and comfortable with the concept

that a private individual could seek relief for a public nuisance after showing a special injury. The Utilities face a daunting task in attempting to show that the application of this old law to new facts transgresses constitutional limits on the judicial role.

2. The Land Trusts' constitutional standing is confirmed by this Court's modern refinement of the test, which identifies three "requisite elements": (1) a "personal injury" that is (2) "fairly traceable to the defendant's allegedly unlawful conduct" and (3) "likely to be redressed by the requested relief." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (internal quotation marks omitted).

First, the Land Trusts have alleged "an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations and footnote omitted). The injury that the Land Trusts have alleged is damage to their property, a paradigm example of a concrete and particularized interest. *See, e.g., Hodel v. Irving*, 481 U.S. 704, 711 (1987) (holding that loss of a fractional property interest was injury-in-fact). Heightened levels of carbon dioxide already in the atmosphere will cause that property "actual and imminent" injury, *Massachusetts v. EPA*, 549 U.S. at 521 (internal quotation marks omitted): temperatures are increasing, ecosystems are changing, and sea levels are rising. Those injuries will only increase over time, perhaps catastrophically so. The Land Trusts' injury-in-fact is further supported by their special interest in preserving their properties permanently for conservation purposes and for public use. *See supra* pp. 31-32.

Second, the Land Trusts have alleged facts to show that their injury is fairly traceable to the unlawful conduct of the Utilities and TVA. Those entities "and their predecessors in interest have emitted large amounts of carbon dioxide from the combustion of fossil fuels for at least many decades," which "will remain in the atmosphere for many [more] decades, or even centuries." JA137 (¶ 56). The Land Trusts have further alleged that the Utilities and TVA have been increasing their emissions faster than the rest of the U.S. economy and will continue to do so in the future. JA136-37 (¶ 54). "Judged by any standard," the Utilities and TVA "make a meaningful contribution to greenhouse gas concentrations and hence," based on the facts alleged, "to global warming." *Massachusetts v. EPA*, 549 U.S. at 525.

Third, the same facts that establish causation further show that the Land Trusts' injuries would be redressed by judicial relief. Where, as here, "[t]he relief requested . . . [is] simply the cessation of the allegedly illegal conduct," the "'redressability' analysis is identical to the 'fairly traceable' analysis." *Allen v. Wright*, 468 U.S. 737, 759 n.24 (1984); *see* Pet. Br. 22 (citing *Allen*). The "enormity of the potential consequences associated with manmade climate change" weigh heavily in favor of a finding that even a small reduction in the "risk of catastrophic harm" satisfies the bare minimum constitutional requirement for standing. *Massachusetts v. EPA*, 549 U.S. at 525, 526. And there is "a substantial likelihood that the judicial relief requested will . . . reduce that risk." *Id.* at 521 (internal quotation marks omitted).

As TVA acknowledges (at 28-30), the Court's constitutional holding in *Massachusetts v. EPA*, where nearly identical allegations were held to satisfy

"the most demanding standards of the adversarial process," 549 U.S. at 521, provides ample support for traceability and redressability in this case. Indeed, the relationship between injury and remedy is tighter in this case than in that one: the Land Trusts seek substantive judicial relief that would *directly* restrain the largest emitters of carbon dioxide in the United States, rather than procedural relief to create "some possibility . . . [of] prompt[ing] . . . [EPA] to reconsider [its] decision" not to take regulatory action to reduce emissions. *Id.* at 518.

Accordingly, it makes no difference (as the Utilities contend, at 24-29) that there is no statutory remedy here, as there was in *Massachusetts v. EPA*. The special "'chain[] of causation'" that "'Congress ha[d] . . . articulate[d]'" in that case, 549 U.S. at 516 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)), was the chain between the "procedural right" to challenge agency action and the ultimate action that the agency might take, *id.* at 520. Here, the States and Land Trusts do not need to take those extra causal steps, so they do not need "special solicitude" to establish standing. *Id.*[20]

3. The Utilities argue (at 18) that the Land Trusts have failed to "allege [a] . . . direct connection between these defendants' emissions and the individual risks to which plaintiffs are allegedly exposed" and that without such an allegation the harm to the Land Trusts is not traceable to the Utilities' conduct.

---

[20] For the same reason, it also does not matter that the Land Trusts lack the "quasi-sovereign" interest that Massachusetts had in protecting its state-owned lands. *Massachusetts v. EPA*, 549 U.S. at 520. To be sure, the States *do* have that same quasi-sovereign interest here.

What the Utilities appear to mean is that, if they were the only emitters of carbon dioxide in the world, their emissions would not alone cause significant global warming, *see id.* at 19-20; they say this fact creates a constitutional barrier to relief.

There is not and should not be any such rule, constitutional or otherwise. As we have explained, the common law of public nuisance recognizes that the courts may adjudicate claims for a defendant's *contribution* to a cognizable injury, and federal courts frequently apply that law in pollution cases. *See supra* pp. 32-34 & n.19.

The Utilities acknowledge this rule, but attempt to distinguish it on the ground that the common law requires "a plausible inference that all [contributors] might be 'substantial factors' in causing the injury." Pet. Br. 20 n.4 (citing Restatement (Second) of Torts §§ 432, 840E, 875). But liability for contribution to a nuisance lies even when any single actor's contribution would be "harmless in itself" and even when the nuisance has already "reached the point where it causes . . . serious interference with the rights of those who use the water" before that contribution is made. Restatement (Second) of Torts § 840E cmt. b; *see id.* (giving the example of one who "pollute[s] a stream to only a slight extent") What the Utilities seek is thus to "raise the standing hurdle higher than the necessary showing for success on the merits in an action," which this Court has declined to do. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

Cases in which alleged harm was caused by "the unfettered choices made by independent actors not before the courts," *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (plurality opinion), *quoted in* Pet. Br.

21, do not help the Utilities. Those cases sought relief against government defendants who had not themselves injured the plaintiffs; instead, their conduct had allegedly affected the conduct of third parties who had caused injury. *See id.* Because those plaintiffs could not show that the relief they sought would *actually* affect the third party's actions, they could not establish standing.[21] No such intervening causes are present here, where the Utilities themselves are adding to the atmosphere hundreds of millions of tons of carbon dioxide yearly, contributing to the general injury to the public and the special injuries to the Land Trusts.

The Utilities also argue (at 23-24) that, because the States and Land Trusts seek to compel them only to do their "share" to slow or reduce global warming, the alleged harm is not judicially redressable. This argument exactly parallels one that was rejected in *Massachusetts v. EPA*. *See* 549 U.S. at 526 ("The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced to some extent if petitioners received the relief they seek."). And that holding is consistent with precedent that permits a suit for injunctive relief against a contribu-

---

[21] *See Lujan*, 504 U.S. at 570-71 (plurality opinion) (rejecting a suit by environmental groups that would have decreased U.S. funding for projects that injured endangered species, but not necessarily stopped the projects); *ASARCO*, 490 U.S. at 614-15 (plurality opinion) (rejecting a suit by state teachers against the Arizona Land Department to invalidate mineral leases because doing so would not necessarily have caused Arizona to spend more money on education); *Allen*, 468 U.S. at 757-59 (rejecting a suit by parents of schoolchildren to invalidate tax exemptions for racially discriminatory schools because the schools would not necessarily have changed their policies in response).

tor to a nuisance even when all the other contributors are not joined.

B. Respondents Have Prudential Standing

This Court need not and should not address TVA's contention that the States and Land Trusts lack prudential standing. That contention was "neither pressed nor passed upon below." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 224 (1990) (plurality opinion). Nevertheless, the Land Trusts will address the issue because TVA makes the argument at length and because this Court has occasionally considered prudential standing for the first time after granting certiorari. *See, e.g., Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11-18 (2004).

1. As TVA observes (at 14), the principle that the federal courts will decline as a prudential matter to hear claims that would require "adjudication of generalized grievances more appropriately addressed in the representative branches," *Allen*, 468 U.S. at 751, is "closely related to Art[icle] III concerns," *Newdow*, 542 U.S. at 12 (internal quotation marks omitted). The historical answer to the Utilities' constitutional standing objection, *see supra* pp. 36-37, thus has equal force in response to TVA's prudential argument. Further, the special injury rule evolved specifically to address concerns about a "multiplicity of potential litigants," TVA Br. 17, much like the concerns underpinning prudential standing. The Land Trusts' ability to meet that requirement, *see supra* pp. 31-32, answers whatever concerns may remain.

2. In any event, the injury the Land Trusts seek to prevent is not "generalized": rather, their concern is that the particular property they own will be damaged by global warming and that this will interfere with their particular mission to preserve this proper-

ty for future generations. That injury is not common to all citizens or even to all landowners. Even among those private landowners who own land that they have specially committed to preserve, the character and degree of the injury varies. It is not "undifferentiated and common to all members of the public." *United States v. Richardson*, 418 U.S. 166, 176-77 (1974) (internal quotation marks omitted).

The dissent in *FEC v. Akins*, 524 U.S. 11 (1998), which took a more demanding view of standing than did the majority, made this point very clear. *See id.* at 35 (Scalia, J., dissenting) ("One tort victim suffers a burnt leg, another a burnt arm – or even if both suffer burnt arms they are *different* arms. . . . With the generalized grievance, on the other hand, the injury or deprivation is not only widely shared but it is *undifferentiated*."). Just so here: global warming may cause landowners other than the Land Trusts to suffer the loss of *different* property, but the Land Trusts will be the only ones to suffer damage to the particular land they are charged with preserving.

3. TVA's contention that the respondents in this case lack prudential standing is unsupported by precedent and seeks a dramatic extension of that doctrine. TVA cites no case in which this Court has applied the rule against generalized grievances to bar any common law claim. Instead, that rule limits the plaintiffs who can assert constitutional and statutory challenges to government action, by prohibiting "undifferentiated, generalized grievance[s] about the conduct of government," where "[t]he only injury plaintiffs allege is that the law . . . has not been followed." *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (per curiam).

TVA asserts in a footnote (at 21 n.7) that the rule it seeks is distinct from the rule applied in *Lance*, conceding that "plaintiffs are not asserting the 'generalized' interest of a taxpayer or citizen in having the government follow the law." But, if TVA is not relying on *Lance* and its predecessors, then it appears to be asking the Court to invent a new doctrine without justification. Conduct-of-government cases are the only generalized-grievance cases there are. Prudential standing has never been, and should not be, an open-ended inquiry into whether a judge thinks that a particular claim of private right has such broad-reaching consequences that the plaintiff should go to Congress and not to court.

C. Respondents' Claims Raise No Political Question

In *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), involving international and interstate pollution of Lake Erie with mercury, the Court specifically distinguished interstate pollution cases from "political questions" and held that under *Tennessee Copper I* and other interstate pollution cases, the judiciary is "empowered to resolve this dispute in the first instance." *Id.* at 496 (internal quotation marks omitted). Undeterred, the Utilities contend (at 46-51) that this case falls within the political question doctrine. That doctrine applies primarily when the text of the Constitution commits the resolution of an issue to one of the representative branches of government, rather than to the courts. *See Nixon v. United States*, 506 U.S. 224, 228 (1993) ("[T]he courts must, in the first instance, interpret the text in question and determine whether and to what extent the issue is textually committed.").

The Utilities press no claim of such a textual commitment before this Court. On the contrary, a common law public nuisance claim fits comfortably within the traditional definition of a "Case" or "Controversy." *See supra* p. 36. Accordingly, "the textual commitment factor actually weighs in favor of resolution by the judiciary." *Lane v. Halliburton*, 529 F.3d 548, 560 (5th Cir. 2008).

Both in theory and as applied, the political question doctrine "is purposely very narrow in scope." *Zivotofsky v. Secretary of State*, 571 F.3d 1227, 1236 (D.C. Cir. 2009), *pet. for cert. pending*, No. 10-699 (filed Nov. 24, 2010). A case does not present a political question merely because it has "great importance to the political branches" or "has motivated partisan . . . debate." *United States Dep't of Commerce v. Montana*, 503 U.S. 442, 458 (1992). Nor is it sufficient that a case exhibit "interplay . . . [with] the conduct of this Nation's foreign relations" or "have significant political overtones." *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986). So long as the case involves a "characteristic role[]" of the judiciary such as "interpret[ing] statutes," *id.*, it remains justiciable. Deciding common law claims is certainly consistent with the traditional judicial role.

The Utilities contend that this case requires an "'initial policy determination'" that has not yet been made. Pet. Br. 47 (quoting *Baker*, 369 U.S. at 217). That is hard to square with their claim two pages earlier that Congress has already made all the relevant "basic policy choices," *id.* at 45, but even taken on its own terms the claim is incorrect. The policy decision relevant to a common law claim for public nuisance was made long ago, when the courts first recognized such claims.

The Utilities further contend that this case exhibits a lack of "'judicially discoverable and manageable standards.'" *Id.* at 47 (quoting *Baker*, 369 U.S. at 217). But the standards for determining liability for public nuisance are a matter of established precedent, *see supra* pp. 29-31, and have repeatedly been applied to sources of pollution that threaten health and property, *see supra* pp. 19-21. As for the remedy, the "considerations that equity always takes into account," *Tennessee Copper I*, 206 U.S. at 238 (Holmes, J.), are nothing if not judicially manageable. *See supra* pp. 34-35 (discussing possible remedies in this case).

III. RESPONDENTS' FEDERAL COMMON LAW CLAIMS HAVE NOT BEEN DISPLACED

Both the Utilities and TVA contend that the States' and Land Trusts' federal common law claims have been displaced, but they do so based on strikingly different theories. The Utilities argue that any federal common law claims for air pollution have been categorically displaced by the mere existence of the Clean Air Act, whatever EPA may or may not do. Pet. Br. 40-46. TVA argues that the Court need not reach that broader question but should instead determine that EPA's particular regulatory actions regarding carbon dioxide have displaced respondents' claims, TVA Br. 42-53, though those actions have not yet limited emissions by the Utilities or by TVA.

The Utilities' broad argument is wrong and misreads *Milwaukee II*, the case on which the Utilities principally rely. TVA's narrower claim is premature.

A. Neither the Clean Air Act nor EPA Regulations Presently Limit Petitioners' Emissions

The Clean Air Act contains mechanisms under which EPA can potentially regulate emissions of carbon dioxide by an existing stationary source such as a power plant. None of these mechanisms has yet been used to regulate the Utilities' or TVA's existing stationary sources.

This Court's decision in *Massachusetts v. EPA* established that carbon dioxide is an "air pollutant" within the meaning of § 302(g) of the Act, 42 U.S.C. § 7602(g). That case concerned EPA's obligations to address carbon dioxide and other greenhouse gas emissions from new motor vehicles under § 202 of the Act, 42 U.S.C. § 7521. The Court remanded for EPA to consider the scientific evidence and decide whether emissions of these pollutants from new vehicles "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." *Id.* § 7521(a)(1). EPA made a two-part determination in December 2009 (1) that greenhouse gas emissions accumulated in the atmosphere endanger both public health and welfare, and (2) that emissions of those pollutants from new motor vehicles contribute to the accumulation of dangerous air pollution in the atmosphere.[22] EPA then promulgated greenhouse gas emission standards for light-duty motor vehicles.[23]

---

[22] EPA, Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009).

[23] EPA, Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010).

These motor vehicle emission standards triggered two other provisions of the Act, neither of which limits carbon dioxide emissions from existing power plants. Under § 165 of the Act, 42 U.S.C. § 7475, the construction of *new* and *modified* "major emitting facilities" is prohibited without a permit containing an emission limitation reflecting the best available control technology "for each pollutant subject to regulation under this chapter." *Id.* § 7475(a)(4). Beginning on January 2, 2011 (when the motor vehicle standards took effect), carbon dioxide became "subject to regulation" for purposes of that program. None of the existing facilities at issue here will be affected by § 165, however, unless the Utilities or TVA make "major modification[s]" to them.[24]

EPA's vehicle greenhouse gas emission standards also affect the requirement that major stationary sources obtain "operating permits" under Title V of the Act. 42 U.S.C. § 7661a. The agency imposes no substantive requirements when issuing a Title V operating permit: such a permit merely compiles pre-existing requirements established under other parts of the Act, serving as an aid to their enforcement. The existing power plants operated by the Utilities and TVA already have Title V operating permits compiling pre-existing emissions limitations for long-regulated pollutants such as sulfur dioxide, nitrogen oxides, and particulate matter. Until they are subjected to actual limitations on their carbon

---

[24] A "major modification" for these purposes is "any physical change in or change in the method of operation of a major stationary source that would result in: a significant emissions increase . . . of a regulated NSR pollutant . . . ; and a significant net emissions increase of that pollutant from the major stationary source." 40 C.F.R. § 51.166(b)(2).

dioxide emissions by some other provision of the Act, their Title V permits will not need to be changed and will not limit carbon dioxide emissions.

EPA's principal pathway for regulating carbon dioxide emissions from existing power plants under the Clean Air Act is by imposing performance standards under § 111 of the Act, 42 U.S.C. § 7411. Under § 111, EPA defines a list of categories of stationary sources that in the Administrator's judgment "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare" and sets emission levels for specific pollutants from new or modified sources based on a determination of what is achievable using the "best system of emission reduction" available. *Id.* § 7411(a)(1), (b)(1)(A). Under § 111(d)(1), EPA also (in coordination with the states, and with exceptions not applicable here) sets similar performance standards for *existing* sources in the listed categories, weighing factors including sources' "remaining useful lives." *Id.* § 7411(d)(1).

Power plants have been a listed category since 1971, but EPA has set § 111 performance standards to date only for a few pollutants such as sulfur dioxide, nitrogen oxides, and particulate matter. EPA has not yet established § 111 standards that limit emissions of carbon dioxide. It has, however, recently agreed in a settlement of other litigation to initiate a rulemaking in which it will *consider* whether to do so. *See* TVA Br. 10, 50-51. The settlement commits EPA to complete a rulemaking process covering existing power plants by May 2012. If EPA acts, states would then be obligated to establish and implement emission standards for their existing

power plants – or, if the states do not act, EPA will step in. *See* 42 U.S.C. § 7411(d)(2)(B).

Under the settlement, however, EPA is not obliged to promulgate carbon dioxide emission limitations either for new and modified power plants or for existing plants. EPA has retained the option of not ultimately issuing any such standards.

Further, the settlement expressly depends on the availability of appropriated funds, recognizing that Congress could deny EPA funding to regulate carbon dioxide. Language that would have done so was included in a recent appropriations bill that passed the House of Representatives on February 19, 2011, *see* H.R. 1, 112th Cong., div. B, tit. VII, § 1746, at 276-77 (2011), but was not adopted by the Senate. Though that funding rider was not enacted, it illustrates the real possibility that EPA's current efforts, though undertaken in good faith, may come to nothing. It would be inappropriate, for the purposes of displacement, simply to assume that emissions standards will be forthcoming.

B. The Clean Air Act Does Not of Its Own Force Displace Respondents' Claims

1. Congress displaces federal common law when it "'speak[s] directly to a question'" that common law would otherwise govern. *Milwaukee II*, 451 U.S. at 315 (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). But common law remains in place when "problems requiring federal answers are not addressed by federal statutory law." *Id.* at 319 n.14.

In *Milwaukee II*, this Court held that, because the sewage discharges that gave rise to the cause of action in *Milwaukee I* had been "thoroughly addressed through the administrative scheme established by

Congress," that cause of action was displaced. *Id.* at 320. The Clean Water Act, the Court found, had already put in place a specific permitting mechanism for controlling the problem that Illinois had alleged to be a public nuisance. That mechanism had already led to judicial relief including an order that any overflows be abated – relief practically identical to what would have been available in a public nuisance action. *See County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 239 (1985) (observing that *Milwaukee II* relied on the "specific remedial provisions contained in" the Clean Water Act).

Under these circumstances, it is unsurprising that the Court concluded that Illinois' attempt to renew its nuisance claim rested fundamentally on a belief that "the permits issued to petitioners under the Act do not control overflows or treated discharges in a *sufficiently stringent* manner," *Milwaukee II*, 451 U.S. at 324 n.18 (emphasis added), and declined to allow Illinois to proceed. As the Court put it in *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), the problem in *Milwaukee II* was that "plaintiffs' common law nuisance claims amounted to arguments for effluent-discharge standards different from those" of the Clean Water Act. *Id.* at 489 n.7.

2. This Court's decision in *Massachusetts v. EPA* held that the Clean Air Act authorizes EPA to regulate carbon dioxide. That decision by itself, however, imposed no limits on carbon dioxide emissions even from mobile sources such as automobiles, let alone from existing stationary sources such as power plants. Rather, it remained for EPA to make endangerment and contribution findings and establish emission standards under § 202(a) of the Clean Air Act before any constraint was imposed even on

automobile manufacturers. Until EPA issues performance standards applicable to existing power plants, carbon dioxide emissions from the Utilities' and TVA's existing plants will remain unregulated. *See supra* pp. 46-50.

The Utilities contend (at 45) that EPA's mere "authority . . . to make regulatory decisions" displaces federal common law remedies. That goes far beyond *Milwaukee II*. Indeed, in that case this Court emphasized that under the Clean Water Act "*[e]very* point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals." 451 U.S. at 318 (footnote omitted). The Clean Air Act contains no similar prohibitions. It allows existing-source emissions to continue without limitation until they are restricted by affirmative agency action; in this case, by performance standards that the agency may issue (but has not yet issued) under § 111.

C. Regulatory Action by EPA Has Not Yet Displaced Respondents' Claims

TVA suggests that, whether or not the Clean Air Act itself displaces federal common law claims, EPA's recent actions have increased the level of agency involvement enough for displacement. That would be premature. Displacement will occur only when federal standards govern the emission of carbon dioxide from existing power plants. Only then will Congress and EPA have "'spoke[n] directly to [the] question,'" *Milwaukee II*, 451 U.S. at 315, and provided a "uniform standard" for "dealing . . . with the environmental rights of a State against improper impairment by sources outside its domain" that removes the

need for federal common law, *Milwaukee I*, 406 U.S. at 107 n.9 (internal quotation marks omitted).[25]

First, TVA states that, as a collateral consequence of the action EPA has taken on motor vehicles, any "new or modified 'major emitting facility'" must now obtain a permit under § 165 that includes the best available control technology for carbon dioxide. TVA Br. 47-48 & n.21 (quoting 42 U.S.C. § 7475(a)). As of this writing, however, the Land Trusts know of no existing facility operated by the Utilities or TVA that has been modified since January 2, 2011. Any constraints stemming from § 165 will affect only those power plants that are modified in the future and will never affect the vast majority of existing power plants that merely continue current operations.

Second, TVA states, that as another collateral consequence of EPA's motor-vehicle action, the power plants at issue are now "subject to the permitting requirements under Title V of the" Clean Air Act. TVA Br. 48. TVA overstates its case. As we have explained, unlike discharge permits under the Clean Water Act, Title V permits are compilations of pre-existing requirements; they do not limit carbon dioxide emissions. *See supra* p. 48.

---

[25] *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), is not to the contrary. TVA contends that the statute in *Sea Clammers* displaced federal common law even though it allowed "'continued dumping of sludge' for nine years after" its enactment. TVA Br. 52 (quoting *Sea Clammers*, 453 U.S. at 22 n.32). But dumping during those nine years required a permit, *see* 453 U.S. at 12, which under *Milwaukee II* was enough to displace. After that time, EPA was directed to end sludge dumping *completely*. *See id.* at 9 n.14. Accordingly, *Sea Clammers* does not establish that federal common law may be displaced by a regulatory regime that does not yet regulate.

Third, TVA also states that EPA intends to complete a rulemaking by May 26, 2012, that may lead to limits on existing facilities' emissions of carbon dioxide under § 111 of the Act. TVA Br. 51 & n.25. As TVA itself concedes, one possible outcome of that process is that EPA will *not* impose any limits, or even decide whether limits would be appropriate. Among other things, Congress may decline to fund EPA's rulemaking without changing the underlying substantive law. *See supra* pp. 49-50. Congress also might remove EPA's authority to regulate carbon dioxide entirely.[26] What, if anything, such legislative actions would do to federal common law causes of action for air pollution would depend on what Congress said and how.

Adopting a turn of phrase suggested by the Solicitor General, this Court once wrote that the repeal of a statute cannot "leave behind a pre-emptive grin without a statutory cat." *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 504 (1988). This case involves a claim that the pre-emptive grin *precedes* an *anticipated* regulatory cat. Displacement of federal common law is appropriate when, and only when, some substantive rule of regulatory law arrives to displace it. "[U]ntil that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water" – and no less air – "pollution." *Milwaukee I*, 406 U.S. at 107.

CONCLUSION

The judgment of the court of appeals should be affirmed.

---

[26] *See, e.g.*, Energy Tax Prevention Act of 2011, H.R. 910, 112th Cong. (introduced Mar. 3, 2011).

Respectfully submitted,

MICHAEL K. KELLOGG
GREGORY G. RAPAWY
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

MATTHEW F. PAWA
Counsel of Record
LAW OFFICES OF
MATTHEW F. PAWA, P.C.
1280 Centre Street
Suite 230
Newton Centre, MA 02459
(617) 641-9550

DAVID D. DONIGER
GERALD GOLDMAN
NATURAL RESOURCES
DEFENSE COUNCIL
1200 New York Avenue, N.W.
Washington, D.C. 20005
(202) 289-6868

March 11, 2011

RESPONDENT'S BRIEF

No. 10-174

SUPREME COURT, U.S.
FILED
MAR 16 2011
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY INC., ET AL.,

Petitioners,

v.

STATE OF CONNECTICUT, ET AL.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS CONNECTICUT, NEW YORK, CALIFORNIA, IOWA, RHODE ISLAND, VERMONT, AND THE CITY OF NEW YORK

ERIC T. SCHNEIDERMAN
Attorney General of New York

BARBARA D. UNDERWOOD*
Solicitor General
BENJAMIN N. GUTMAN
Deputy Solicitor General
MONICA WAGNER
Assistant Solicitor General
MICHAEL J. MYERS
MORGAN A. COSTELLO
ROBERT ROSENTHAL
Assistant Attorneys General
120 Broadway, 25th Floor
New York, NY 10271
(212) 416-6351
barbara.underwood@ag.ny.gov

* *Counsel of Record*

Additional attorneys listed on inside cover.

GEORGE JEPSEN
Attorney General of Connecticut
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120

KAMALA D. HARRIS
Attorney General of California
P.O. Box 70550, 1515 Clay Street
Oakland, CA 94612-0550

THOMAS J. MILLER
Attorney General of Iowa
1305 E. Walnut Street
Des Moines, IA 50319

PETER F. KILMARTIN
Attorney General of Rhode Island
150 South Main Street
Providence, RI 02903

WILLIAM H. SORRELL
Attorney General of Vermont
109 State Street
Montpelier, VT 05609-1001

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
100 Church Street
New York, NY 10007

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether plaintiff States have standing to sue defendants for the common-law tort of public nuisance when the complaint alleges that defendants' power plants are causing or threatening harm to the States' property and natural resources and to the health and welfare of their citizens, and that reducing defendants' carbon-dioxide emissions will reduce the risk and magnitude of these injuries.

2. Whether plaintiffs' federal common-law nuisance claims can be resolved on the basis of judicially manageable standards, without implicating constitutional separation-of-powers concerns that would require dismissal of the claims as nonjusticiable political questions.

3. Whether plaintiffs have federal common-law nuisance claims that are not displaced by the federal Clean Air Act, 42 U.S.C. § 7401 et seq., when the Act does not place any limits on, or otherwise address, defendants' carbon-dioxide emissions.

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT 3

SUMMARY OF ARGUMENT 8

ARGUMENT 11

I. PLAINTIFFS HAVE STANDING TO SUE 11

A. Plaintiffs' allegations of injury and causation suffice to establish Article III standing at this stage 11

1. It is uncontested that the States have adequately alleged concrete injuries 12

2. The States have sufficiently alleged that their injuries are fairly traceable to defendants' emissions 14

Table of Contents

Page

3. The States have sufficiently alleged that a ruling awarding them injunctive relief would redress the States' injuries 16

4. The States' standing here is even more firmly established than in Massachusetts 18

B. In light of the States' showing of concrete injury, there are no prudential limitations that require dismissal of the case 23

1. The generalized-grievance doctrine is part of Article III, not prudential, standing 23

2. The States' claims are not generalized grievances 25

II. THE POLITICAL-QUESTION DOCTRINE DOES NOT BAR ADJUDICATION OF PLAINTIFFS' COMMON-LAW CLAIMS 27

A. The political-question doctrine is limited to constitutional issues and foreign affairs, neither of which are present here 27

B. The *Baker v. Carr* factors do not bar adjudication of plaintiffs' claims 31

Table of Contents

Page

III. THE FEDERAL COMMON LAW ENCOMPASSES PLAINTIFFS' PUBLIC-NUISANCE CLAIMS AND HAS NOT BEEN DISPLACED BY THE CLEAN AIR ACT OR REGULATORY ACTIONS TAKEN BY EPA 37

A. Plaintiffs' claims arise under federal common law 37

1. There is a federal common law of public nuisance 37

2. The federal common law of public nuisance encompasses the claims here 42

B. Neither the Clean Air Act nor the limited regulatory actions taken by EPA displace plaintiffs' federal common-law claims 46

1. The Clean Air Act does not itself address the public nuisance alleged by plaintiffs 48

2. EPA's regulatory actions have not addressed the public nuisance alleged here 49

CONCLUSION 54

TABLE OF CITED AUTHORITIES

Page

CASES

Alexander v. Sandoval,
532 U.S. 275 (2001) 41

Allen v. Wright,
468 U.S. 737 (1984) 19, 21

Alliant Energy Corp. v. Bie,
277 F.3d 916 (7th Cir. 2002) 19

Arkansas v. Oklahoma,
503 U.S. 91 (1992) 38

ASARCO, Inc. v. Kadish,
490 U.S. 605 (1989) 20

Ashcroft v. Iqbal,
129 S. Ct. 1937 (2009) 14

Baker v. Carr,
369 U.S. 186 (1962) 27, 28, 29, 31

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 11

Bennett v. Spear,
520 U.S. 154 (1997) 19, 23

Blakely v. Washington,
542 U.S. 296 (2004) 46

Cited Authorities

	Page
Boim v. Holy Land Found. for Relief & Dev., 549 F.3d 685 (7th Cir. 2008)	15
Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932)	31
California v. Gen. Motors Corp., No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), *appeal voluntarily dismissed*, No. 07-16908 (Dkt. No. 54, June 24, 2009)	44
Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821)	36
Coleman v. Miller, 307 U.S. 433 (1939)	28-29
Colo. River Water Conservation Dist. v. United States, 424 U.S. 800 (1976)	24
Colorado v. New Mexico, 459 U.S. 176 (1982)	35
Cox v. City of Dallas, 256 F.3d 281 (5th Cir. 2001)	15
Dennis v. State, 91 Ind. 291 (1883)	21
Edmonds v. Compagnie Gen. Transatlantique, 443 U.S. 256 (1979)	16

Cited Authorities

Page

Erie R.R. Co. v. Tompkins,
304 U.S. 64 (1938) 39

FEC v. Akins,
524 U.S. 11 (1998) 23, 26

Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.,
204 F.3d 149 (4th Cir. 2000) (en banc)..... 15, 22

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,
528 U.S. 167 (2000) 16

FW/PBS, Inc. v. City of Dallas,
493 U.S. 215 (1990) 12

Georgia v. Tenn. Copper Co.,
206 U.S. 230 (1907) ..... *passim*

Georgia v. Tenn. Copper Co.,
237 U.S. 474 (1915)..... 32, 42

Gilligan v. Morgan,
413 U.S. 1 (1973) 29

Granholm v. Heald,
544 U.S. 460 (2005) 41

Hecht v. Bowles,
321 U.S. 321 (1944) 23, 35

Cited Authorities

	Page
Hein v. Freedom From Religion Found., Inc., 551 U.S. 587 (2007)	23-24
Illinois v. City of Milwaukee, 599 F.2d 151 (7th Cir. 1979) *rev'd on other grounds*, 451 U.S. 304 (1981)	*passim*
Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987)	45
Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund, 500 U.S. 72 (1991)	15
Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005)	41
Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007)	34
Lance v. Coffman, 549 U.S. 437 (2007)	23
Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992)	32
Luther v. Borden, 48 U.S. (7 How.) 1 (1849)	29
Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)	*passim*

Cited Authorities

Page

Massachusetts v. EPA,
549 U.S. 497 (2007) ..... *passim*

Md. People's Counsel v. FERC,
760 F.2d 318 (D.C. Cir. 1985) 26

Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n,
453 U.S. 1 (1981) 51

Missouri v. Illinois,
180 U.S. 208 (1901) 1, 32, 38, 40

Missouri v. Illinois,
200 U.S. 496 (1906) 1, 32, 38, 40, 43

Native Vill. of Kivalina v. ExxonMobile Corp.,
663 F. Supp. 2d 863 (N.D. Cal. 2009),
appeal pending, No. 09-17490 (9th Cir.) 44

New Jersey v. City of N.Y.,
283 U.S. 473 (1931) 1, 38, 40

New York v. New Jersey,
256 U.S. 296 (1921) 1, 39, 40

Nixon v. Herndon,
273 U.S. 536 (1927) 37

Nixon v. United States,
506 U.S. 224 (1993) 29

Page

North Carolina ex rel. Cooper v. TVA,
593 F. Supp. 2d 812 (W.D.N.C. 2009),
rev'd, 615 F.3d 291 (4th Cir. 2010),
pet. for cert. filed, No. 10-997 45

Oneida Indian Nation of N.Y. v. New York,
691 F.2d 1070 (2d Cir. 1982) 35

People v. Gold Run Ditch & Mining Co.,
4 P. 1152 (Cal. 1884) 21

Richards v. City of Seattle,
114 P. 896 (Wash. 1911) 21

Romero v. Int'l Terminal Operating Co.,
358 U.S. 354 (1959) 40

Rumsfeld v. Forum for Academic & Institutional Rights, Inc.,
547 U.S. 47 (2006) 12

Sierra Club v. EPA,
292 F.3d 895 (D.C. Cir. 2002) 19

Sierra Club v. Morton,
405 U.S. 727 (1972) 22

Skinner v. Switzer,
— U.S. — (Mar. 7, 2011) 50

Snapp v. Puerto Rico ex rel. Barez,
458 U.S. 592 (1982) 13, 26

Cited Authorities

Page

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 22

Tex. Indus., Inc. v. Radcliff Materials, Inc.,
451 U.S. 630 (1981) 38

Texas v. Pankey,
441 F.2d 236 (10th Cir. 1971) 39

United States v. Munoz-Flores,
495 U.S. 385 (1990) 27, 33

Utility Air Regulatory Group v. EPA,
Nos. 10-1042, 10-1122, 10-1161 (D.C. Cir)..... 7, 50

Vieth v. Jubelirer,
541 U.S. 267 (2004) 29, 30

Whitmore v. Arkansas,
495 U.S. 149 (1990) 22, 39

Woodyear v. Schaefer,
57 Md. 1 (1881)..... 15

STATUTES

28 U.S.C. § 1251..... 39

28 U.S.C. § 1331..... 40

33 U.S.C. § 1365..... 45

Cited Authorities

Page

42 U.S.C. § 7401 i

42 U.S.C. § 7411 ..... 7, 8, 46, 53

42 U.S.C. § 7475 ..... 7, 52

42 U.S.C. § 7479 ..... 46, 52

42 U.S.C. § 7521 52

42 U.S.C. § 7602 52

42 U.S.C. § 7604 45

42 U.S.C. § 7661 52

42 U.S.C. § 7661a 52

REGULATIONS

74 Fed. Reg. 66,496 (Dec. 15, 2009) 7

75 Fed. Reg. 25,324 (May 7, 2010) 7, 52

75 Fed. Reg. 31,514 (June 3, 2010) 7, 53

75 Fed. Reg. 82,392 (Dec. 30, 2010) 8

Page

OTHER AUTHORITIES

Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After* Boomer, 54 Alb. L. Rev. 359 (1990) 33

Erwin Chemerinsky, *Federal Jurisdiction* (4th ed. 2003) 22

Intergovernmental Panel on Climate Change, *Climate Change 2007: Synthesis Report* (2007) 34

W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* (5th ed. 1984) 16

National Research Council, *Advancing the Science of Climate Change* (2010) 34

William L. Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997 (1966) 1

Martin H. Redish, *Judicial Review and the "Political Question,"* 79 Nw. U. L. Rev. 1031 (1984) 34

Restatement (Second) of Torts (1979) ..... *passim*

Charles A. Wright & Mary Kay Kane, *Law of Federal Courts* (5th ed. 2007) 22

INTRODUCTION

Since the fourteenth century, Anglo-American common law has allowed the sovereign to sue to abate a nuisance that unreasonably interferes with "a right common to the general public." Restatement (Second) of Torts § 821B(1) (1979); *see* William L. Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 998 (1966) (tracing the doctrine back to the reign of Edward III). States have frequently relied on this doctrine to address emerging threats to their citizens' health and safety. For example, this Court has long adjudicated common-law public-nuisance claims brought by States seeking to enjoin air or water pollution that crosses state boundaries, sometimes based on new scientific knowledge about the harm caused by a particular kind of pollution. *See, e.g.*, *New Jersey v. City of N.Y.*, 283 U.S. 473 (1931); *New York v. New Jersey*, 256 U.S. 296 (1921); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907); *Missouri v. Illinois*, 200 U.S. 496 (1906) ("*Missouri II*"); *Missouri v. Illinois*, 180 U.S. 208 (1901) ("*Missouri I*").

In recent years, States have turned their attention to the urgent threat of the phenomenon known as "global warming" or "climate change." There is a broad scientific consensus that emissions of carbon dioxide and other greenhouse gases from human activities, principally the burning of fossil fuels, are causing a substantial alteration of the global climate, resulting in adverse impacts to property and health. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 504-05, 507 (2007).

Before this Court's ruling in *Massachusetts*, the Environmental Protection Agency took the position that

the federal Clean Air Act did not give it authority to regulate greenhouse-gas emissions to address climate-change-related threats. *See id.* at 511-14. Concerned States therefore invoked the common law of public nuisance to abate the health and environmental threats from rising temperatures and seas, just as they had invoked the law of public nuisance in the past for other emerging threats to the public health and welfare. This case concerns a complaint filed in 2004 by States and other concerned parties against five large power companies over the carbon-dioxide emissions from their fossil-fuel-burning power plants, emissions that plaintiffs allege are substantially contributing to the public nuisance of global warming.

These public-nuisance claims are justiciable because they fall within the well-settled confines of a common-law tort that courts have long adjudicated. Plaintiffs' claims differ from earlier public-nuisance claims in that climate change may involve different scientific evidence from earlier threats. But this case is at the motion-to-dismiss stage, and questions of proof are not before the Court. If plaintiffs are ultimately unable to establish that defendants contributed to the public nuisance of global warming, their claims will fail on the merits. If on the other hand plaintiffs substantiate their allegations, they will be entitled to an order abating defendants' contribution to the nuisance. The judiciary is competent to hear and decide those matters on their merits, without invading the exclusive province of the political branches of government.

After certiorari was granted in this case, the Environmental Protection Agency agreed to complete

by 2012 a rulemaking on whether to impose carbon-dioxide emission limitations on sources like defendants' power plants. If EPA imposes these limitations, which it has not committed to doing, all parties agree that the federal common-law nuisance claims at issue here will be displaced. That possibility is a good reason for this Court to dismiss the writ as improvidently granted. And if EPA continues to move forward with regulatory action on schedule, the district court would have a sound basis for staying proceedings on remand while the rulemaking is actively proceeding. But the potential for emission limitations in the future does not displace the federal common law in the present. Until EPA addresses the nuisance, plaintiffs are entitled to pursue relief under the federal common law of public nuisance, just as they have in the past for other threats to the public health or welfare.

STATEMENT

1. In 2004, plaintiffs Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, Wisconsin, and the City of New York[1] sued defendants, the five largest emitters of carbon dioxide in the United States, in the United States District Court for the Southern District of New York. Three private land trusts—the Open Space Institute, Inc., Open Space Conservancy, Inc., and Audubon Society of New Hampshire—filed a parallel suit against the same defendants, and the two suits were heard together.

---

1. New Jersey and Wisconsin are no longer participating in the case.

Plaintiffs brought their claims under the common law of public nuisance. They alleged that carbon-dioxide emissions from defendants' power plants contribute to global warming, causing a wide range of current and threatened injuries to plaintiffs and their citizens. Among other things, plaintiffs alleged that the emissions and resulting global warming would:

- increase smog and heat-related mortality in Los Angeles and New York City, J.A. 88-89;

- continue to shrink California's mountain snowpack, which forms the State's largest source of drinking water and has already been diminished by global warming, J.A. 92-93;

- raise sea levels, thereby inundating low-lying property such as much of New York City's infrastructure, J.A. 89-92;

- reduce crop and livestock yields in Iowa, J.A. 96-97;

- lower water levels in the Great Lakes, harming commercial shipping and hydropower production in New York, J.A. 93-96; and

- make it impossible for several species of hardwood trees to survive in Vermont, Connecticut, New York, and Rhode Island, J.A. 97-98;

Plaintiffs alleged that defendants were contributing to and exacerbating these harms by emitting 650 million tons of carbon dioxide each year—10 percent of the entire country's annual emissions. J.A. 57, 84. And

plaintiffs alleged that defendants have feasible, cost-effective alternatives for generating electricity with lower emissions. J.A. 58, 104.

Plaintiffs alleged that the harms caused by global warming will lead to higher surface temperatures and greater threats of injuries, and lower levels of emissions will reduce the rise in temperature and thus decrease the threat of those injuries. J.A. 58, 102. Plaintiffs also alleged that defendants' "emission of millions of tons of carbon dioxide each year contribute to [a] risk of an abrupt change in climate due to global warming." J.A. 101. Therefore, reducing the emissions from defendants' facilities would decrease the threats of the injuries that plaintiffs and their citizens face. J.A. 102.

Plaintiffs sought relief under the federal common law of public nuisance or, in the alternative if federal claims were not available, under the state common law of public nuisance. The States sued both in their capacity as *parens patriae*—to protect the health and welfare of their citizens—and as property owners. *See* J.A. 59-61. The other plaintiffs sued solely as property owners. *See id.* at 120. Plaintiffs sought injunctive relief to reduce defendants' carbon-dioxide emissions, but they did not seek damages.

The district court dismissed the case on the ground that the relief sought by plaintiffs raised nonjusticiable political questions that the district court believed would require complex policy determinations that should be made by the legislative and executive branches. Pet. App. 180a-181a, 183a-187a.

2. The Court of Appeals for the Second Circuit reversed, holding that plaintiffs' public-nuisance claims do not involve political questions because the claims can be decided based on well-settled principles of tort and public-nuisance law and would not require the district court to make policy determinations of a kind clearly reserved for non-judicial discretion. *Id.* at 17a-41a.

The court of appeals in addition rejected several alternative grounds for dismissal that had been raised before but not addressed by the district court. The court of appeals held that plaintiffs' allegations were sufficient at the pleading stage to establish standing, and also sufficient to state a public-nuisance claim under federal common law. *Id.* at 41a-76a, 88a-94a. The court emphasized that it was making only a threshold determination as to standing, based on the pleadings, and that a greater evidentiary showing would be required as discovery progressed and at the summary-judgment stage. *Id.* at 42a-44a.

The court of appeals also held that the federal Clean Air Act does not displace plaintiffs' existing remedies under federal common law because it does not itself regulate greenhouse-gas emissions from stationary sources like defendants' power plants. *Id.* at 131a-144a. The court noted that it was not deciding how, if at all, future Environmental Protection Agency regulatory actions would affect its displacement analysis. *Id.* at 144a, 159a-160, 169a-170a.

The court of appeals denied petitions for panel or *en banc* rehearing. *Id.* at 188a-190a.

3. Except in limited ways that are not relevant here, the Clean Air Act does not prohibit or control the emission of air pollutants unless and until EPA has issued standards controlling the emissions or has required States to do so. *See, e.g.*, 42 U.S.C. § 7411. EPA has not yet issued any such standards or requirements applicable to defendants' existing power plants.

When this case was filed in 2004, EPA had taken the position that it lacked authority to regulate carbon dioxide and other greenhouse gases under the Act, and consequently the agency had taken no steps to regulate those emissions. *See Massachusetts*, 549 U.S. at 511-14. While this case was pending before the court of appeals, this Court held that EPA has the power to regulate greenhouse-gas emissions under the Clean Air Act, if the agency finds that they endanger public health or welfare. *See id.* at 528-30. EPA has since made such a finding for the purposes of greenhouse-gas emissions from motor vehicles and issued regulations limiting those emissions. *See* 74 Fed. Reg. 66,496 (Dec. 15, 2009); 75 Fed. Reg. 25,324 (May 7, 2010).

As a consequence of the motor-vehicle emission standards, EPA was obligated to impose greenhouse-gas limitations on major sources that are newly built or substantially modified starting in 2011. 42 U.S.C. § 7475. The agency did so by issuing a regulation phasing in those limitations over the next several years. *See* 75 Fed. Reg. 31,514 (June 3, 2010). The private defendants have filed a series of cases aimed at blocking these regulations. *See Utility Air Regulatory Group v. EPA*, Nos. 10-1042, 10-1122, 10-1161 (D.C. Cir).

EPA has not limited carbon-dioxide emissions from existing sources, like defendants' power plants, nor has EPA taken any action that obligates it to do so in the future. As TVA's brief explains, after certiorari was granted here EPA entered into a settlement of separate litigation that may lead to regulation of these plants in the future. TVA Br. 50-51. Under this settlement, which became final on March 2, 2011, EPA will propose "new source performance standards" for greenhouse-gas emissions from new and modified power plants along with guidelines to be used by States in establishing emission limitations for existing plants, 42 U.S.C. § 7411(b), (d), and promulgate a final rule with respect to this proposal by 2012. *See* 75 Fed. Reg. 82,392 (Dec. 30, 2010). As TVA has explained, TVA Br. 51 n.25, EPA retains the discretion under the settlement not to issue those performance standards.

SUMMARY OF ARGUMENT

I. The allegations are sufficient to establish that one or more of the plaintiffs has Article III standing at this preliminary stage of the lawsuit. The complaint details the particularized injuries that global warming is causing the States and their citizens, including harm to the States' natural resources and the public health. It alleges that defendants' emissions of carbon dioxide are contributing meaningfully to global warming, and hence to these injuries. And it alleges that an order requiring defendants to lower their emissions would reduce the actual and threatened injuries that plaintiffs and their citizens face.

The facts alleged here are of the same nature and type as those that established the States' standing to seek

abatement of greenhouse-gas emissions in *Massachusetts*. If anything, the case for standing here is stronger than it was in *Massachusetts*. Because *Massachusetts* involved a petition for review, the petitioners had to come forward with evidence establishing the specific facts supporting standing, whereas this case involves a motion to dismiss for which general allegations of harm suffice. And in *Massachusetts* the States sought redress for their injuries only indirectly, through a suit against the regulatory agency, whereas here the States are suing the alleged tortfeasors directly. Indeed, for common-law claims, standing rarely if ever requires separate analysis, because the elements of the claim, including injury and causation, themselves satisfy the requirements of standing.

Nor do plaintiffs lack "prudential standing" on the ground that their claims are generalized grievances—an argument that TVA raises for the first time in this Court. The generalized-grievance doctrine is part of Article III's injury-in-fact requirement, not a separate prudential test for non-constitutional standing. And the injuries alleged here are not generalized as this Court has used that term, because they are concrete and particularized rather than abstract. Although a public-nuisance suit brought under the States' *parens patriae* authority by definition involves a widespread harm that affects the public at large, the federal courts have frequently and properly entertained such suits without dismissing them as generalized grievances.

II. A claim raises a political question only when its resolution would require the judiciary to interfere with matters committed to the political branches. Plaintiffs' claims here are justiciable because common-

law suits are the essence of the business of the judiciary. Moreover, plaintiffs' claims share none of the features of nonjusticiable political questions, such as the absence of judicially manageable standards or the need for the court to make initial nonjudicial policy determinations. Public-nuisance suits are governed by well-established principles that the courts are fully capable of applying in the specific factual context of climate change. While these principles may turn on general standards such as reasonableness, they are no less appropriate for judicial application than many other legal rules that rely on similar standards. Nor will the court need to decide broad policy issues to adjudicate plaintiffs' claims here. The court will need to determine not how to resolve the worldwide problem of global warming, but rather the feasibility of abating defendants' contribution to the nuisance, here by reducing the carbon-dioxide emissions from their power plants.

III. Plaintiffs' public-nuisance claim arises under federal common law. When the States joined the Union, they gave up their sovereign right to use force to abate public nuisances that arose beyond their borders. In return, they received relief for those nuisances under federal common law. Thus, this Court has long applied federal common law to resolve suits by a State complaining about interstate pollution unless a federal statute or regulation addresses the problem.

Here, the Clean Air Act does not itself impose any limits on carbon-dioxide emissions from stationary sources such as defendants' power plants. And while EPA recently began regulating carbon-dioxide emissions from motor vehicles and certain new or modified stationary

sources, thus far it has not issued any regulations that limit carbon-dioxide emissions from existing stationary sources like defendants' plants. Although EPA may issue such regulations in 2012, the possibility of future regulations does not displace plaintiffs' claims in the present.

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO SUE.

A. Plaintiffs' allegations of injury and causation suffice to establish Article III standing at this stage.

To satisfy Article III's case-or-controversy requirement, a plaintiff must have suffered or face (1) an injury that is (2) traceable to the defendant's conduct and (3) redressable by a favorable court decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Standing need not be pleaded with greater specificity than any other elements of the plaintiff's case. Thus, on a motion to dismiss, "general factual allegations of injury resulting from the defendant's conduct" are enough because the court will "presume that general allegations embrace those specific facts that are necessary to support the claim." *Id.* at 561 (quotation and alteration marks omitted). To defeat a motion to dismiss for failure to state a claim, a plaintiff need plead only "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). TVA, but not the other defendants, agrees that at least some of the plaintiff States have standing under that test. TVA Br. 30.

Because the presence of just one party with standing satisfies Article III's case-or-controversy requirement for all parties, *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006), this brief focuses solely on the States' standing.

1. *It is uncontested that the States have adequately alleged concrete injuries.*

No party disputes that allegations in the States' complaint satisfy the first element of standing set forth in *Lujan*, a concrete injury that is actual or imminent. 504 U.S. at 560. But because this Court has an independent obligation to examine standing, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990), plaintiffs briefly address the injury-in-fact requirement here.

The States' complaint alleges two kinds of actual or threatened injuries from global warming: injuries to the States' own sovereign and proprietary interests, and injuries to the health and welfare of the States' citizens. Either kind of injury alone would suffice to establish the States' standing.

First, the complaint alleges with particularity current or threatened injuries to the sovereign and proprietary interests of each State. For example, the complaint alleges that global warming has already caused earlier melting of the Sierra Nevada snowpack, which reduces the amount of fresh drinking water available to California during the dry summer season. J.A. 92-93. The complaint also alleges that global warming will cause beach erosion and flooding at particular parks in California, Connecticut, New York, and Rhode Island. J.A. 89-92.

These injuries are indistinguishable from those the Court held cognizable in *Massachusetts*. The Court explained that the "harms associated with climate change are serious and well recognized." 549 U.S. at 521. And it specifically noted the harm to water supplies from melting snowpack, erosion of coastal lands, and flooding as the "significant harms" that established the States' standing there. *Id.* at 521.

Second, a State suing as *parens patriae* may rely on an injury to its quasi-sovereign interests such as the health and welfare of a substantial segment of its population. *Snapp v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982). As the court of appeals correctly noted, Pet. App. 54a-55a, the States' complaint alleges those kinds of interests as well. It alleges, for example, that even one degree of global warming will double the number of heat-related deaths in New York City, to 700 per year. J.A. 88. It also alleges that global warming will increase smog levels, which in turn cause more respiratory illnesses like asthma. J.A. 89. The complaint further alleges threatened injuries to the States' natural resources that would result in aesthetic and economic harms. J.A. 97-98 (describing, for example, threats to hardwood forests in the Adirondack Mountains and New England from global warming). The scale of these alleged injuries suffices to establish *parens patriae* standing at the pleading stage. *See Snapp*, 458 U.S. at 609 (alleged discrimination involving 787 jobs affected a substantial segment of the population of Puerto Rico).

2. *The States have sufficiently alleged that their injuries are fairly traceable to defendants' emissions.*

a. The Court held in *Massachusetts* that traceability may be satisfied by showing that the emissions targeted in the lawsuit make a "meaningful contribution" to the alleged injuries. 549 U.S. at 524. There, States sought to compel EPA to regulate emissions from new motor vehicles of greenhouse gases, including carbon dioxide. United States motor vehicles collectively were responsible for about six percent of worldwide carbon-dioxide emissions. *Id.* at 524. And the States were seeking EPA regulations applicable only to new motor vehicles, which constitute "only a fraction" of that figure. *Id.* at 544 (Roberts, C.J., dissenting). The Court nonetheless found traceability, reasoning that "by any standard," these emissions "make a meaningful contribution to greenhouse gas concentrations and hence . . . to global warming." *Id.* at 525.

The emissions alleged in this case are commensurate with those found to establish traceability in *Massachusetts*. *See* TVA Br. 29-30 (acknowledging the sufficiency of the States' allegations regarding traceability). The percentage of global emissions at issue in that case (well under six percent) is comparable to the percentage attributed by the complaint to defendants here: about 2.5 percent of all carbon-dioxide emissions worldwide. J.A. 57, 85.

In any event, the States' allegations of meaningful contribution are sufficient at this stage; precise scientific calculations can and should await factual development during discovery. *Cf. Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1940 (2009) (the factual allegations of a complaint meet

the "facial plausibility" standard when they "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged").

b. Although the standard for traceability is less stringent than the standard for establishing causation as a matter of substantive tort law, *see, e.g.*, *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000) (en banc) (Wilkinson, C.J.) (citing cases), principles of tort law confirm that defendants' alleged contributions to global warming satisfy the traceability requirement. *Cf. Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991) ("[s]tanding is gauged by the specific common-law, statutory or constitutional claims that a party presents").

It is well established that each person who causes or contributes to a public nuisance may be held liable even if others are also contributing to the nuisance. Pet. App. 69a-70a (citing *Cox v. City of Dallas*, 256 F.3d 281, 292 n.19 (5th Cir. 2001)); *see also Woodyear v. Schaefer*, 57 Md. 1, 5 (1881) (rejecting defendant's argument that it could not be enjoined from polluting a stream because it was just one of many polluters, reasoning that "[o]ne drop of poison in a person's cup may have no injurious effect[] [b]ut when a dozen, or twenty, or fifty, each put in a drop, fatal results may follow"). As the *Restatement* explains, "[i]t may, for example, be unreasonable to pollute a stream to only a slight extent, harmless in itself, when the defendant knows that pollution by others is approaching or has reached the point where it causes or threatens serious interference with the rights of those who use the water." Restatement (Second) of Torts § 840E cmt. b; *accord Boim v. Holy Land Found. for Relief & Dev.*, 549

F.3d 685, 696-97 (7th Cir. 2008) (en banc) (Posner, J.); W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* § 52, at 354 (5th ed. 1984); *cf. Edmonds v. Compagnie Gen. Transatlantique*, 443 U.S. 256, 260 n.8 (1979) ("A tortfeasor is not relieved of liability for the entire harm he caused just because another's negligence was also a factor in effecting the injury.").

Here, the States allege that defendants are "substantial contributors" to the public nuisance of global warming, based on the volume of carbon-dioxide emissions from their power plants. J.A. 57; *see id.* 85-86, 104. These allegations are consistent with the common-law principle set forth above that one who contributes to a nuisance may be held liable. *Cf. Massachusetts*, 549 U.S. at 524-25 (evidence of "meaningful contribution" to global warming satisfies causation prong of standing test). Because the alleged injuries are traceable to defendants as a matter of tort law, they are also traceable as a matter of standing law. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (courts should not "raise the standing hurdle higher than the necessary showing for success on the merits").

3. *The States have sufficiently alleged that a ruling awarding them injunctive relief would redress the States' injuries.*

A lawsuit need not completely redress all of a plaintiff's injuries at once; it is enough for standing if a favorable ruling would reduce the degree or likelihood of the injuries. As this Court recognized in *Massachusetts*, the requested remedy need not "*reverse*" global warming; the pertinent question is whether the plaintiffs have

alleged that the requested remedy would "*slow* or *reduce* it." 549 U.S. at 525 (emphasis in original).

Here, the States' complaint alleges that requiring defendants to reduce emissions at their power plants will "contribute to a reduction in the risk and threat of injury to the plaintiffs and their citizens and residents from global warming." J.A. 102. That is because the "primary factor in determining the rate and magnitude of future warming," and thus the risk and degree of global-warming-related harm, is "the level of greenhouse gas concentrations in the atmosphere." *Id.* This, in turn, is "driven by the rate of emissions of greenhouse gases and, in particular, of carbon dioxide." *Id.* Thus, the greater the overall level of emissions, the greater the resulting injuries, and the lower the level of emissions, the lesser the injuries. *Id.* And because plaintiffs seek direct limitations on defendants' emissions, J.A. 110, a favorable decision would lower overall global emissions and reduce the risk and degree of the alleged global-warming-related emissions.

As TVA acknowledges, TVA Br. 30, these allegations are sufficient to establish redressability under *Massachusetts*. Similar to the defendants here, EPA had argued in *Massachusetts* that redressability was lacking because a favorable decision compelling EPA regulation of greenhouse gas emissions from new motor vehicles "would therefore result in, at most, a tiny percentage reduction in worldwide greenhouse gas emissions." Brief for Federal Respondent at 13 (S. Ct. No. 05-1120). The Court disagreed, reasoning that the "risk of catastrophic harm, though remote, is nevertheless real" and "[t]hat risk would be reduced to some extent if petitioners received the relief they seek." 549 U.S. at 526. Similarly, the States allege

that global warming will result in a number of serious harms, including heat-related deaths and respiratory illnesses, and that an order compelling defendants to decrease their emissions would reduce the risk of injury and severity of their injuries. J.A. 58, 83-84, 102.

Although *Massachusetts* relied in part on the fact that the States in that case had invoked a statutory remedy, 549 U.S. at 516-18, its discussion of Article III standing was not limited to statutory rights, and the Court expressly held that Massachusetts had satisfied "the most demanding standards of the adversarial process." 549 U.S. at 521. The Court relied in significant part on *Georgia*, a common-law nuisance case, for the proposition that "States are not normal litigants for purposes of invoking federal jurisdiction." *Id.* at 518. In *Georgia*, the Court ordered injunctive relief to abate a public nuisance even though the evidence might not have supported granting similar relief to a private plaintiff. *Id.* Affording special solicitude to the States in pursuing a remedy as *parens patriae* is therefore consistent with *Massachusetts* and *Georgia*.

4. *The States' standing here is even more firmly established than in* Massachusetts.

As explained above, the States' standing here follows directly from *Massachusetts*, which held in almost identical circumstances that the States had standing to seek abatement of greenhouse-gas emissions. But the standing of the States in this case is even more firmly grounded than in *Massachusetts* in three respects.

a. *Massachusetts* addressed a petition for review of agency action, *see* 549 U.S. at 514, and thus was decided

under summary-judgment standards rather than (as here) motion-to-dismiss standards. *See Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002). For example, although the dissenting justices in *Massachusetts* agreed that a State's loss of coastal lands *could* be an injury that confers standing, they concluded that the States in that case had not offered enough evidence that such loss was *actually* occurring or would be likely to occur in the near future. 549 U.S. at 541-42 (Roberts, C.J., dissenting); *see also Lujan*, 504 U.S. at 561 (at the summary judgment stage, the plaintiff cannot rely on "mere allegations" but rather must proffer evidence establishing the "specific fact" supporting standing) (quotation marks omitted).

This case, however, presents itself on a motion to dismiss, which means that "general factual allegations of injury resulting from the defendant's conduct may suffice" and the courts will presume that the general allegations embrace the specific facts needed to support standing. *Bennett v. Spear*, 520 U.S. 154, 168 (1997) (quotation marks omitted). As the court of appeals noted, at this point in the litigation the States "need not present scientific evidence to prove that they face future injury or increased risk of injury, that Defendants' emissions cause their injuries, or that the remedy they seek will redress those injuries." Pet. App. 43a; *see also Alliant Energy Corp. v. Bie*, 277 F.3d 916, 920 (7th Cir. 2002) (Easterbrook, J.) ("Skepticism about a plaintiff's ability to prove its claims is not a reason to dismiss a pleading, however. It is at most a reason to hold a hearing and require the plaintiff to pony up the proof.").[2]

---

2. For this reason, *amici* Southeast Legal Foundation, *et al.*, err in asking the Court to dismiss based on *amici*'s erroneous scientific analysis before plaintiffs have presented any evidence

b. Standing "is ordinarily substantially more difficult to establish" when—as in *Massachusetts*, but unlike here—the plaintiff's alleged harm flows not from the defendant's conduct directly but rather from third parties that could be regulated by the defendant. *Lujan*, 504 U.S. at 562 (quotation marks omitted). As TVA recognizes, the chain of causation is shorter here than the one at issue in *Massachusetts*, because the States "seek judicial relief directly from the entities responsible for the allegedly unlawful emissions." TVA Br. 31. To establish their public-nuisance claims, the States will have to show that defendants' emissions are causing an injury-in-fact to the public health or welfare. If the States prove injury and causation, they necessarily will have established their standing. *See Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984) (traceability and redressability are "two facets of a single causation requirement") (quotation marks omitted).

It is irrelevant to redressability that "the vast bulk of greenhouse gas emissions are from sources that are not parties to this case and would not be reached by a decree in this case." Pet. Br. 24. Unlike in *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 615 (1989), where the effectiveness of the remedy sought depended on "the unfettered choices made by independent actors not before the courts," redressability here does not depend on the conduct of third parties. *Cf. Massachusetts*, 549 U.S. at 526 ("A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.").[3] Moreover, it is long established

---

of causation. *See* Brief of Southeastern Legal Foundation, *et al.*, as *Amici Curiae* in Support of Petitioners 20-37.

3. The complaint's allegations do not support the suggestion that defendants' competitors will increase their own emissions

that States may take incremental steps to protect their citizens by suing just some of the contributors to a public nuisance—for example, a single factory that is fouling the air in a city with many emitters, *Richards v. City of Seattle*, 114 P. 896 (Wash. 1911), a single mining company among many whose discharges are degrading a river, *People v. Gold Run Ditch & Mining Co.*, 4 P. 1152 (Cal. 1884), or a single slaughterhouse that is polluting the air into which there are many other emitters, *Dennis v. State*, 91 Ind. 291 (1883). Even if injuries suffered in 2011 could be traced to emissions from "a factory in China that same year, or just as easily to emissions from a California farm in 1961," Pet. Br. 18-19, the existence of other contributors to climate change is not dispositive either as a matter of substantive tort law or as a matter of standing.

c. Because this case—unlike *Massachusetts*—involves only common-law claims, the concerns regarding the separation of powers that ultimately drive the standing doctrine, *see Allen*, 468 U.S. at 752, are not present here. The line of cases culminating in *Lujan* dealt solely with lawsuits brought to enforce statutory or constitutional provisions by taxpayers or others functioning as private attorneys general—lawsuits where injury-in-fact, traceability, and redressability are not subsumed within

---

in response to defendants' reductions. *See* Brief *Amicus Curiae* of Pacific Legal Foundation in Support of Petitioners 19. The complaint alleges that "[d]efendants have available to them practical, feasible and economically viable options for reducing carbon dioxide emissions without significantly increasing the cost of electricity to their customers." J.A. 58. Because defendants can achieve reductions without significantly raising customers' electricity costs, those customers are not likely to switch to defendants' competitors even if the competitors are not subject to an abatement order.

the elements of the claim. In those cases, a threshold inquiry regarding standing serves a gatekeeping function to ensure that the plaintiffs "have a direct stake in the outcome." *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972). The gatekeeping function is necessary because once the threshold question of standing is resolved, the parties and the court then proceed to address the proper application of the public law in question, an inquiry that often will not focus on the standing-conferring injury on the plaintiff.

By contrast, the merits inquiry in a lawsuit brought under the common law turns on that injury, and thus "standing to sue is self-evident." Charles A. Wright & Mary Kay Kane, *Law of Federal Courts* 69 (5th ed. 2007); *see also* Erwin Chemerinsky, *Federal Jurisdiction* § 2.3, at 68 (4th ed. 2003) ("Injury to rights recognized at common law—property, contracts, and torts—are sufficient for standing purposes."). In most common-law litigation, "there is scant need for courts to pause over the standing inquiry. One can readily recognize that the victim of an automobile accident or a party to a breached contract bears the kind of claim that he may press in court." *Gaston Copper Recycling Corp.*, 204 F.3d at 154; *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) ("[J]urisdiction is not defeated by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover.") (quotation and alteration marks omitted).

The doctrine of standing "serves to identify those disputes which are appropriately resolved through the judicial process." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Adjudicating common-law torts, including public-nuisance cases, is the essence of the business of the

judiciary. *See* TVA Br. 40 (the States' common-law claims "ask the judiciary to act in its own domain"). As a result, the gatekeeping function provided by a separate analysis of standing is unnecessary here.

B. In light of the States' showing of concrete injury, there are no prudential limitations that require dismissal of the case.

1. *The generalized-grievance doctrine is part of Article III, not prudential, standing.*

Although TVA agrees that the States have satisfied the requirements for Article III standing, it nonetheless argues that they do not have prudential standing because their public-nuisance claims amount to "generalized grievances" that are more appropriately addressed through the political process. TVA Br. 14-24. This argument—which was neither raised in nor decided by the lower courts—is inconsistent with this Court's standing jurisprudence. Prudential standing addresses issues such as whether the plaintiff's claims fall within the zone of interests protected by the statutory provision invoked in the suit, which is not at issue here. *See Bennett*, 520 U.S. at 162. But the generalized-grievance requirement is part of the Article III—not prudential—standing inquiry, because it addresses whether the plaintiff has suffered an injury-in-fact. *See, e.g., Lance v. Coffman*, 549 U.S. 437, 439 (2007); *FEC v. Akins*, 524 U.S. 11, 23-24 (1998); *Lujan*, 504 U.S. at 573-74. Although the Court "has occasionally in dicta described the prohibition on generalized grievances as merely a prudential bar," the doctrine "squarely rest[s] on Article III considerations, as the analysis in *Lujan* . . . confirms." *Hein v. Freedom From Religion Found., Inc.*,

551 U.S. 587, 634 n.5 (2007) (Scalia, J., concurring in the judgment). Because the States have satisfied Article III's injury-in-fact requirement, TVA's prudential standing argument adds nothing.

TVA all but admits as much, asserting that "the prudential-standing analysis articulated" in its brief "is distinct from, and would not alter, [the] Court's settled approach . . . in litigation to establish Article III injury." TVA Br. 21 n.7. In other words TVA is asking the Court to create a *new* rule of prudential standing that would allow for threshold dismissal of claims under an ill-defined balancing test without any connection to traditional standing requirements.

But the generalized-grievance doctrine is not a catch-all for cases involving complex issues that could arguably be more efficiently or effectively addressed by regulation. *See* TVA Br. 18. Federal courts have a "virtually unflagging obligation" to exercise their jurisdiction. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Moreover, all of the concerns TVA raises about this case can be addressed through conventional legal analysis. For example, TVA's argument about EPA's role under the Clean Air Act is indistinguishable from petitioners' arguments about whether the Act has displaced the States' common-law causes of action. *Compare* TVA Br. 15, 18, *with* Pet. Br. 40-46. And TVA's arguments about the purported difficulties in fashioning a remedy here are identical to petitioners' political-question arguments. *Compare* TVA Br. 15-21 *with* Pet. Br. 38-40, 46-51. The Court therefore should decline TVA's invitation to muddle settled principles of justiciability with a new prudential-standing test.

2. *The States' claims are not generalized grievances.*

While global warming may cause widespread harm, that does not make the States' public-nuisance claims generalized grievances as this Court has used that term. Generalized grievances are "abstract and indefinite." *Akins*, 524 U.S. at 23. The quintessential generalized grievance is a case in which a group of plaintiffs sues only out of "common concern for obedience to law." *Id.* These kinds of disputes seek "what would, in effect, amount to an advisory opinion" and thus are more appropriate for the political process. *Id.* at 24.

But this case presents something quite different. Grievances are not generalized if the alleged harm is concrete rather than abstract, even if it is also widespread. In *Akins*, for example, the Court examined whether voters had suffered an injury-in-fact from their inability to obtain information about an organization's donations to political candidates. 524 U.S. at 20-21. Although the voters' alleged "informational injury" was "widely shared" by the public at large, the Court nevertheless found that the injury was "sufficiently concrete and specific" to overcome the limitation associated with generalized grievances. *Id.* at 24-25. The Court also identified a "widespread mass tort" as the kind of claim that, while affecting "large numbers of individuals suffering the same common-law injury," would nevertheless "count as an injury in fact." *Id.* (quotation and alteration marks omitted); *see also Lujan*, 504 U.S. at 572 (also identifying a mass tort as the kind of claim that impacts a large number of people but nevertheless would meet the concrete-injury requirement).

The States' public-nuisance claims here allege concrete injuries—to their interests both as landowners and as *parens patriae*—arising out of a mass tort, which *Akins* and *Lujan* held are sufficient for standing. And the complaint goes beyond the requirements of *Akins*, because it also alleges impacts of global warming that are *particularized* to each of the States, based on the diverse nature of the public resources at issue and each State's unique geography. *Cf. Akins*, 524 U.S. 35 (Scalia, J., dissenting) (arguing that injuries must be particularized to avoid being generalized grievances). The States' claims therefore are not abstract or indefinite, or seeking an advisory opinion. They are not generalized grievances as this Court has used that term.

To the extent that the States make claims alleging harm to the general public, they do so in their unique capacities as *parens patriae* and as sovereigns seeking to abate a public nuisance, which by definition involves a harm to the general public. *See* Restatement (Second) of Torts § 821B (defining "public nuisance," *inter alia*, as "an unreasonable interference with a right common to the general public"). As this Court recognized in *Snapp*, there is a long line of cases in which "States successfully sought to represent the interests of their citizens in enjoining public nuisance." 458 U.S. at 603. And as explained above, the States have met the requirements identified by *Snapp* for asserting their *parens patriae* claims. This demonstrates that their interest is concrete, not abstract, and therefore sufficient to confer standing. *See Md. People's Counsel v. FERC*, 760 F.2d 318, 321 (D.C. Cir. 1985) (Scalia, J.) ("It is unquestionable that a state, in its *parens patriae* capacity, does qualify as personally suffering some actual or threatened injury") (quotation and alteration marks omitted).

II. THE POLITICAL-QUESTION DOCTRINE DOES NOT BAR ADJUDICATION OF PLAINTIFFS' COMMON-LAW CLAIMS.

The political-question doctrine is a limited exception to the obligation of the federal courts to exercise jurisdiction, invoked sparingly by the Court to prevent inappropriate interference by the judiciary in the business of the political branches. *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990). The separation-of-powers concerns that gave rise to the doctrine have vitality only in a small number of constitutional and foreign affairs cases and are not present in common-law tort cases like this one, which are at the core of what the judicial branch does. Nor, in any event, do plaintiffs' particular claims have any of the features of a true political question, such as a lack of judicially manageable standards.

A. The political-question doctrine is limited to foreign affairs and constitutional issues, which are not present here.

1. The political-question doctrine applies only to cases implicating separation-of-powers concerns, and not to common-law tort claims like those at issue here. The Court's extensive review of the history and evolution of the political-question doctrine in *Baker v. Carr*, 369 U.S. 186, 208-235 (1962), confirms the limited scope of the doctrine. The Court in *Baker* first clarified that the "nonjusticiability of a political question is primarily a function of the separation of powers." *Id.* at 210. Because this is ultimately an "exercise in constitutional interpretation," *id.* at 211, a court must look primarily to the Constitution to determine whether a matter has been

committed, either explicitly or implicitly, to the political branches to the exclusion of the judiciary.

Baker involved a challenge under the Equal Protection Clause to a State's apportionment of its legislators among counties. To determine whether the case was justiciable, *Baker* reviewed the cases in which the Court had previously considered the political-question doctrine and identified several factors that had given rise to separation-of-powers concerns, including "a textually demonstrable constitutional commitment of the issue to a coordinate political department," "a lack of judicially discoverable and manageable standards for resolving it," and "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Id.* at 217.

Most of the political-question cases discussed in *Baker* concerned the area of foreign affairs, which the Constitution unambiguously commits to the political branches. *Id.* at 211-14 & n.31. The cases concerning domestic controversies each involved a constitutional issue, and the political-question discussion in those cases generally centered on the textual-commitment test. The Court did not invoke the "lack of judicially discoverable and manageable standards" to describe a factually complex question, as defendants seek to do here. Instead, the Court referred to a lack of judicially discoverable or manageable standards in the course of explaining that the matter implicated a particular constitutional provision that lacked such standards, or that the matter was textually committed to a political branch that had not enunciated any standards. For example, in *Coleman v. Miller*, 307

U.S. 433 (1939), the Court dismissed a claim that a State's ratification of a constitutional amendment failed to satisfy Article V's requirements, because the questions involved were committed to Congress and neither Article V nor any statute provided criteria for a judicial determination. Similarly, in *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), the Court dismissed a trespass claim that depended on determining which of two competing state governments in Rhode Island was legitimate, because the Guarantee Clause commits that question to Congress and does not provide "a repository of judicially manageable standards which a court could utilize independently in order to identify a State's lawful government," *Baker*, 369 U.S. at 223. Unlike these cases, the Court in *Baker* determined that the Equal Protection Clause claim before it did not raise any question to be decided by a political branch and that "[j]udicial standards under the Equal Protection Clause are well developed and familiar." *Id.*

The few cases dismissed by this Court on political-question grounds since *Baker* also involved constitutional challenges to the actions of another branch of government. *Vieth v. Jubelirer*, 541 U.S. 267, 290 (2004) (plurality opinion) (legislative gerrymandering of congressional districts); *Nixon v. United States*, 506 U.S. 224, 228-36 (1993) (Senate procedure for impeaching a federal judge); *Gilligan v. Morgan*, 413 U.S. 1, 6 (1973) (National Guard's standards for weaponry, training, and other matters). When this Court found a lack of judicially discoverable or manageable standards in these cases, it did so only as a basis for determining that the constitutional claim was within the province of another branch. *Vieth*, 541 U.S. at 305 (plurality opinion); *Nixon*, 506 U.S. at 228-31.

2. This Court has never held that the political-question doctrine bars adjudication of a tort case absent a question of constitutional law or foreign affairs—neither of which is present here.[4] Nor should the doctrine be extended to such a case. Outside of these contexts, common-law claims do not implicate separation-of-powers issues. Instead, they require the judiciary "to act in the manner traditional for English and American courts." *Vieth*, 541 U.S. at 278 (plurality opinion); *see also* TVA Br. 40 (plaintiffs "ask the judiciary to act in its own domain by applying judicially fashioned federal common law in a new context").

Nor does the judiciary's exercise of power in common-law cases present any danger of an irreconcilable conflict between the branches, because the political branches remain free to modify or displace common-law principles. EPA may limit carbon-dioxide emission from existing power plants, and thereby displace plaintiffs' federal common-law claims. Congress similarly may pass legislation modifying or displacing federal common law in this area. As a result, this case presents no risk that the judiciary will develop a "parallel" regulatory system that would "frustrate and complicate" EPA's regulatory undertakings, TVA Br. 38, or that common-law decisions

---

4. Defendants have abandoned their argument that plaintiffs' claims interfere with the President's authority over foreign affairs. *See* Pet. App. 24a. Their *amici* Law Professors cite a handful of lower-court cases that applied the political-question doctrine to bar adjudication of common-law claims, but those cases all turned on an issue of foreign policy or military affairs that the courts found to be exclusively committed to the political branches. *See* Brief for Law Professors as *Amici Curiae* in Support of Petitioners 22-23.

will "conflict[] with current and future legislation and regulation addressing greenhouse gas emissions," Pet. Br. 51. That makes this case quite different from one raising true political questions, which are matters of constitutional interpretation about the political branches' respective powers and therefore may not be susceptible to correction by those branches. *Cf. Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 409-10 (1932) (Brandeis, J., dissenting) (political branches are not free to correct judicial error with respect to constitutional rulings). And to the extent that the regulatory and judicial processes are proceeding in parallel, the district court has the discretion to manage the case in a way to avoid any conflict, such as by staying proceedings to allow the rulemaking to play out.[5]

B. The *Baker v. Carr* factors do not bar adjudication of plaintiffs' claims.

1. Defendants argue that plaintiffs' federal common-law claims present a political question because public-nuisance law inherently suffers from two of the factors identified in *Baker*, 369 U.S. at 217: a lack of judicially

---

5. There is also no danger that adjudication of the States' federal common-law claims would undermine the cooperative federalism scheme embodied in the Clean Air Act, as claimed by the *amici* States supporting petitioners. *See* Brief of States of Indiana, et al. as *Amici Curiae* in Support of Petitioners 12-23. As explained below (p. 53), the States' role under the Clean Air Act is to implement and enforce federal standards, the promulgation of which will displace federal common law. In any event, "it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'" *Baker*, 369 U.S. at 210.

discoverable and manageable standards, and initial policy determinations of a kind clearly for nonjudicial discretion. Pet. Br. 46-47. But public-nuisance law is a settled part of the common law created by the judiciary itself, so the standards that govern it were necessarily judicially discovered and any policy determinations that it requires are necessarily of a kind for judicial discretion.

There are long-established standards for deciding plaintiffs' public-nuisance claims. *See, e.g.*, *Missouri II*, 200 U.S. at 520; *Missouri I*, 180 U.S. at 248; *Georgia v. Tenn. Copper Co.*, 237 U.S. 474, 474-78 (1915); *Georgia*, 206 U.S. at 236-39. As this Court recognized more recently in a different context, nuisance law "ordinarily entails" "analysis of, among other things, the degree of harm to public lands and resources" from the challenged activity, the "social value" of the activity, and "the relative ease with which the alleged harm can be avoided." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030-31 (1992). These standards are judicially manageable; indeed, courts are required to apply them as a matter of constitutional law in some takings litigation. *See id.* As the court of appeals recognized, Pet. App. 82a-83a, these standards have been distilled in the *Restatement*, which provides that a public nuisance is "an unreasonable interference with a right common to the general public," taking into account several factors, including whether the conduct (1) interferes with public health; (2) "is proscribed by a statute, ordinance or administrative regulation"; or (3) "is of a continuing nature or has produced a permanent or long-lasting effect." Restatement (Second) of Torts § 821B(1), (2)(a)-(c).

Contrary to defendants' assertion, Pet. Br. 47, in this public-nuisance case (unlike in a private-nuisance case)

it is doubtful that the district court will need to weigh the gravity of the harm caused by defendants' emissions against the utility of the conduct to determine liability. *See* Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After* Boomer, 54 Alb. L. Rev. 359, 368-69 (1990); *see also Georgia*, 206 U.S. at 237-39 (finding, without any inquiry into fault, that Georgia adequately pleaded a public-nuisance claim and was entitled to an injunction); *Illinois v. City of Milwaukee*, 599 F.2d 151, 165 (7th Cir. 1979) ("The elements of a claim based on the federal common law of nuisance are simply that the defendant is carrying on an activity that is causing an injury or significant threat of injury to some cognizable interest of the complainant."), *rev'd on other grounds*, 451 U.S. 304 (1981).

But even if a court were required to determine the reasonableness of defendants' conduct, that would not turn this case into a political question. The Court has never found a political question merely because a case involves a broad standard that courts must tailor to the particular behavior at issue. *See Munoz-Flores*, 495 U.S. at 396 ("Surely a judicial system capable of determining when punishment is 'cruel and unusual,' when bail is '[e]xcessive,' when searches are 'unreasonable,' and when congressional action is 'necessary and proper' for executing an enumerated power is capable of making the more prosaic judgments demanded by adjudication of Origination Clause challenges.").[6] In fact, applying broadly

6. As counsel for the private defendants has acknowledged in advocating for a repudiation of the political-question doctrine entirely, when courts perform their "traditional judicial function,"

stated principles to the specific facts and circumstances of a case is the very nature of common-law adjudication. *See Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 290 (2d Cir. 2007) (Hall, J., concurring) ("Common law decisionmaking proceeds through the incremental, analogical application of broadly-stated principles, and it is therefore not amenable to the formulation of finely detailed rules in the manner of a regulatory code.").

Defendants also express concern that complex questions of causation make this case unmanageable for a court, Pet. Br. 49-50, but again the Court has never found a political question simply because a claim involves a complex chain of causation or difficult scientific questions. Indeed, complex causation issues occur repeatedly in, for example, toxic tort litigation, where courts must weigh scientific evidence regarding chemical pathways and the etiology of disease. The science relevant to carbon dioxide's impact on climate is, for the most part, governed by basic, long-established principles of chemistry and physics. *See, e.g.*, National Research Council, *Advancing the Science of Climate Change* (2010); Intergovernmental Panel on Climate Change, *Climate Change 2007: Synthesis Report* (2007).[7]

---

they "are often called upon to apply generalized and ambiguous abstract principles to specific factual situations, even when the application of those principles is unclear." Martin H. Redish, *Judicial Review and the "Political Question,"* 79 Nw. U. L. Rev. 1031, 1060 (1984).

7. The National Research Council's report is available at http://www.americasclimatechoices.org/panelscience.shtml, and the Intergovernmental Panel's report is available at http://www.ipcc.ch/publications_and_data/ar4/syr/en/contents.html.

2. Well-established principles also exist to guide federal courts in fashioning equitable relief in common-law public-nuisance cases. Courts have a long tradition of equity practice with "a background of several hundred years of history" to call upon. *Hecht v. Bowles*, 321 U.S. 321, 329 (1944). Federal courts regularly adjudicate cases involving complex issues and potential remedies that may have broad societal significance. *See, e.g., Georgia*, 206 U.S. at 236-39; *Colorado v. New Mexico*, 459 U.S. 176, 183, 189-90 (1982) (applying principle of "equitable apportionment," which requires consideration of numerous complex scientific and factual issues, to fashion remedy in interstate water allocation dispute); *see also Oneida Indian Nation of N.Y. v. New York*, 691 F.2d 1070, 1083 (2d Cir. 1982) ("we know of no principle of law that would relate the availability of judicial relief inversely to the gravity of the wrong sought to be addressed"). And the *Restatement* provides standards for determining whether injunctive relief is appropriate based on "a comparative appraisal of all of the factors in the case," including "the nature of the interest to be protected," "the relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied," and "the practicability of framing and enforcing the order or judgment." Restatement (Second) of Torts § 936(1)(a), (e), (g).

In crafting a remedy for this case, the district court would focus on facts specific to the parties in the litigation, not broad policy issues such as determining the reasonable level of global emissions or emissions from sources that are not a party to this lawsuit. Pet. Br. 47-48. In particular, the court would assess the feasibility of reducing emissions from petitioners' plants and, based upon expert testimony, set a timetable for those reductions. *See Georgia*, 206

U.S. at 239 (contemplating a delay in issuing injunction to allow defendants a reasonable time to install emissions controls). Nor would fashioning injunctive relief require a court to make the "policy judgments" that the Court in *Massachusetts*, 549 U.S. at 533-34, stated that it did not have the "expertise" or "authority" to evaluate. *See* Pet. Br. 51. Those issues "have nothing to do with whether greenhouse gas emissions contribute to climate change" or to the injuries alleged here. *Massachusetts*, 549 U.S. at 533.

3. This case should also not be dismissed on the ground that it presents "unique and difficult challenges for the federal courts" that would be better handled comprehensively by the political branches or on a global basis. TVA Br. 37-38; *see also* Pet. Br. 50. That a comprehensive political solution to climate change might be preferable does not mean that courts lack the authority and capability to decide the discrete issues of liability presented here in the absence of such a solution. The same is true in many other areas of tort law, such as products liability, yet the courts adjudicate common-law claims unless and until a statute or regulation displaces the common law with a different regulatory regime. The political-question doctrine is not a broad, catch-all doctrine that courts can use to jettison cases that involve issues that courts think would be better handled by the other branches. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them.").

At bottom, defendants' political-question argument rests heavily on the politicized character of the climate-change debate. But this misunderstands the nature of the political-question doctrine. The Court in *Baker* took care to underscore that the political-question doctrine is "one of 'political questions,' not one of 'political cases.'" 369 U.S. at 217; *see also Japan Whaling Ass'n*, 478 U.S. at 230 ("[U]nder the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones"); *Nixon v. Herndon*, 273 U.S. 536, 540 (1927) ("The objection that the subject-matter of the suit is political is little more than a play upon words."). Courts have a constitutional obligation to exercise their jurisdiction under Article III even where, as here, the issue involved is one that may have political sensitivities.

III. THE FEDERAL COMMON LAW ENCOMPASSES PLAINTIFFS' PUBLIC-NUISANCE CLAIMS AND HAS NOT BEEN DISPLACED BY THE CLEAN AIR ACT OR REGULATORY ACTIONS TAKEN BY EPA.

A. Plaintiffs' claims arise under federal common law.

1. *There is a federal common law of public nuisance.*

"When the states by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done." *Georgia*, 206 U.S. at 237. In exchange for giving

up the ability to abate transboundary nuisances by force, the States received the right to seek relief for those nuisances under federal law. In the absence of action by either Congress or a federal administrative agency that addresses the nuisance, the States are entitled to invoke the judicially developed body of federal common law. *Id.*; *see also Arkansas v. Oklahoma*, 503 U.S. 91, 98 (1992); *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 n.13 (1981); *Milwaukee I*, 406 U.S. at 107; *Missouri II*, 200 U.S. at 520; *Missouri I*, 180 U.S. at 241.

a. The earliest public-nuisance cases involving interstate pollution were *Missouri I*, *Missouri II*, and *Georgia*. In *Missouri*, an original action in the Court, Missouri claimed that Illinois had caused a public nuisance by discharging sewage into the Mississippi River, causing typhoid deaths downstream in Missouri. The Court held that Missouri's claim—which could amount to a *casus belli* if it were between sovereign nations—stated a claim for equitable relief in federal court. *Missouri II*, 200 U.S. at 520. Although the Court ultimately concluded that Missouri had not established the element of causation, it did so only after full evidentiary development, including conflicting expert testimony regarding the impact of typhoid bacillus found in Illinois's discharges on the incidence of typhoid in Missouri. *Id.* at 523-26.

Similarly, in *Georgia*, 206 U.S. at 236, the Court entertained Georgia's suit to enjoin copper companies located in Tennessee from "discharging noxious gas" into Georgia, where the gases damaged forests, orchards, and crops. After full evidentiary development, the Court entered the injunction, relying upon common-law tort principles. *Id.* at 237, 239; *see also New Jersey*, 283 U.S.

at 483 (enjoining New York City from dumping garbage into the Atlantic Ocean, polluting New Jersey's waters and beaches); *New York*, 256 U.S. at 312-13 (entertaining, although ultimately rejecting, New Jersey's challenge to New York's discharge of treated sewage).

b. Although these cases were decided before *Erie* explained that "[t]here is no federal *general* common law," *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (emphasis added), this Court has since confirmed that interstate public-nuisance claims remain one of the few areas of federal *specialized* common law. The Court did so in *Milwaukee I*, where Illinois asked the Court to determine whether Milwaukee and other local authorities had created a public nuisance by discharging sewage into Lake Michigan. Because the dispute was between a State and the political subdivisions of another State, it fell within the Court's non-exclusive original jurisdiction, 28 U.S.C. § 1251(b), and the Court remanded the suit to a district court after determining that it raised a federal question: "When we deal with air and water in their ambient or interstate aspects, there is a federal common law." 406 U.S. at 103.

In reaching that conclusion, the Court relied extensively on *Texas v. Pankey*, 441 F.2d 236 (10th Cir. 1971), *see* 406 U.S. at 99-100, 103, where Texas claimed that the use of pesticide by ranchers in New Mexico had impaired Texas water supplies. The court of appeals determined that Texas had raised a federal question because a State that joins the union gains a federal common-law right to "protection by a federal court against improper pollution or impairment by outside sources." 441 F.2d at 236; *accord Arkansas*, 503 U.S. at 98-101,

110. Based on that reasoning and the Court's prior public-nuisance decisions—*Missouri II*, *Georgia*, *New York*, and *New Jersey*—*Milwaukee I* ruled that there is a "federal common law of nuisance." 406 U.S. at 107.

Contrary to defendants' contention, Pet. Br. 36-37, that ruling was not *dictum*. As the Court made plain, it was declining to exercise its original jurisdiction to hear the case only because Illinois had raised a claim arising under federal law that could be heard by a federal district court.[8] 406 U.S. at 97-98 & n.1.

c. Nothing has transpired since *Milwaukee I* that would undermine the continuing vitality of the federal common law of public nuisance. Defendants conflate the question whether to imply a cause of action to enforce a statute or regulation with the question whether the federal common law of nuisance exists, arguing that just as this Court has shown increasing reluctance to imply statutory causes of action it also should be reluctant to recognize federal common-law claims. Pet. Br. 33. But these are two different enterprises.

When Congress creates an obligation by statute, the question is whether that statute also enacts a private cause

---

8. One of defendants' *amici* argues that this holding conflicts with the earlier ruling in *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959). Brief of Nicholas Johnson as *Amicus Curiae* in Support of Petitioners 5. But *Romero* held only that *maritime* claims did not fall within the general federal-question statute, 28 U.S.C. § 1331. That determination was rooted in the separate treatment of maritime cases under Article III and the Judiciary Act of 1789, *Romero*, 358 U.S. at 359-65, and has no application to the federal common law of public nuisance.

of action. This question is one of congressional intent. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress."). But when the obligation is created by something other than legislation, such as the Constitution or the common law, there is no issue of congressional intent. For example, this Court enforces the dormant Commerce Clause to protect interstate commerce in areas where Congress has not acted. *See, e.g., Granholm v. Heald*, 544 U.S. 460 (2005).

Unlike a statute, which may contain its own remedial measures that obviate the need for a private right of action, these nonstatutory duties would have no force if there were no implied cause of action to enforce them. Thus, in one of the narrow areas in which federal common law exists, this Court properly recognizes a cause of action to enforce the common law. Because the entire enterprise is judicially created, recognition of a cause of action does not run afoul of the rule for statutes set forth in *Alexander*.

Moreover, defendants are mistaken to suggest that this case involves recognition of a new cause of action. As noted above, this Court has long heard federal public-nuisance claims by States regarding transboundary pollution. Even if this Court were no longer recognizing new common-law causes of action, that would not affect the viability of previously recognized causes of action like those at issue here. *See, e.g., Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (enforcing an implied cause of action recognized before *Alexander*).

2. *The federal common law of public nuisance encompasses the claims here.*

a. Defendants offer two limiting principles to distinguish this Court's prior public-nuisance cases from this case, but they are mistaken.

First, defendants argue that the federal common law is limited to disputes between two States. Pet. Br. 36. But this Court has repeatedly addressed public nuisance disputes between States and non-state actors. *Georgia* involved Georgia's public-nuisance claims against private copper companies in Tennessee. 206 U.S. at 236. And *Milwaukee I* was a suit by Illinois against non-state actors (Milwaukee and other local authorities). 406 U.S. at 97-98. Indeed, the fact that the defendants in that case were not themselves States was essential to the holding that the case did not fall within this Court's exclusive original jurisdiction. *Id.* at 98. Moreover, the reason for recognizing federal common law in this field—that States gave up their power to abate interstate nuisances forcibly when they entered the Union, *see Georgia*, 206 U.S. at 237—exists equally whether the nuisance is created by another State or its citizens.

Second, defendants also argue that the federal common law of public nuisance is limited to "a localized problem that affected a discrete area and was traceable to a discrete source—*i.e.*, nuisances of simple type." Pet. Br. 39 (citations and quotation marks omitted). But in the *Missouri* cases, Missouri alleged a public nuisance that was neither localized nor clearly traceable to a discrete source, claiming that Illinois's sewage injured the residents of St. Louis, over 300 miles downstream.

In its day, that claim was as scientifically complex as the claims made by the States here, and the Court observed that "we cannot but be struck by the consideration that if this suit had been brought fifty years ago it almost necessarily would have failed." *Missouri II*, 200 U.S. at 522. Indeed, the Court emphasized that Missouri's claim did *not* involve "a nuisance of the simple kind that was known to the older common law." *Id.* Yet the Court did not, as defendants request here, reject Missouri's public-nuisance claim on that ground. Instead, it allowed full factual development of Missouri's claims and only then resolved them on the merits, finding that the evidence did not establish causation. *Id.* at 525.

As in *Missouri II*, the causation element of plaintiffs' claims here is a matter of proof that can and should be decided under public-nuisance law. Just as Missouri had to prove that discharges from Illinois contributed to typhoid deaths in St. Louis, plaintiffs will ultimately have to prove that defendants' emissions contribute to the global warming that threatens to injure plaintiffs. The claims will rise or fall on whether plaintiffs can provide that proof, but the claims should not be dismissed at the start merely because the public nuisance alleged here is of a scope and complexity not yet addressed by federal courts due to the newness of the global-warming problem.

b. Recognizing that plaintiffs have stated claims under federal common law will neither open the floodgates to federal public-nuisance litigation nor increase the likelihood of inconsistent judicial remedies. Plaintiffs are not asking the Court "[t]o hold that anyone affected by climate change may maintain a claim against any source of greenhouse gas emissions under the federal common

law of nuisance." Pet. Br. 39 (quotation marks omitted). The federal common law of public nuisance arose to resolve interstate public-nuisance claims made by *States*, and this Court need not decide whether the non-state plaintiffs would be able to assert federal common-law claims if they were suing without the participation of States.

Public-nuisance and standing principles also limit who can sue and be sued for injuries resulting from climate change. For example, public-nuisance claims may be brought only by a sovereign, or by private parties whose specialized injury is different from that suffered by the general public. Restatement (Second) of Torts § 821C. Recognizing the States' right to sue under federal common law thus will not, as claimed by defendants, result in an "essentially limitless set" of potential parties. Pet. Br. 39; *see also id.* at 50; TVA Br. 37.

Climate-change litigation under federal common law has reflected these limits. Only two other federal common-law suits have been brought, only one of which remains pending. *See Native Vill. of Kivalina v. ExxonMobile Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal pending*, No. 09-17490 (9th Cir.); *California v. Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), *appeal voluntarily dismissed*, No. 07-16908 (Dkt. No. 54, June 24, 2009).

Defendants also misunderstand the consequences of *not* applying federal common law here. They assert that recognizing federal common law creates a risk that federal courts would "come to different conclusions, and impose different forms of relief against different sources of greenhouse gas emissions." Pet. Br. 40; *see also* TVA

Br. 37. But the alternative is state common law, which creates a much greater risk of inconsistency. So long as plaintiffs have a claim under federal common law, they may not sue under state common law. *Milwaukee II*, 451 U.S. at 313 n.7; *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987). But because the Clean Air Act preserves their right to sue under state common law, they may bring state common-law claims if they have no federal common-law claim. *See Ouellette*, 479 U.S. at 497-99 (interpreting the savings clause in the Clean Water Act, 33 U.S.C. §1365(e), which is virtually identical to the savings clause in the Clean Air Act, 42 U.S.C. § 7604(a)(1)). Thus the risk of inconsistent rulings from the courts of the several States will be greater if plaintiffs do not have a claim under federal common law. *See Milwaukee I*, 406 U.S. at 107 n.9 (federal common law is preferable to the "varying common law of the individual States").[9]

Furthermore, defendants overstate the dangers of inconsistent rulings here. In any area of the law, particularly one involving equitable discretion, it is always possible that courts will come to different conclusions on facially similar facts. But courts *should* reach different results when the differences in the factual records in

---

9. Petitioners cite *North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291, 296 (4th Cir. 2010), *pet. for cert. filed*, No. 10-997, to support their argument that federal common law creates a risk of inconsistent rulings, *see* Pet. Br. 40, but that case rested on *state* common-law, *see* 593 F. Supp. 2d 812, 829 (W.D.N.C. 2009). The court of appeals held there that the Clean Air Act preempts state common law claims, but that holding is incorrect, *see* Brief of the States of Maryland et al. as *Amici Curiae* in Support of Petitioner, No. 10-977 (filed Mar. 7, 2011), and in any event the issue is not presented here.

separate cases warrant it. Even emission limitations imposed under the Clean Air take into account a range of factors "on a case-by-case basis," including "production processes and available methods, systems, and technologies" and "energy, environmental, and economic impacts and other costs." 42 U.S.C. § 7479(3). Ordinary procedural tools, such as transfer and consolidation of related cases and appellate review, will remain available to defendants that face potentially conflicting obligations. And in the unlikely event that inconsistent judicial rulings become a problem, the political branches will remain free to step in. *Cf. Blakely v. Washington*, 542 U.S. 296, 326 (2004) (Kennedy, J., dissenting) ("Constant, constructive discourse between our courts and our legislatures is an integral and admirable part of the constitutional design. Case-by-case judicial determinations often yield intelligible patterns that can be refined by legislatures and codified into statutes or rules as general standards.").

B. Neither the Clean Air Act nor the limited regulatory actions taken by EPA displaces plaintiffs' federal common-law claims.

A federal common-law public-nuisance claim is displaced when a federal statute or regulatory action addresses the nuisance. The relief that the Clean Air Act authorizes for emissions of air pollutants by stationary sources is the imposition of emission limitations. *See* 42 U.S.C. § 7411(d). Because no limitations have yet been imposed on existing power plants' carbon-dioxide emissions by either the Clean Air Act itself or EPA's limited regulatory actions, plaintiffs' federal common-law claims have not been displaced.

Milwaukee I held that the Federal Water Pollution Control Act (now called the Clean Water Act) in its original incarnation did not displace Illinois's federal common-law claims because it did not establish controls on the sewage discharges challenged by Illinois. *See* 406 U.S. at 103. This Court explained that controls would arise only if the United States brought an abatement action. *Id.*

But Congress amended the Clean Water Act in 1972 to provide that "[e]*very* point source discharge is prohibited unless covered by a permit" setting emissions limits. *Milwaukee II*, 451 U.S. at 318. Illinois's federal common-law claims were displaced by the amended Act and the permits issued to Milwaukee under the Act, which (1) imposed effluent limitations on Milwaukee's sewage treatment plants, and (2) established a program for abating overflows from Milwaukee's sewers.

Because effluent limitations were established for the sewage plants, "there [was] no basis for a federal court to impose more stringent limitations than those imposed under the regulatory regime by reference to federal common law." *Id.* at 320. And while the overflow abatement program would take several years to complete, it was also sufficient to displace Illinois's claims because it "addressed the problem of overflows." *Id.* at 323.

It did not matter that EPA controlled overflows on a case-by-case basis rather than by uniform regulation:

> Demanding specific regulations of general applicability before concluding that Congress has addressed the problem to the exclusion of

> federal common law asks the wrong question. The question is whether the field has been occupied, not whether it has been occupied in a particular manner.

Id. at 324. Although defendants make much out of that observation, Pet. Br. 45-46, the Court did not state, as defendants would have it, that displacement occurs whenever a statute merely legislates in the same field as the alleged nuisance. The Court's point was simply that, even if Illinois would have preferred that EPA issue a *regulation* addressing overflows, the abatement program established by Milwaukee's permits was sufficient to solve the problem and thus displaced Illinois's federal common-law claim. The crucial predicate—which, as explained below, is absent here—was that positive federal law addressed the problem by imposing a program for abating the overflows and afforded Illinois relief for the nuisance.

Unlike in *Milwaukee II*, the carbon-dioxide emissions from defendants' existing sources are neither prohibited by the Clean Air Act nor subject to regulatory emission limitations or an abatement program. Nor are those emissions otherwise addressed by either the Clean Air Act or EPA's regulatory actions. As a result, plaintiffs' federal common-law claims have not been displaced.

1. *The Clean Air Act does not itself address the public nuisance alleged by plaintiffs.*

Defendants argue that the Clean Air Act, standing alone, has displaced plaintiffs' claims but do not confront the essential difference between the Clean Water Act and the Clean Air Act: The former prohibits any discharge

of water pollutants unless authorized by a permit, while the latter does not prohibit or control the emission of air pollutants unless and until EPA has taken affirmative steps to regulate the emissions. *See* TVA Br. 45. Defendants try to equate the two statutes by quoting various descriptions of the Clean Air Act as "comprehensive," "sweeping," and "capacious," Pet. Br. 41 (citations omitted), but displacement must turn on what a statute actually does, and the Clean Air Act does not regulate carbon-dioxide emissions from defendants' plants.

It is not enough that the Clean Air Act gives EPA the authority to regulate carbon-dioxide emissions from existing power plants and allows plaintiffs to petition EPA to act. Pet. Br. 43-44. Unlike the panoply of actual remedies that the Court analyzed in *Milwaukee II*, the existence of EPA authority has had no effect on defendants' emissions. Indeed, if a grant of authority to a federal agency were sufficient to displace a federal common-law claim, the *pre*-1972 Federal Water Pollution Control Act would have displaced Illinois's claim, because that version of the statute authorized the United States to bring an abatement action. *Milwaukee I*, 406 U.S. at 103. Only EPA actions actually addressing the emissions would satisfy the federal interest that gave rise to the federal common law of public nuisance.

2. *EPA's regulatory actions have not addressed the public nuisance alleged here.*

a. TVA's argument that EPA's regulatory actions displace federal common law also fails. There are several prudential reasons for the Court not to reach that issue. The issue was not decided below, is not argued by petitioners,

and is not fairly included in the questions presented, Sup. Ct. R. 14(1)(a), which ask only whether the Clean Air Act itself displaces the States' claims by "speak[ing] directly to the subject matter and assign[ing] federal responsibility for regulating such emissions to" EPA, Pet. Br. i. *See Skinner v. Switzer*, — U.S. —, slip op. at 14 (Mar. 7, 2011) ("Mindful that we are a court of review, not of first view, we confine this opinion to the matter on which we granted certiorari . . . .") (quotation marks, alteration marks, and citation omitted). And even if the regulations upon which TVA relies controlled emissions from defendants' plants—which they do not—the regulations are currently being challenged by numerous parties, including the private defendants. *See Utility Air Regulatory Group v. EPA*, Nos. 10-1042, 10-1122, 10-1161 (D.C. Cir). It would be premature for this Court to decide the effect on plaintiffs' claims of those regulations before their validity has been finally adjudicated by the lower courts.

Moreover, EPA recently entered into a settlement agreement that calls for it to complete a rulemaking by May 2012 on whether to issue new source performance standards for greenhouse-gas emissions from new and modified power plants, as well as guidelines for state limits on greenhouse-gas emissions from existing plants. Notice of Proposed Settlement Agreement, 75 Fed. Reg. 82,392 (Dec. 30, 2010); *see also* Pet. Br. 9; TVA Br. 50-51. Should those emissions become subject to actual limitations, plaintiffs' federal common-law claims here would be displaced under *Milwaukee II*.

In these circumstances, the more prudent disposition of the petition would be to dismiss the writ of certiorari as improvidently granted. The case would then return to the district court, which would have a sound basis

to stay further proceedings pending the outcome of EPA's rulemaking. If for some reason EPA does not follow through by 2012 with regulations actually limiting emissions from defendants' plants, the district court and the court of appeals would have an opportunity to consider whether some basis for displacement then existed despite the absence of actual regulation, and the unsuccessful party could seek this Court's review.

b. If the Court nonetheless now reaches the question of whether EPA's recent regulatory actions have displaced plaintiffs' federal claims, the Court should hold that they do not. TVA argues that the claims have been displaced because EPA has "directly entered the field plaintiffs would have governed by common-law nuisance suits." TVA Br. 45. But regulatory actions "occupy the field" under *Milwaukee II*, 451 U.S. at 317-18, only when they address the challenged public nuisance, and EPA's regulatory actions do not address greenhouse-gas emissions from existing power plants. TVA claims that plaintiffs are complaining that "EPA has not yet done precisely what plaintiffs demand here," TVA Br. 52, but plaintiffs are not objecting to the *kind* of relief that EPA has provided. Instead, they seek relief under federal common law because EPA has as yet provided *no* relief at all for emissions at issue here.

Nor are plaintiffs' claims displaced because EPA is taking an "incremental approach" to addressing greenhouse-gas emissions. *See* TVA Br. 44. TVA relies on *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 11-12, 22 & n.32 (1981), *see* TVA Br. 52, but the incremental approach adopted by the statute at issue in that case was part of a comprehensive scheme initially imposing immediate limitations on dumping

sewage sludge in the ocean and later prohibited dumping altogether. Thus, relief was provided in increments there, unlike here where EPA has provided no relief from defendants' emissions.

The series of EPA actions discussed by TVA culminated in the imposition of greenhouse-gas limitations on new and modified major stationary sources, but neither imposed limitations on existing sources nor obligated EPA to regulate those emissions in the future. *See* TVA Br. 46-50. The first action in that series was EPA's issuance—as a result of this Court's decision in *Massachusetts*—of a finding under the section of the Act that pertains to mobile sources, 42 U.S.C. § 7521(a)(1), that greenhouse gases "may reasonably be anticipated to endanger public health or public welfare." As a result of the endangerment finding, EPA issued greenhouse-gas emission standards for light-duty motor vehicles. *See* 75 Fed. Reg. 25,324.

Those standards made greenhouse gases a pollutant "subject to regulation" for the purposes of two of the Act's stationary-source programs—the "prevention of significant deterioration" ("PSD") program and the Title V permitting program—neither of which requires greenhouse-gas limitations for existing power plants. 42 U.S.C. §§ 7475(a)(4), 7479(1), 7602(j), 7661(2)(B), 7661a(a); 75 Fed. Reg. at 31,606-07, 31,551-54. The PSD program covers only *new* "major" stationary sources and *modifications* to major stationary sources. 42 U.S.C. §§ 7475(a), 7479(2)(C). The Title V operating permit program requires major stationary sources, including defendants' plants, to obtain one permit setting forth all the emission limitations already imposed under other provisions of the Act, in order to facilitate enforcement of

those limitations, but does not itself impose any emission limitations, as TVA acknowledged at the certiorari stage, *see* Brief of the Tennessee Valley Authority in Support of Petitioners 4. Since there are no carbon-dioxide emission limitations imposed on existing power plants, defendants' Title V permits do not include such limitations.

To implement its new obligations under the PSD and Title V programs, EPA issued the "tailoring rule," which phases in the greenhouse-gas requirements under the PSD program and Title V. 75 Fed. Reg. 31,514. TVA cites the tailoring rule as evidence of EPA's judgment that "regulation of greenhouse-gas emissions from stationary sources should proceed in an orderly and phased fashion based on a variety of considerations," TVA Br. at 50, but the tailoring rule reflects only EPA's judgment that for administrative reasons, it should take an incremental approach to meeting its obligations under the PSD and Title V programs. 75 Fed. Reg. at 31,516. As explained above, these programs do not impose limitations on greenhouse-gas emissions from existing sources.

c. Greenhouse-gas limitations on existing stationary sources would be triggered if EPA issued new source performance standards for greenhouse-gas emissions from power plants under 42 U.S.C. § 7411(b). Those standards themselves would apply to new and modified plants, but they also would obligate EPA to issue regulations requiring States to impose emission standards on existing power plants. *Id.* § 7411(d)(1); *see also* TVA Br. 50-51. EPA has announced that it intends to complete a rulemaking by May 2012 on the issue of new source performance standards for power plants, but, as TVA emphasizes, TVA Br. 51 n.25, there is no guarantee that

this rulemaking will actually impose limits on defendants' emissions or otherwise address them. In any event, until the rulemaking is complete, federal law will offer no relief for defendants' emissions nor address them in any way other than through federal common law.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General of New York
BARBARA D. UNDERWOOD*
Solicitor General
BENJAMIN N. GUTMAN
Deputy Solicitor General
MONICA WAGNER
Assistant Solicitor General
MICHAEL J. MYERS
MORGAN A. COSTELLO
ROBERT ROSENTHAL
Assistant Attorneys General
120 Broadway, 25th Floor
New York, NY 10271
(212) 416-6351
barbara.underwood@ag.ny.gov

March 2011

* *Counsel of Record*

GEORGE JEPSEN
Attorney General of Connecticut
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120

KAMALA D. HARRIS
Attorney General of California
P.O. Box 70550, 1515 Clay Street
Oakland, CA 94612-0550

THOMAS J. MILLER
Attorney General of Iowa
1305 E. Walnut Street
Des Moines, IA 50319

PETER F. KILMARTIN
Attorney General of Rhode Island
150 South Main Street
Providence, RI 02903

WILLIAM H. SORRELL
Attorney General of Vermont
109 State Street
Montpelier, VT 05609-1001

MICHAEL A. CARDOZO
Corporation Counsel
of the City of New York
100 Church Street
New York, NY 10007

REPLY BRIEF

Supreme Court, U.S.
FILED
APR 11 2011
OFFICE OF THE CLERK

No. 10-174

IN THE

Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY INC., *et al.*,
Petitioners,

v.

STATE OF CONNECTICUT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR THE PETITIONERS

F. WILLIAM BROWNELL
NORMAN W. FICHTHORN
ALLISON D. WOOD
HUNTON & WILLIAMS LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 955-1500

Counsel for Petitioner Southern Company

PETER D. KEISLER*
CARTER G. PHILLIPS
DAVID T. BUENTE JR.
ROGER R. MARTELLA JR.
QUIN M. SORENSON
JAMES W. COLEMAN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
pkeisler@sidley.com
(202) 736-8000

Counsel for Petitioners

* Counsel of Record
[Additional Counsel Listed On Inside Cover]

April 11, 2011

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

0347961
29

SHAWN PATRICK REGAN
HUNTON & WILLIAMS LLP
200 Park Avenue
52nd Floor
New York, N.Y. 10166
(212) 309-1000

Counsel for Petitioner Southern Company

MARTIN H. REDISH
NORTHWESTERN UNIVERSITY SCHOOL OF LAW
375 East Chicago Avenue
Chicago, Illinois 60611
(312) 503-8545

Counsel for Petitioners

DONALD B. AYER
KEVIN P. HOLEWINSKI
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

THOMAS E. FENNELL
MICHAEL L. RICE
JONES DAY
2727 North Harwood Street
Dallas, Texas 75201
(214) 220-3939

Counsel for Petitioner Xcel Energy Inc.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF	1
I. PLAINTIFFS LACK STANDING TO PURSUE THEIR CLIMATE CHANGE NUISANCE CLAIMS	4
II. A CLIMATE CHANGE NUISANCE CAUSE OF ACTION CANNOT BE MAINTAINED AS A MATTER OF FEDERAL COMMON LAW	11
III. THIS CASE PRESENTS NON-JUSTICIABLE POLITICAL QUESTIONS	18
CONCLUSION	22

TABLE OF AUTHORITIES

CASES Page

Alexander v. *Sandoval*, 532 U.S. 275 (2001) 12
Arizona v. *California*, 373 U.S. 546 (1963) .. 16
ASARCO Inc. v. *Kadish*, 490 U.S. 605 (1989) 5
Astra USA, Inc. v. *Santa Clara Cnty.*, No. 09-1273, 2011 WL 1119021 (U.S. Mar. 29, 2011) 18
Atherton v. *FDIC*, 519 U.S. 213 (1997) 15
Baker v. *Carr*, 369 U.S. 186 (1962) 21
Bush v. *Lucas*, 462 U.S. 367 (1983) 12, 13
California v. *Sierra Club*, 451 U.S. 287 (1981) 12, 13
Chevron U.S.A., Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) 16
City of Milwaukee v. *Illinois*, 451 U.S. 304 (1981) 14, 16, 17
Coleman v. *Miller*, 307 U.S. 433 (1939) 9
Corr. Servs. Corp. v. *Malesko*, 534 U.S. 61 (2001) 12
Friends of the Earth, Inc. v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000) 10
Georgia v. *Tenn. Copper Co.*, 206 U.S. 230 (1907) 13
Gladstone Realtors v. *Vill. of Bellwood*, 441 U.S. 91 (1979) 5
Illinois v. *Milwaukee*, 406 U.S. 91 (1972) 13, 14, 17
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 8, 9
Luther v. *Borden*, 48 U.S. (7 How.) 1 (1849) 20
Massachusetts v. *EPA*, 549 U.S. 497 (2007) 9, 10, 21

TABLE OF AUTHORITIES—continued

Page

Middlesex Cnty. Sewerage Auth. v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981) 16
Missouri v. *Illinois*, 180 U.S. 208 (1901) 13
Missouri v. *Illinois*, 200 U.S. 496 (1906) 14
O'Melveny & Myers v. *FDIC*, 512 U.S. 79 (1994) 15
Sosa v. *Alvarez-Machain*, 542 U.S. 692 (2004) 12
Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998) 7
Tex. Indus., Inc. v. *Radcliff Mats., Inc.*, 451 U.S. 630 (1981) 12
United States v. *Standard Oil Co.*, 332 U.S. 301 (1947) 12, 13, 15
Vieth v. *Jubelirer*, 541 U.S. 267 (2004) 21
Vt. Agency of Natural Res. v. *United States ex rel. Stevens*, 529 U.S. 765 (2000) 7
Wheaton v. *Peters*, 33 U.S. (8 Pet.) 591 (1834) 12
Wheeldin v. *Wheeler*, 373 U.S. 647 (1963) 12
Willamette Iron Bridge Co. v. *Hatch*, 125 U.S. 1 (1888) 12

STATUTES AND REGULATIONS

33 U.S.C. § 1160 (1970) 17
42 U.S.C. § 7416 17
73 Fed. Reg. 44354 (July 30, 2008) 6
74 Fed. Reg. 66496 (Dec. 15, 2009) 6

TABLE OF AUTHORITIES—continued

OTHER AUTHORITIES

Page

Intergovernmental Panel on Climate Change, *Climate Change 2007: The Physical Science Basis* (2007) 6

W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* (5th ed. 1984) 19

Matthew F. Pawa, *Global Warming: The Ultimate Public Nuisance*, 39 Envtl. L. Rep. 10230 (2009) 9

Restatement (Second) of Torts (1965, 1979) 8

REPLY BRIEF

Plaintiffs argue that their suits involve only the routine application of "old law to new facts." Br. of OSI et al. ("OSI Br.") 1. That is wrong. Plaintiffs' claims are unprecedented—and plainly non-justiciable. If accepted, the legal theories underlying these claims will have extraordinary ramifications for courts and society alike.

Those ramifications are starkly illustrated by plaintiffs' efforts to satisfy Article III's traceability and redressability requirements. Plaintiffs deny that a finding that they have standing here would permit them to sue virtually anyone, arguing instead that, in this case, they sued only five "substantial" contributors of greenhouse gas emissions. Br. of Connecticut et al. ("State Br.") 15-16. Yet plaintiffs' claimed injuries result from the risks of climate change, and they allege that the "primary factor in determining the rate and magnitude" of that change is not these five defendants' emissions but the overall concentration of greenhouse gases throughout the atmosphere from past, present, and future sources. J.A. 102.

Plaintiffs' theory of traceability therefore relies on the assertion that "each person who ... contributes to a public nuisance may be held liable even if others are also contributing," and even if that person contributes "to only a slight extent." State Br. 15. And their theory of redressability rests on the claim that reducing a fraction of even one defendant's emissions will "contribute to a reduction in the risk and threat of injury," because "the lower the [overall] level of emissions, the lesser the injuries." *Id.* at 17. Plaintiffs thus predicate their right to bring this suit on the logic that every emission increases the risk of

injury, and every reduction lowers that risk. If those premises were a sufficient predicate for standing, they would enable plaintiffs and any others satisfying plaintiffs' expansive "special injury" standard to use the federal courts to target any sector of the economy that they believe should reduce its emissions.

Plaintiffs' theory would also require the courts to make broad policy judgments, without statutory standards or regulatory guidance, in determining the nature and scope of the injunctions (if any) that should be entered against whichever of the countless potential defendants a plaintiff might choose to name. Plaintiffs argue that courts can simply apply nuisance law's "reasonableness" standard to decide for each defendant what level of emissions is acceptable. OSI Br. 29; State Br. 33-34. But they nowhere explain how courts would do this, and for good reason: it is a judicially unmanageable task.

To adjudicate these claims, a court would need to determine (i) the overall reductions necessary to reach a safe level of atmospheric greenhouse gases (*i.e.*, the level at which the plaintiffs would not face undue risk of harm); and (ii) the defendants' "share of the carbon dioxide emission reductions necessary to" reach that level. J.A. 102. To determine a defendant's "share" of necessary reductions, however, a court would need to decide what everyone else's "share" should be. And to do this, a court would need to determine the social utility of the defendants' emissions-causing conduct and the societal costs of reducing those emissions, and then weigh those benefits and costs against the social benefits and costs of reducing emissions from numerous other activities. Only by conducting such comparative assessments would a court have any basis for deciding, for example, that these defendants must

reduce emissions by three percent, while major airlines should reduce theirs by only one percent.

These policy judgments should be made by the political branches, not the courts. This is so *not* because they involve "difficult scientific questions." State Br. 34. It is because the task of weighing the relative societal burdens of, for example, more expensive electricity in certain parts of the country against the relative societal burdens of greater costs in agriculture, transportation, manufacturing, and many other economic sectors calls for policy judgments so sweeping in their implications that they can legitimately be made only by the politically accountable branches.

Plaintiffs respond that balancing is unnecessary because the social utility of a defendant's conduct is irrelevant under public nuisance law. *Id.* at 32-33. But the relief they seek—a three percent annual reduction in defendants' emissions for ten years, J.A. 102—belies this claim. If social utility were truly irrelevant, then plaintiffs' "every reduction matters" theory would seemingly support a total shutdown of defendants' electric generating plants. Plaintiffs understandably avoid seeking this unthinkable relief. Their unwillingness to embrace the consequences of their theory confirms that a complex weighing of the respective costs and benefits of innumerable emissions-causing activities is essential to resolution of their claims. And this standardless, *ad hoc* balancing would be repeated and revised by different district courts in suit after suit, as these and other plaintiffs sue other emitters as asserted contributors to climate change to obtain their respective "shares" of necessary reductions as well.

The necessity of this balancing of societal burdens and interests across virtually all economic activities

makes this case fundamentally different from those in which courts have applied other broad standards (*e.g.*, "reasonableness" under the Fourth Amendment), or weighed important equitable claims (*e.g.*, apportioning rights in a single river). State Br. 33, 35. There is no meaningful judicial analog for the enterprise plaintiffs seek to launch. It is, instead, a legislative and regulatory function, properly reserved under our constitutional system for the legislative and executive branches.

For these reasons, plaintiffs' claims fail on every level. Neither the importance of greenhouse gas emissions, nor their interstate and international character and consequences, offer any justification for implying a completely unmanageable federal common law nuisance remedy to address this unique concern. And these same considerations establish that litigation of such a claim is also barred by the separation-of-powers principles reflected in this Court's doctrines of standing, displacement, and political question.

I. PLAINTIFFS LACK STANDING TO PURSUE THEIR CLIMATE CHANGE NUISANCE CLAIMS.

The unprecedented nature of plaintiffs' asserted cause of action is reflected in the theory of standing necessary to support it. Under that theory, any single "contribution" of greenhouse gas emissions could be a traceable cause of climate change; as a result, plaintiffs alleging risks associated with climate change could sue to enjoin any source of those emissions, claiming that any reduction in emissions would mitigate those risks to some degree, however small. Petrs. Br. 19-21. Never before has this Court approved such an expansive approach to standing, which would allow suits by each against all and

effectively eliminate the requirements of traceability and redressability for climate change cases. *Id.*[1]

1. These problems cannot be ignored merely because plaintiffs allege that these defendants are "substantial" sources of greenhouse gas emissions, and "the five largest U.S. emitters of carbon dioxide." OSI Br. 2, 32-34; State Br. 15-16. Plaintiffs selected five defendants, but their theory of standing fails to restrict the pool of potential defendants. It would allow suit against *any* contributor of greenhouse gas emissions, no matter how "slight" its contribution. OSI Br. 32-34, 40; State Br. 15-16.

Plaintiffs argue that tort law would not impose liability for a "*de minimis*" contribution. OSI Br. 33. But there is no apparent standard by which a court could define who is or is not a "*de minimis*" or "substantial" contributor of greenhouse gas emissions. Plaintiffs' theory of redressability, moreover, plainly sweeps into the latter category innumerable actors in every major economic sector.

The five defendants in this case are characterized as "substantial" contributors because, collectively, they are allegedly responsible for approximately 2.5% of annual anthropogenic carbon dioxide emissions worldwide. OSI Br. 7; State Br. 14. But these defendants are separate entities, so their emissions cannot be aggregated for purposes of assessing standing. *E.g.*, *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J., joined by Rehnquist, C.J., Stevens & Scalia, JJ.) ("standing to

---

[1] Contrary to plaintiffs' argument, OSI Br. 35-36, plaintiffs in a tort suit must each independently establish standing. *See, e.g.*, *Gladstone Realtors* v. *Vill. of Bellwood*, 441 U.S. 91, 111 (1979). That is particularly true where, as here, plaintiffs brought their claims in separate, unconsolidated lawsuits.

sue is not a kind of gaming device that can be surmounted merely by aggregating the allegations"). Individually, each defendant was allegedly responsible in 2004 for less than one percent of annual worldwide anthropogenic carbon dioxide emissions, which have been accumulating in the atmosphere for centuries.[2] J.A. 57, 61-67, 84-85. And plaintiffs claim that each defendant should be required to reduce its emissions by a limited yearly percentage—about three percent—as its "share" of the overall emissions reduction needed to address climate change. *Id.* at 102. For judicial relief to have any appreciable impact on those alleged risks, therefore, countless other relatively minute "shares" of annual reductions must be obtained through litigation against innumerable other sources of anthropogenic greenhouse gas emissions—including those in the "electricity, industrial, commercial, residential, transportation and agriculture sectors." 73 Fed. Reg. 44354, 44402 (July 30, 2008).[3] Thus, plaintiffs' theory of redressability offers no meaningful limit on the number of entities that can be sued as "substantial" contributors to global greenhouse gas emissions.

---

[2] Carbon dioxide is, moreover, only one of several greenhouse gases, and other types—for example, methane—have a substantially greater climatological impact on a per-volume basis. *E.g.*, Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2007: The Physical Science Basis* 210-14 (2007).

[3] Critically, more than 80% of annual global anthropogenic greenhouse gas emissions come from overseas sources such as those in China and India, 74 Fed. Reg. 66496, 66538 (Dec. 15, 2009), which presumably could not be compelled by federal courts to contribute their own "shares" of reductions.

Similar problems afflict plaintiffs' proposal to restrict these claims to States and private entities alleging "special injury." OSI Br. 18-19; State Br. 44. Plaintiffs never offer a precise definition of that standard, but the land trusts allegedly satisfy it because they purchased their properties for the purpose of conservation, and that interest is at risk from climate change. OSI Br. 31-32. Any purchaser of property, however, could assert an interest in its preservation—as well as some risk to that interest from the climatological and meteorological occurrences plaintiffs attribute to climate change. State Br. 4. In short, neither "special injury" nor the other constructs proposed by plaintiffs offer a principled basis on which to limit meaningfully the potential parties to climate change litigation, or suffice to meet Article III's traceability and redressability requirements.

2. Unable to satisfy constitutional standing requirements, plaintiffs argue in the alternative that those requirements should not apply because their claims are assertedly patterned after a traditional private common law tort action. OSI Br. 36-37; State Br. 21-23; see Br. of Tort Law Scholars 10-12. That is not the law. This Court has never suggested that standing requirements are inapplicable merely because a claim has historical antecedents or addresses private as opposed to governmental conduct. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 103-04 n.5 (1998) ("[T]he standing inquiry ... does not depend on the defendant's status as a governmental entity. There is no conceivable reason why it should."). To the contrary, even when claims have historical pedigrees, this Court still requires plaintiffs to show injury-in-fact, traceability, and redressability. *E.g.*, *Vt. Agency of Natural Res.* v.

United States ex rel. Stevens, 529 U.S. 765, 771-73 (2000). These elements represent the "irreducible constitutional minimum of standing," *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992), and they cannot be ignored because a claim is framed as a tort.

In any event, the climate change claims asserted in this case are nothing like the tort and nuisance cases courts have adjudicated in the past. Those cases, including the "contribution" cases plaintiffs cite, involved a finite (though sometimes large) number of parties whose actions in a particular geographic area produced a discrete effect in or near that area: for example, an automobile strikes a pedestrian, State Br. 22; several factories emit a pollutant that "foul[s] the air in a city," *id.* at 21; or fifty people each put "[o]ne drop of poison in a person's cup," OSI Br. 32. In these circumstances, where there is a clear nexus between individual contributors and ultimate effect, it is reasonable to characterize each of the actors as a "substantial factor" in producing the harm. Restatement (Second) of Torts §§ 432, 840E, 875; see TVA Br. 15.

The sweeping liability claims here bear no resemblance to those limited tort actions. The contributors of greenhouse gas emissions are innumerable and ever-expanding; the alleged effects of climate change are diffuse and worldwide; and there is no geographic or temporal nexus between individual emissions and particular alleged effects of climate change. Petrs. Br. 18-21. Without any such nexus, each and all of the billions of "contributors" of greenhouse gas emissions over centuries and across the globe cannot be characterized as "substantial factors" in producing each and all of the occurrences

plaintiffs attribute to climate change. *Id.*; see Br. of Chevron 16-21.

This is, then, not a case in which the requirements of standing are being "raise[d] ... higher than the necessary showing for success on the merits." OSI Br. 40; State Br. 16. Never before has a court adjudicated claims such as these, or adopted the expansive and novel theory of "contribution" on which they are based. Br. of DRI 10-20; Br. of Nat'l Fed. Ind. Bus. 13-25. There is no reason to believe that plaintiffs' theory of climate change as "the ultimate public nuisance" would or should be accepted even as a matter of tort law. Matthew F. Pawa, *Global Warming: The Ultimate Public Nuisance*, 39 Envtl. L. Rep. 10230 (2009). And, even if it were, there would be no basis for lowering constitutional traceability or redressability requirements to match that relaxed causation standard. Just as constitutional standing requirements cannot be raised to bar adjudication of "matters that were the traditional concern of the courts at Westminster," *Coleman* v. *Miller*, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.), so, too, novel tort claims cannot be used to lower those requirements. *Lujan*, 504 U.S. at 560-61.

3. Nor does *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), relax standing requirements for the claims presented here. That case arose in a regulatory context, where Congress often authorizes agencies to address problems incrementally. *Id.* at 516-17, 524-26. In addition, it was brought pursuant to an express statutory right of action, allowing petitioners to seek the "incremental" remedy of specific emissions regulations. *Id.* No statutory right is invoked in this case, so that analysis cannot support the comparable "incremental" relief sought here. Petrs. Br. 24-29.

Plaintiffs respond that Congress's decision to create a statutory right of action is relevant to standing analysis in only one limited respect: it establishes only that uncertainty about whether an agency will provide relief *on the merits* does not break the chain of causation when a party complains about the denial of a *procedural right*. OSI Br. 39. But this Court has also deemed the presence of a statutory right of action crucial to determining whether plaintiffs have standing in cases that raised no issue of agency discretion. *E.g.*, *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185-86 (2000). And in *Massachusetts* itself, the statutory right of action was "critical," 549 U.S. at 516, not merely because it filled a gap in causation resulting from agency discretion. More fundamentally, this Court found that the statutory cause of action was important to the standing analysis because its exercise vindicated Congress's policy judgment to afford petitioners the right to obtain the "incremental" benefit of piecemeal emissions reductions that agency action could provide, notwithstanding the broad array of independent sources of greenhouse gas emissions that would remain unaffected by the regulations sought. Petrs. Br. 25-30.

By contrast, it is directly relevant in this non-statutory tort case that the overwhelming majority of greenhouse gas emissions come from independent sources that cannot be affected by a judicial decree here. This Court has in several cases rejected claims of standing when the occurrence of the harm depended on the conduct of independent third parties—including, contrary to plaintiffs' suggestion, OSI Br. 40-41, cases in which the defendant was alleged to contribute "directly" to the harm. Petrs.

Br. 21-22 (citing, *inter alia*, *ASARCO*, 490 U.S. 605). That is the situation here: according to the complaints, climate change "has begun" and will continue whether or not these defendants are required to "achieve their share" of the overall global emissions reductions that are "necessary to significantly slow the rate and magnitude of warming." J.A. 79, 102.

Plaintiffs' inability to plead facts establishing redressability underscores the impropriety of extending a common law tort claim to address these issues. Plaintiffs are not suing to obtain meaningful redress for their alleged injuries, or to vindicate a statutory right; they are suing because, in their view, Congress and EPA are not doing enough to address global warming. See OSI Br. 50-54; State Br. 48-54. Plaintiffs thus seek to use federal common law to implement their vision of proper public policy and apply it to a small subset of regulated entities. Article III courts do not exist to allow States and other parties to implement their incremental preferred responses to a national concern. To have standing, plaintiffs must allege facts establishing that judicial relief will redress their injuries—something they do not and cannot do.

II. A CLIMATE CHANGE NUISANCE CAUSE OF ACTION CANNOT BE MAINTAINED AS A MATTER OF FEDERAL COMMON LAW.

Standing concerns aside, the federal common law cause of action asserted here should not be recognized. It goes far beyond any "nuisance" cause of action previously adjudicated by this Court, and implicates broad issues of national and international importance that render it fundamentally a matter for legislative, not judicial, resolution.

1. Plaintiffs' view of federal common law harkens to "the free-wheeling days antedating *Erie R. Co.* v. *Tompkins*." *Wheeldin* v. *Wheeler*, 373 U.S. 647, 651 (1963). Plaintiffs argue that, while federal courts are limited in their authority to imply rights of action arising from federal statutes, no similar restrictions apply when the claims are premised on "nonstatutory duties" that are "created by ... the Constitution or the common law." State Br. 40-41. In that context, plaintiffs claim, federal courts are generally free to recognize and adjudicate causes of actions "to enforce the common law." *Id.*; see OSI Br. 26-27.

That is plainly wrong. The creation or expansion of a cause of action at the federal level is an inherently legislative act—whether the claim is based on statutory right, constitutional guarantee, or common law duty. *E.g.*, *Bush* v. *Lucas*, 462 U.S. 367, 388-90 (1983) (refusing to expand *Bivens* action to denials of First Amendment rights). This Court has consistently held in all types of cases that a federal common law claim may be recognized only when justified by a "uniquely federal interest" that would be undermined if the claim were not recognized. *Tex. Indus., Inc.* v. *Radcliff Mats., Inc.*, 451 U.S. 630, 641-42 (1981).[4] Indeed, even when a uniquely federal interest is present in a particular *area* of law such

---

[4] *Compare Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 725-27 (2004) (Alien Tort Statute); *Alexander* v. *Sandoval*, 532 U.S. 275, 287 (2001) (Civil Rights Act), *with Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 67 n.3 (2001) (Eighth Amendment); *Bush*, 462 U.S. at 388-90 (First Amendment), *with California* v. *Sierra Club*, 451 U.S. 287, 296 n.7 (1981) (common law nuisance); *Wheeldin*, 373 U.S. at 652 (common law abuse of process); *United States* v. *Standard Oil Co.*, 332 U.S. 301, 314 (1947) (common law indemnity); *Willamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1, 8 (1888) (common law nuisance); *Wheaton* v. *Peters*, 33 U.S. (8 Pet.) 591, 658-59 (1834) (common law copyright).

that federal common law *generally* applies, this Court has refused to approve specific proposed causes of action within that area of law when doing so would implicate policy issues more appropriately addressed by Congress. *Bush*, 462 U.S. at 378-380, 388-90. In *United States* v. *Standard Oil Co.*, 332 U.S. 301 (1947), for example, the Court found that federal common law governed claims by the United States seeking recovery of costs relating to the negligent injury of a soldier, but nonetheless declined to recognize that specific cause of action because the claim concerned "question[s] of federal fiscal policy" that were "a proper subject for congressional action, not for any creative power of ours." *Id.* at 314.

Similarly, this Court's previous adjudication of common law "nuisance" claims and cases involving interstate air emissions, see *Missouri* v. *Illinois*, 180 U.S. 208 (1901); *Illinois* v. *Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee I*"), does not support recognition of the specific and unprecedented federal common law claims asserted here. Those cases did not "establish a general federal law of nuisance." *California* v. *Sierra Club*, 451 U.S. 287, 296 n.7 (1981). They held only that, in the specific circumstances presented, and in light of then-existing federal statutes and relevant constitutional principles, the federal courts could address a specific claim without "intruding within a field properly within Congress' control." *Standard Oil*, 332 U.S. at 316; see Petrs. Br. 36-37.

Moreover, all of the disputes addressed in prior nuisance cases were of a type susceptible to resolution through a common law cause of action. They addressed allegations that a noxious pollutant emitted by a source in one State was causing harm in another. *Milwaukee I*, 406 U.S. at 93; *Georgia* v. *Tenn. Copper Co.*, 206 U.S. 230, 236 (1907); *Missouri*,

180 U.S. at 211-21. Put differently, one State was outsourcing its pollution to another. Those disputes involved a discrete number of relevant parties and an identifiable causal link between the challenged conduct in the source State and the resulting injury in the complaining State. *E.g.*, *Milwaukee I*, 406 U.S. at 103-07. However novel the scientific proof of causation may have been in *Missouri* v. *Illinois*, 200 U.S. 496 (1906), resolution of that and other essentially regional disputes did not require the Court to make expansive policy judgments with implications for the Nation's economy and foreign policy, using "vague and indeterminate nuisance concepts and maxims of equity jurisprudence." *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 317 (1981) ("*Milwaukee II*").

These claims are different in kind. Carbon dioxide is not inherently noxious—to the contrary, it is essential to virtually all industries, and produced as a result of numerous natural processes. And greenhouse gas emissions from a particular source in one State cannot be linked to particular alleged effects of climate change in any other. Petrs. Br. 18-20. As a result, this case does not involve one State outsourcing its pollution to another, or a localized dispute between an injured State and an injury-producing source in another. In marked contrast, the injuries asserted here—the effects of climate change—are alleged both to result from and affect enterprises in all States and around the world.

Contrary to plaintiffs' assertions, OSI Br. 1, therefore, this clearly is *not* a case in which "all that is involved is application of 'a well-settled concept of legal liability to a new situation, where that new situation is in every respect similar to the old situation that originally gave rise to the concept.'"

Standard Oil, 332 U.S. at 315. Unlike claims brought by a State against a discrete pollution source or discrete group of sources alleged to harm its residents, plaintiffs' claims would allow any or all States to sue facilities in any or all other States and seek emissions caps reflecting their interests and policy preferences. Federal common law has never been employed to resolve such disputes, and a "nuisance" action originally developed to address "obstructions of highways" and "scour[ing] of ditch[es]," OSI Br. 18, cannot be contorted to encompass such claims. See *Standard Oil*, 332 U.S. at 311-16 (tradition of common law indemnity claims did not support recognition of indemnity claim as a matter of federal common law).[5] The issues raised by this case are of national and global concern, and can legitimately be addressed only by the political branches. See *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 89 (1994) (weighing and appraising policy considerations is a task "for those who write the laws, rather than for those who interpret them").[6]

---

[5] These claims also would be unique in allowing private parties to assert an environmental nuisance claim under federal common law for the first time in this Court's history. *See* Pet. App. 102a-112a.

[6] Plaintiffs argue further that this cause of action is necessary to preserve "uniformity" and protect against the "uncertainty" that would arise if federal common law were not applied. OSI Br. 3; State Br. 45. But this Court has said that bare pleas for uniformity are insufficient to warrant creation of federal common law rules of decision, *Atherton* v. *FDIC*, 519 U.S. 213, 219-20 (1997), let alone creation or expansion of a federal common law cause of action. In any event, Congress, not the courts, should decide whether and how any interest in "uniformity" of greenhouse gas emissions regulation should be pursued (and is in a far better position to achieve such uniformity). *See Standard Oil*, 332 U.S. at 311-16.

2. Any federal common law climate change cause of action that might have been recognized has been displaced. Petrs. Br. 41-46. Plaintiffs acknowledge that this Court has held that the Clean Air Act ("CAA") grants EPA regulatory authority to restrict greenhouse gas emissions pursuant to statutory criteria, and they concede that EPA has exercised that authority and further committed to consider regulations concerning the very category of facilities at issue here. OSI Br. 50-54; State Br. 48-54. They nevertheless argue that displacement does not occur unless and until "EPA issues performance standards applicable to existing power plants." OSI Br. 52; State Br. 49; see Br. of Envtl. Law Prof. 8-16.

This is not the standard for displacement. In addressing *preemption* of *state* law, the presumption is against the party seeking preemption. *Milwaukee II*, 451 U.S. at 316-17. In contrast, this case addresses whether Congress has displaced federal common law, and the presumption therefore runs the other way: courts "start with the assumption that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." *Id.* Once Congress "addresse[s] [a] problem," whether through direct legislative regulation or by conferring regulatory authority on a federal officer or agency, related common law claims are displaced. *Id.* at 324; see *Middlesex Cnty. Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 21-22 (1981); *Arizona* v. *California*, 373 U.S. 546, 565-66, 580-81 (1963).

There is no doubt that the CAA "addresse[s] the problem" of greenhouse gas emissions by directing EPA to consider regulations based on the agency's findings regarding the risks of those emissions. Petrs. Br. 41-46; see *Chevron U.S.A., Inc.* v. *Natural*

Res. Def. Council, Inc., 467 U.S. 837, 848 (1984) (describing the CAA as a "comprehensive" approach to air pollution regulation).[7] The fact that Congress chose to address these issues by delegating regulatory authority to an agency, rather than imposing direct statutory emissions restrictions, does not mean there is a "gap" in the legislative scheme to be filled by courts. Petrs. Br. 41-44. Nor is there a "gap" in the statutory system with respect to the particular emissions restrictions plaintiffs seek: federal law not only grants EPA authorization to consider imposing such restrictions pursuant to statutory criteria, but also defines an administrative process by which plaintiffs can seek those restrictions through rulemaking petitions to EPA and judicial review of EPA's responses (the process used in *Massachusetts* v. *EPA*). *Id.*

---

[7] The CAA's "comprehensive" regulatory scheme is wholly unlike the system established by the pre-1972 Federal Water Pollution Control Act ("FWPCA") addressed in *Milwaukee I*, notwithstanding plaintiffs' efforts to link the statutes. State Br. 49. The FWPCA did not grant EPA *any* direct authority to regulate pollutant discharges. Petrs. Br. 42-43. Instead, it allowed the agency to request that the Attorney General bring an equitable abatement action where, as in common law nuisance actions, relief depended on the district judge's discretionary balancing of "the public interest and equities of the case." 33 U.S.C. § 1160(c)(5) (1970). Indeed, the FWPCA's savings clause expressly provided that "interstate action[s] ... shall not ... be displaced." *Id.* § 1160(b); *see Milwaukee I*, 406 U.S. at 102-04. The CAA, by contrast, vests in EPA direct authority to set and enforce emissions limitations, Petrs. Br. 41-43, and this Court has held that the language of its savings clause, 42 U.S.C. § 7416, does *not* preserve federal common law claims against displacement, *Milwaukee II*, 451 U.S. at 328-29 & n.21 (discussing "virtually identical" provisions in Clean Water Act).

Plaintiffs effectively ask this Court to hold that the CAA does not displace federal common law because the statute does not "obligate[ ]" EPA to regulate emissions in the way they prefer. OSI Br. 49. This argument reflects plaintiffs' *policy* judgment that the approach selected by Congress is inadequate or unsatisfactory and should be supplemented (if not supplanted) by the common law regulatory regime they propose. Br. of Rep. Upton 3-11. Accepting plaintiffs' argument would affirmatively undermine the regulatory scheme enacted by Congress, allowing plaintiffs to bypass the administrative process Congress established and instead seek a different and competing regime of emissions restrictions crafted by federal judges. Petrs. Br. 40-46; see Br. of EEI 14-23; Br. of Cato 29-34; Br. of U.S. Chamber of Commerce 28-30; cf. *Astra USA, Inc.* v. *Santa Clara County, Cal.*, No. 09-1273, 2011 WL 1119021, at *6-7 (U.S. Mar. 29, 2011) (refusing to recognize common law cause of action when Congress provided administrative system to address relevant issues). Creating and policing such a regime is not a proper function of the federal judiciary or federal common law.

III. THIS CASE PRESENTS NON-JUSTICIABLE POLITICAL QUESTIONS.

In addition to being precluded by principles of standing and restrictions on the role of federal common law, plaintiffs' claims are non-justiciable because they call on courts to address and resolve inescapably political questions. Petrs. Br. 46-51. To determine a "reasonable" emissions level for these defendants, a court would be required to determine the "reasonable" global level of greenhouse gas emissions, weighing the global risks of climate change and the global costs and benefits of emissions-

producing activities and associated reduction measures, and then make a comparative judgment to determine which industries, sectors, and particular defendants should be required to reduce their emissions and by how much. *Id.* These determinations implicate a broad array of national and international socioeconomic policy issues, with wide-ranging ramifications for the Nation's economy and security extending far beyond the parties in this case. *E.g.*, Br. of Am. Farm Bureau 10-22; Br. of U.S. Chamber of Commerce 24-30; Br. of Nat'l Black Chamber of Commerce 4-6; Br. of Bus. Roundtable 3-25.[8]

Nowhere do plaintiffs explain how a court could manage a "reasonableness" inquiry in this context. Instead, they propose an alternative standard under which a court could grant relief on these claims "without any inquiry into fault" based solely on the severity of the risks posed by climate change. State Br. 32-33. But, as the authorities they cite acknowledge, that standard would likewise require courts to engage in a "reasonableness" analysis, to decide whether it is socially and economically appropriate to hold the defendant liable for alleged harm regardless of fault, *e.g.*, W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 88, at 629-30 (5th ed. 1984), and thus implicates the same *ad hoc* judicial balancing of policy goals that the political

---

[8] The political and normative judgments inherent in recognition and adjudication of these claims, as well as the potentially massive socioeconomic consequences, are highlighted by amicus briefs supporting respondents. *E.g.*, Br. of AllEarth 4-20 (citing "market failures" and promotion of "clean energy" technologies); Br. of N. Coast Rivers 4-17 (citing cross-industry economic effects); Br. of Unitarian Universalist Ministry 10-24 (citing "ethical implications" of these issues).

question doctrine forbids. Petrs. Br. 46-51. Moreover, to hold that no balancing is required to resolve these claims, and that any "contributor" of greenhouse gas emissions—that is, virtually any enterprise anywhere in the world—could be judicially compelled to halt its emissions without any consideration of social utility or costs, would carry extraordinary consequences for the Nation's economy and security and would necessarily reflect a *policy* choice concerning the proper manner of assigning responsibility for and addressing the risks of climate change. That even plaintiffs do not here urge such draconian measures, which is what their theory logically supports, confirms the political questions inherent in their claims.

Nor are these claims justiciable merely because they are framed as a common law tort. OSI Br. 44-46; State Br. 32-33. One of the earliest political question cases, *Luther* v. *Borden*, 48 U.S. (7 How.) 1 (1849), was an action for common law trespass. *Id.* at 34. To adjudicate the merits of the claims there, however, a court would have been required to determine which of two competing governments of Rhode Island was lawful—a political question beyond a court's authority to resolve, notwithstanding the fact that it arose in a common law tort action. *Id.* at 35-39. Indeed, virtually *every* case presenting a non-justiciable political question comes to the court clothed in some recognized cause of action; if that were all that were required to compel a court to address an otherwise non-justiciable political question, the doctrine would be meaningless.

While political questions have arisen most often in cases addressing "foreign affairs and constitutional issues," State Br. 27, 30, those cases were deemed non-justiciable not because the doctrine is limited to

those two subject matters, but because particular questions implicated by those cases were committed exclusively to other branches or because there were no judicially manageable standards by which they could be resolved without engaging in *ad hoc* policy determinations. *E.g.*, *Vieth* v. *Jubelirer*, 541 U.S. 267, 277 (2004) (plurality); see *Baker* v. *Carr*, 369 U.S. 186, 210-17 (1962). This Court emphasized in *Baker* that the political question doctrine applies "even in private litigation which directly implicates no feature of separation of powers," and that it cannot be addressed by mere "semantic cataloguing" of prior cases in which a political question has been found. 369 U.S. at 214, 216; see Br. of U.S. Chamber of Commerce 17-18; Br. of Petrs. Law Prof. 22-23.

Moreover, this case *does* implicate constitutional issues and foreign affairs concerns: *inter alia*, whether the judiciary is constitutionally empowered to recognize and adjudicate a cause of action for global climate change in the absence of legislative or regulatory guidance when the relevant issues are subject to ongoing international negotiations. Br. of ACC 26-34; Br. of Global Automakers 24-29. These matters are undoubtedly "within the province of [the political] branch[es]." State Br. 29; see Br. of Rep. Upton 9-13.

The problem thus is not the "importance" of the questions presented, the "political overtones" of these cases, or the "complex[ity]" of the issues. OSI Br. 45-46; State Br. 34. The problem is that these claims inherently involve highly sensitive policy tradeoffs and judgments with far-reaching national and global effects. Petrs. Br. 46-51; see Br. of Indiana 12-24; cf. *Massachusetts*, 549 U.S. at 533 (courts have "neither the expertise nor the authority to evaluate these policy judgments"). The standards this Court and

others have previously applied in assessing the "reasonableness" of particular conduct, including in constitutional claims and prior nuisance cases, *e.g.*, State Br. 32-33, offer no basis for adjudicating these fundamentally different claims or for balancing the myriad national and international socioeconomic issues they implicate.[9]

CONCLUSION

The decision of the court of appeals should be reversed, and the case should be remanded with instructions that it be dismissed.

Respectfully submitted,

F. WILLIAM BROWNELL
NORMAN W. FICHTHORN
ALLISON D. WOOD
HUNTON & WILLIAMS LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 955-1500

Counsel for Petitioner Southern Company

PETER D. KEISLER*
CARTER G. PHILLIPS
DAVID T. BUENTE JR.
ROGER R. MARTELLA JR.
QUIN M. SORENSON
JAMES W. COLEMAN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
pkeisler@sidley.com
(202) 736-8000

Counsel for Petitioners

---

[9] Many of the issues that make this case non-justiciable under the political question (and Article III standing) doctrines also support dismissal on prudential standing grounds, as the Solicitor General argues. TVA Br. 11-22.

SHAWN PATRICK REGAN
HUNTON & WILLIAMS LLP
200 Park Avenue
52nd Floor
New York, N.Y. 10166
(212) 309-1000

Counsel for Petitioner Southern Company

MARTIN H. REDISH
NORTHWESTERN UNIVERSITY SCHOOL OF LAW
375 East Chicago Avenue
Chicago, Illinois 60611
(312) 503-8545

Counsel for Petitioners

DONALD B. AYER
KEVIN P. HOLEWINSKI
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

THOMAS E. FENNELL
MICHAEL L. RICE
JONES DAY
2727 North Harwood Street
Dallas, Texas 75201
(214) 220-3939

Counsel for Petitioner Xcel Energy Inc.

* Counsel of Record

April 11, 2011

REPLY BRIEF

Supreme Court, U.S.
FILED
APR 11 2011
OFFICE OF THE CLERK

No. 10-174

In the Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY INC., ET AL.,
PETITIONERS

v.

STATE OF CONNECTICUT, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE TENNESSEE VALLEY AUTHORITY AS RESPONDENT SUPPORTING PETITIONERS

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

03478a (27)

TABLE OF CONTENTS

Page

I. Plaintiffs' claims are not justiciable 2
   A. The assertion of novel common-law claims does not establish justiciability 3
   B. Plaintiffs lack prudential standing because their suits are generalized grievances more appropriately addressed by the representative Branches 8
   C. This case raises separation-of-powers concerns addressed by the political-question doctrine, but other grounds provide a more appropriate basis for dismissal 15
II. Any federal common-law claims have been displaced by EPA's regulatory actions under the Clean Air Act .. 17

TABLE OF AUTHORITIES

Cases:

Alfred L. Snapp & Son, Inc. v. *Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982) 11
Allen v. *Wright*, 468 U.S. 737 (1984) 2, 3, 8
Alvarado v. *KOB-TV, LLC*, 493 F.3d 1210 (10th Cir. 2007) 4
Association of Data Processing Serv. Orgs. v. *Camp*, 397 U.S. 150 (1970) 9
Baker v. *Carr*, 369 U.S. 186 (1962) 16
Barrows v. *Jackson*, 346 U.S. 249 (1953) 3, 9
Bennett v. *Spear*, 520 U.S. 154 (1997) 3
Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) 15
City of Milwaukee v. *Illinois*, 451 U.S. 304 (1981) (*Milwaukee II*) 15, 18, 20

Cases—Continued: Page

City of Phila. v. *Beretta U.S.A. Corp.*, 277 F.3d 415 (3d Cir. 2002) 5
Clarke v. *Securities Indus. Ass'n*, 479 U.S. 388 (1987) ... 14
Elk Grove Unified Sch. Dist. v. *Newdow*, 542 U.S. 1 (2004) 2, 3, 8, 9, 13
Exxon Valdez, In re, 104 F.3d 1196 (9th Cir. 1997) 10
FEC v. *Akins*, 524 U.S. 11 (1998) 13
Freeman v. *First Union Nat'l*, 329 F.3d 1231 (11th Cir. 2003) 4
Friends of the Earth, Inc. v. *Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000) 5
Friends of the Earth, Inc. v. *Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167 (2000) 4
Georgia v. *Tennessee Copper Co.*, 206 U.S. 230 (1907) 6
International Primate Prot. League v. *Administrators of Tulane Educ. Fund*, 500 U.S. 72 (1991) 4
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 3
Massachusetts v. *EPA*, 549 U.S. 497 (2007) 11, 17, 19
Massachusetts v. *Mellon*, 262 U.S. 447 (1923) 11
Mayor of Georgetown v. *Alexandria Canal Co.*, 37 U.S. (12 Pet.) 91 (1838) 7
Middlesex County Sewerage Auth. v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981) 19
Missouri v. *Illinois*, 200 U.S. 496 (1906) 7, 8
New Jersey v. *City of N.Y.*, 283 U.S. 473 (1931) 7
People v. *Gold Run Ditch & Mining Co.*, 4 P. 1152 (Cal. 1884) 7
Phillips Petroleum Co. v. *Shutts*, 472 U.S. 797 (1985) 9

Cases—Continued: Page

Secretary of State v. *Joseph H. Munson Co.*, 467 U.S. 947 (1984) 3
Summers v. *Earth Island Inst.*, 129 S. Ct. 1142 (2009) 3, 5
TVA v. *EPA*, 278 F.3d 1184 (11th Cir. 2002), withdrawn in part, *TVA* v. *Whitman*, 336 F.3d 1236 (11th Cir. 2003), cert. denied, 541 U.S. 1030 (2004) ... 20
United States v. *Duke Energy Corp.*, No. 1:00cv1262, 2010 WL 3023517 (M.D.N.C. 2010) 20
Village of Pine City v. *Munch*, 44 N.W. 197 (Minn. 1890) 7
Warth v. *Seldin*, 422 U.S. 490 (1975) 3, 9
Woodyear v. *Schaefer*, 57 Md. 1 (1881) 7

Constitution and statutes:

U.S. Const. Art. III 3, 4, 5, 9, 11, 13
Clean Air Act, 42 U.S.C. 7401 *et seq.* 2
42 U.S.C. 7411 18
42 U.S.C. 7475 17
42 U.S.C. 7475(a)(4) 17
42 U.S.C. 7607(b)(1) (Supp. III 2009) 9

Miscellaneous:

4 William Blackstone, *Commentaries on the Laws of England* (1769) 7
74 Fed. Reg. 66,497 (2009) 10

Miscellaneous—Continued: Page

75 Fed. Reg. (2010):
p. 31,519 12
pp. 31,544-34,545 19
Office of Air & Radiation, Environmental Protection Agency, *PSD and Title V Permitting Guidance for Greenhouse Gases* (Mar. 2011), http://www.epa.gov/nsr/ghgdocs/ ghgpermittingguidance.pdf 20
Restatement (Second) of Torts (1977) 2, 10, 13
Tennessee Valley Authority, *Integrated Resource Plan: TVA's Environmental & Energy Future* (Mar. 2011), http://www.tva.gov/environment/reports/irp/pdf/Final_IRP_complete.pdf 12

In the Supreme Court of the United States

No. 10-174

AMERICAN ELECTRIC POWER COMPANY INC., ET AL.,
PETITIONERS

v.

STATE OF CONNECTICUT, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE TENNESSEE VALLEY AUTHORITY AS RESPONDENT SUPPORTING PETITIONERS

The briefs for the State respondents and the Land Trust respondents (collectively, plaintiffs) only reinforce the unprecedented breadth of their claims. Plaintiffs reiterate the sweeping nature of the effects of climate change. See Br. for Connecticut et al. (States Br.) 4; Br. for Open Space Inst. et al. (Land Trust Br.) 5-7. But they give no reason why complex questions about how the Nation should mitigate contributions to global climate change are fit for judicial resolution through judge-made federal common law. Plaintiffs seek to have federal courts declare—at least with respect to power plants operated by respondent Tennessee Valley Authority (TVA) and petitioners (collectively, defendants) —what levels of carbon-dioxide emissions are sufficiently elevated to create liability for, and require an injunction against, contributing to "an unreasonable

interference with a right common to the general public," which is the definition of a "public nuisance" under Restatement (Second) of Torts § 821B(1) (1977). See States Br. 26, 32; Land Trusts Br. 29. Plaintiffs' attachment of a "common law" label to their extraordinary demands does not bring their cases within the federal courts' accustomed and appropriate role. The relief they seek is instead within the province of Congress and of the Executive Branch, which is actively addressing global warming's causes and effects. See TVA Br. 2-3 & nn.1-2, 45-51; Pet. Br. 5-10.

In light of the separation-of-powers concerns raised by plaintiffs' novel suits, TVA submits that the most appropriate way to recognize that judicial relief should be withheld is to conclude that plaintiffs lack prudential standing—because their widely shared grievance is "more appropriately addressed in the representative branches," *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 12 (2004) (quoting *Allen* v. *Wright*, 468 U.S. 737, 751 (1984))—or to recognize that any common-law claim that plaintiffs might otherwise have had has been displaced by regulatory actions of the Environmental Protection Agency (EPA) under the Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.*

I. PLAINTIFFS' CLAIMS ARE NOT JUSTICIABLE

Plaintiffs assert that they must be able to bring their claims in federal court, and that those claims could not present separation-of-powers concerns, because they purportedly arise under federal common law and are thus inherently judicial. See States Br. 21-23, 27; Land Trusts Br. 36, 42, 45. Although the Land Trusts concede that this Court must decide jurisdictional questions first, they nevertheless devote the first 19 pages of their

argument (Br. 16-35) to the proposition that they have stated valid public-nuisance claims. Even assuming that is true, it does not itself establish that plaintiffs have satisfied Article III and prudential-standing requirements or that they are not asking the courts to decide nonjusticiable political questions.

A. The Assertion Of Novel Common-Law Claims Does Not Establish Justiciability

1. The common-law label is not the panacea that plaintiffs suggest. Justiciability doctrines, including the "judicially self-imposed limits on the exercise of federal jurisdiction" embodied in prudential standing, *Newdow*, 542 U.S. at 11 (quoting *Allen*, 468 U.S. at 751), apply with as much force to suits brought under the common law as to those brought pursuant to other sources of law. If anything, those important limits on judicial power should apply with *more* force to common-law suits, because it is *Congress* that possesses the power to abrogate prudential-standing limitations, *Bennett* v. *Spear*, 520 U.S. 154, 162 (1997), or to "loosen the strictures" of certain aspects of the Article III analysis, *Summers* v. *Earth Island Inst.*, 129 S. Ct. 1142, 1151 (2009); see *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 578 (1992).[1]

In suggesting that a merits inquiry would suffice to determine the justiciability of their claims, plaintiffs rely (States Br. 15; Land Trusts Br. 16) on this Court's

---

[1] This Court, too, may relax prudential-standing limitations in certain contexts, but those contexts involve the vindication of constitutional, not common-law, rights. See, *e.g.*, *Secretary of State* v. *Joseph H. Munson Co.*, 467 U.S. 947 (1984) (First Amendment); *Barrows* v. *Jackson*, 346 U.S. 249 (1953) (Equal Protection). See also *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975) ("In such instances, the Court has found, in effect, that the constitutional or statutory provision in question implies a right of action in the plaintiff.").

statement that "standing is gauged by the specific common-law, statutory or constitutional claims that a party presents." *International Primate Prot. League* v. *Administrators of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991). It is of course true that the cognizability of an injury depends in part on the nature of the claim. But that does not eliminate the need to show a concrete, individualized, traceable, and redressable injury, even in a common-law case. Nor does *Primate Protection League* suggest otherwise. It declined to decide whether the plaintiffs had Article III standing, *id.* at 78 n.4, but still recognized that Article III's requirements could be more stringent than those necessary to state a claim. See *id.* at 75, 88-89 (explaining that remand to state court of claims for "tort damages" and relief "according to equity" would not be futile because "plaintiff's lack of Article III standing would not necessarily defeat its standing in state court").[2]

Thus, courts have recognized that a common-law claim must be dismissed for want of jurisdiction—not failure to state a claim—when a plaintiff lacks standing. See, *e.g.*, *Alvarado* v. *KOB-TV, LLC*, 493 F.3d 1210, 1214 n.1 (10th Cir. 2007) (plaintiffs not identified in media report lacked standing to bring defamation and false-imprisonment claims); *Freeman* v. *First Union Nat'l*,

---

[2] Plaintiffs (States Br. 16; Land Trusts Br. 40) quote *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), for the proposition that the "hurdle" for establishing standing should be raised no "higher than the necessary showing for success on the merits." *Id.* at 181. But they ignore the Court's actual point, which was that "the standing inquiry" in that case *did* require a showing of "injury to the plaintiff," but, in the context of the particular claim at issue there, no additional showing of "injury to the environment." *Ibid.*

329 F.3d 1231, 1235 (11th Cir. 2003) (receiver lacked standing to bring negligence claim); *City of Phila.* v. *Beretta U.S.A. Corp.*, 277 F.3d 415, 419 n.3 (3d Cir. 2002) (civic organizations lacked standing to bring claims against gun manufacturers for public nuisance, negligence, and negligent entrustment). Cf. *Summers*, 129 S. Ct. at 1156 (Breyer, J., dissenting) (landowner would have standing to "complain[] that a neighbor's upstream dam constitutes a nuisance" if "harm to his downstream property" is "bound to occur").

While it may be true that standing in most common-law suits is "self-evident," States Br. 22 (citation omitted), this is far from an ordinary tort suit. The quintessential tort involves one party whose conduct directly injures another. See *Friends of the Earth, Inc.* v. *Gaston Copper Recycling Corp.*, 204 F.3d 149, 154 (4th Cir. 2000) (en banc) ("One can readily recognize that the victim of an automobile accident or a party to a breached contract bears the kind of claim that he may press in court."). Here, by contrast, defendants' challenged activities allegedly injure plaintiffs only by combining with the activities of billions of people, corporations, and governments. In such circumstances, merely referring to "common law" cannot dictate that federal courts can exercise jurisdiction. Moreover, the cases, cited above, on which plaintiffs rely in arguing that a merits inquiry can satisfy standing requirements involved Article III, not prudential standing; the Judiciary can quite properly adopt additional, non-Article III standing limitations as a matter of self-restraint, whether or not they match some preconceived or abstract notion of who may properly bring a suit to enjoin a public nuisance under federal common law, which itself would have to be fashioned by the courts.

2. Even if a plaintiff could establish standing by showing a right under the relevant substantive law to whatever form of relief it seeks, plaintiffs here would still need to show that federal common law provides such a right. The Land Trusts contend that "this case involves just the kind of long history" that should be "'well nigh conclusive'" of their right. Br. 36 (citation omitted). The States similarly assert that the "causes of action * * * at issue here" have been "previously recognized" by this Court because they are "public-nuisance claims by States regarding transboundary pollution." Br. 41.

But using the phrase "transboundary pollution" to describe plaintiffs' allegations is a calculated and dramatic understatement. The allegedly tortious chain of injury here does not merely cross a boundary between two States (as in, for example, *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230 (1907)). Instead, it transcends each and every boundary on the Earth. Plaintiffs allege that when carbon dioxide is emitted, from anywhere in the world, into the atmosphere, it "persist[s there] for several centuries," mixing with earlier and later emissions and causing the entire planet to warm by amounts that are "unprecedented in thousands of years of human civilization" and "will have harmful consequences worldwide," ranging from the melting of glaciers and sea ice to the fatal bleaching of coral reefs; from "more and greater floods" to "an increased likelihood of drought"; from reducing agricultural production to increasing urban death rates. J.A. 81, 83, 84, 88, 96-97 (States' complaint); see also J.A. 137-139 (Land Trusts' complaint).

The intrinsically *global* nature of global warming—in both its causes and effects—distinguishes plaintiffs' allegations from all previously recognized public-nuisance

suits involving air and water pollution. See TVA Br. 18 n.6, 43 n.20. Consistent with the tort's origins in the obstruction of particular "highways, bridges, and public rivers," 4 William Blackstone, *Commentaries on the Laws of England* 167 (1769) (quoted at Land Trusts Br. 18), earlier cases involved only localized, rather than global, effects, and featured a clear geographic nexus between the plaintiff and defendant. The cases plaintiffs cite (States Br. 38-39; Land Trusts Br. 19-21) each involved a specific geographic area (usually a portion of a single body of water).[3] In their attempt to illustrate the scope of earlier cases, the States highlight (Br. 42-43) the decision in *Missouri* v. *Illinois*, 200 U.S. 496 (1906). But that case involved allegations that disease-causing bacteria traveled from a discrete place (Chicago) to another discrete place (St. Louis) by means of a discrete pathway (from an artificial drainage canal to the Des Plaines River to the Illinois River to the Mississippi River) over a period of days, not centuries. *Id.* at 518. While global warming may affect specific places in discrete ways, its ubiquitousness sets it apart from the nuisance alleged in *Missouri*.

---

[3] See, *e.g.*, *New Jersey* v. *City of N.Y.*, 283 U.S. 473, 476-477 (1931) (suit to enjoin New York City from dumping garbage into Atlantic Ocean at points "about 10, 12½ and 22 miles * * * from the New Jersey shore"); *Mayor of Georgetown* v. *Alexandria Canal Co.*, 37 U.S. (12 Pet.) 91 (1838) (suit to enjoin aqueduct across Potomac River); *Village of Pine City* v. *Munch*, 44 N.W. 197 (Minn. 1890) (suit to enjoin seasonal draining of pond); *People* v. *Gold Run Ditch & Mining Co.*, 4 P. 1152 (Cal. 1884) (enjoining company from dumping mine tailings into river that flowed into Sacramento River, impairing navigability of both); *Woodyear* v. *Schaefer*, 57 Md. 1, 2 (1881) (enjoining slaughterhouse from discharging blood and offal into "small stream" one mile upstream from plaintiff's flour mill).

Accordingly, the States are assuredly correct in conceding (Br. 43) that "the public nuisance alleged here is of a scope and complexity not yet addressed by federal courts due to the newness of the global-warming problem." While the Court has previously recognized that nuisance law adapts to emerging problems and understandings, see *Missouri*, 200 U.S. at 522, it is clear that the Court cannot simply proceed on the assumption that plaintiffs' "claims are justiciable because they fall within the well-settled confines of a common-law tort that courts have long adjudicated." States Br. 2. To the contrary, the genesis, scale, and duration of global warming not only make the political Branches the appropriate source for the government's response, but also counsel great caution before finding plaintiffs' claims justiciable under the rubric of judge-made federal common law.

B. Plaintiffs Lack Prudential Standing Because Their Suits Are Generalized Grievances More Appropriately Addressed By The Representative Branches

While at least some of the State plaintiffs can satisfy Article III standing requirements (TVA Br. 25-33; note 5, *infra*), these suits still should be dismissed for want of prudential standing, because they present "generalized grievances more appropriately addressed in the representative branches." *Newdow*, 542 U.S. at 12 (quoting *Allen*, 468 U.S. at 751); see TVA Br. 14-21. It is, in fact, difficult to imagine a more generalized grievance than global warming. Several factors converge in this case to demonstrate that plaintiffs' concerns about climate change should be handled by the political Branches, not the Judiciary, including the countless potential plaintiffs and defendants, the lack of judicial manageability, and the unusually broad range of under-

lying policy judgments that would need to be made to compel defendants to "achieve" what a court might regard as "their share of the carbon dioxide emission reductions necessary to significantly slow the rate and magnitude of warming," J.A. 102. And it is especially appropriate for the Judiciary to exercise self-restraint in the context of a purported federal common-law action when EPA is actively addressing how and when to regulate carbon-dioxide emissions pursuant to the CAA, and its expert decisions in that regard will themselves be subject to judicial review pursuant to special statutory procedures. See 42 U.S.C. 7607(b)(1) (Supp. III 2009).

1. Plaintiffs contend (States Br. 23-26; Land Trusts Br. 42) that, because they have alleged concrete injuries for purposes of Article III, they also satisfy the requirements of prudential standing. But that misapprehends the nature of prudential-standing doctrine, which is a "rule of self-restraint" for the courts. *Association of Data Processing Serv. Orgs.* v. *Camp*, 397 U.S. 150, 154 (1970) (quoting *Barrows* v. *Jackson*, 346 U.S. 249, 255 (1953)). Prudential-standing doctrine provides "[a]dditional" limitations that "exist even though the Article III requirements are met." *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 804 (1985). It prevents courts from being "called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Newdow*, 542 U.S. at 12 (quoting *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975)); see also *id.* at 18 & n.8 (dismissing for lack of prudential standing even though some of plaintiff's allegations might "suffice to establish Article III standing").

2. In an attempt to portray their grievance as one that is not generalized, plaintiffs characterize their public-nuisance action as limited. Discounting the possibility that their theory would allow for a "'multiplicity of actions,'" the Land Trusts stress that they "have properly alleged a special injury" that sets them apart from other potential plaintiffs. Br. 30-31 (quoting Restatement (Second) of Torts § 821C, cmt. a); see also States Br. 44 (citing same limitation on public-nuisance suits brought "by private parties"). The special-injury limitation may have some bite when the alleged nuisance already has the geographic nexus and localized effects that have traditionally characterized public-nuisance actions, because it further limits an already-local pool of victims. See, *e.g.*, *In re Exxon Valdez*, 104 F.3d 1196, 1198 (9th Cir. 1997). But it is toothless in the context of an alleged nuisance in which the Earth's atmosphere transmits the effects of every emission anywhere to virtually anywhere and everywhere in the world, exponentially expanding the class of potential victims.

The Land Trusts' contention that they own "types of property * * * that are particularly vulnerable to global warming" (Br. 31) does little to distinguish them from countless others in global warming's far-reaching wake.[4] Nor does their suggestion (*ibid.*) that they differ from other landowners because they bought their property with a "special purpose" of "conserving" it for various uses. Nearly all landowners can plausibly assert

---

[4] EPA has found "that human-induced climate change has the potential to be far-reaching and multi-dimensional." 74 Fed. Reg. 66,497 (2009). Climate change raises "risks associated with changes in air quality, increases in temperatures, changes in extreme weather events, increases in food- and water-borne pathogens, and changes in aeroallergens." *Ibid.*

that they do not want their land to undergo the many detrimental changes that global warming may wreak.[5]

3. Plaintiffs' attempt to show that their theory would not yield "a limitless number of *defendants*" (Land Trusts' Br. 32) is similarly unconvincing. EPA has explained that, in addition to power-production facil-

---

[5] The States' theories of standing (Br. 12-13) are also capacious, including not just their interests as landowners but also the interests of citizens whose "health and welfare" would be affected by global climate change. TVA explained in its opening brief (at 25-33) that, although the question is not free from doubt, at least the coastal States appear to have satisfied the requirements of Article III standing at the pleading stage in light of this Court's decision in *Massachusetts* v. *EPA*, 549 U.S. 497 (2007). But that conclusion does not support the States' contention (Br. 12-13) that they have *parens patriae* standing by virtue of "quasi-sovereign interests" in the "health and welfare" of their citizens. The injury discussed in *Massachusetts* v. *EPA* was not of a *parens patriae* nature, because it was expressly limited to the "particularized injury" that Massachusetts alleged "in its capacity as a landowner" that stood to lose its "sovereign territory." 549 U.S. at 519, 522, 523 n.21; see also *id.* at 522 n.19 (itemizing state-owned lands, facilities, and infrastructure). And with respect to defendant TVA in particular, its opening brief pointed out (Br. 27 n.11) that a "State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982) (citing *Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486 (1923)). The States do not respond to that point.

Of course, even if Article III standing for global-warming public-nuisance suits were exclusively limited to States (or other entities with claims to represent their citizens' interests), that would still leave at least 50 entities (representing the diverse interests of hundreds of millions of individuals) able to ask different federal courts at different times to respond, without Congressional guidance, to a global phenomenon and effect far-reaching social changes at the expense of hand-picked sets of defendants, who might be selected on the basis of parochial (or changeable) interests. Cf. States Br. 3 n.1 (noting New Jersey and Wisconsin have withdrawn from this case). Prudential-standing doctrine properly addresses those concerns.

ities, other important domestic sources of greenhouse gases include "industrial processes (such as the production of cement, steel, and aluminum), agriculture, forestry, other land use, and waste management." 75 Fed. Reg. 31,519 (2010). Plaintiffs assert that "the district courts know how to apply" the "'venerable maxim *de minimis non curat lex*,'" and they contend that defendants' contribution "to global warming is *not* trifling." Land Trusts Br. 33-34; see also States Br. 8, 14.[6] Of course, although defendants are among the largest national emitters of carbon dioxide, when measured against the alleged nuisance (which is not limited to the United States), their contributions to the nuisance are much smaller, and are joined by contributions from many other sectors of the economy. That is why a comprehensive, national solution, administered by an Executive agency, is needed.

In any event, the submission that plaintiffs' public-nuisance claim would somehow be available against only the largest emitters of greenhouse gases is fatally compromised when plaintiffs stress that, under the Restatement, *every single contributor* to global warming may be held liable for the nuisance and have its conduct enjoined, even if it has contributed "to only a slight extent"

---

[6] The Land Trusts say (Br. 7-8) that defendants have failed to use "[e]conomically viable options" to reduce emissions, but TVA's public Integrated Resource Plan addresses such options. See TVA, *Integrated Resource Plan: TVA's Environmental & Energy Future* (Mar. 2011), http://www.tva.gov/environment/reports/irp/pdf/Final_IRP_complete.pdf. Plaintiffs do not otherwise contend that defendants operate their plants in an unusual way. Using defendants' size as a selection criterion evinces no principle that would prevent public-nuisance suits from swelling into unmanageable tangles of claims and counterclaims involving every significant commercial, industrial, and governmental operation across the country or around the world.

and its own contribution would be "harmless in itself." Land Trusts Br. 40 (quoting Restatement (Second) of Torts § 840E cmt. b); see also States Br. 15 ("[i]t is well established that each person who * * * contributes to a public nuisance may be held liable").

4. Plaintiffs contend (States Br. 23-24; Land Trusts Br. 43-44) that, outside the taxpayer- and citizen-standing contexts, this Court has not dismissed cases on the ground that they are generalized grievances.[7] They also point (States Br. 25) to this Court's "hypothetical example" of a "widespread mass tort" as something that might create "the same common-law injury" in "large numbers of individuals." *FEC* v. *Akins*, 524 U.S. 11, 24 (1998). Although the Court has "not exhaustively defined the * * * dimensions" of prudential standing, the doctrine is grounded on the principle of self-restraint that "it might be appropriate for the federal courts to decline to hear a case" that is better resolved by other institutions. *Newdow*, 542 U.S. at 12-13. While the other institutions at issue here are not the same ones as in *Newdow*, this case perfectly fits the description of a dispute that is "more appropriately addressed in the representative branches." *Id.* at 12.

The numbers of persons who contribute to and are affected by global warming are virtually limitless, and the effects of any one party's conduct on another are far from direct. Plaintiffs' theory thus contemplates that almost unimaginably broad categories of both potential plaintiffs and potential defendants would be able to litigate about widespread effects felt by individuals, corpo-

---

[7] As explained in TVA's opening brief (at 21 n.7), the reason plaintiffs lack prudential standing here is different from the absence of Article III standing where a plaintiff asserts only an undifferentiated, generalized grievance about the conduct of government.

rations, and governmental entities throughout the Nation and around the world, without even any need to establish that any individual defendant directly affected any individual plaintiff. In that sense, plaintiffs' theory is fundamentally at odds with the purpose of the "zone of interest" strand of prudential-standing doctrine, because it flouts the premise that a discernible "zone of interest" demarcates which "particular plaintiff should be heard to complain of a particular * * * decision." *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987).[8] Plaintiffs' theory could also subject any defendant to repeated rounds of potentially inconsistent litigation in various district courts, because one plaintiff would not be bound by a judgment secured by another plaintiff. See TVA Br. 37-38. Although plaintiffs accuse TVA of "asking the Court to invent a new doctrine" (Land Trusts Br. 44; see also States Br. 24)—a curious attack given the entire nature of their suits—they have failed to identify any earlier case that this Court has permitted to proceed on such a foundation.

Nor does the presence of some States as plaintiffs mitigate those fundamental justiciability concerns, for the States do not sue as sovereigns enforcing their *own* laws to abate a public nuisance within their *own* borders. Rather, they rely on effects of global warming that are widely experienced among people of the Nation (and

---

[8] The Court has recognized that the "zone of interest" analysis is not governed by "a single inquiry," and that, outside the context of "the generous review provisions of the [Administrative Procedure Act]," a plaintiff must show more to establish that it is within the zone of interest of the relevant "constitutional or statutory provision." *Clarke*, 479 U.S. at 400 n.16. Yet, in plaintiffs' view, virtually everybody in the world would be within the zone of interest for a *common-law* action to abate global warming.

world) at large, and they seek to have *federal* courts fashion *federal* law to impose limits on emitters in numerous other States. This aspect of the case thus reinforces the conclusion that the widely dispersed problems plaintiffs identify are properly addressed by Congress and the Executive—the Branches of the national government that are politically accountable to the people in all of the States. See *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 866 (1984) ("The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones[.]"); *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 325 (1981) (*Milwaukee II*) ("water pollution control" is such a complex subject that it is better left to "administrative agencies possessing the necessary expertise," and is "particularly unsuited to the approach inevitable under a regime of federal common law").[9] Dismissing plaintiffs' suits on prudential-standing grounds would simply acknowledge that federal courts should not provide the Nation's first-line response to a world-wide problem caused by world-wide activities.

C. This Case Raises Separation-Of-Powers Concerns Addressed By The Political-Question Doctrine, But Other Grounds Provide A More Appropriate Basis For Dismissal

TVA acknowledged in its opening brief that the Court could rely on the political-question doctrine to direct dismissal of this case, but it also explained that a

---

[9] See also *Milwaukee II*, 451 U.S. at 325 (quoting district judge's admission that his "grasp of some of the testimony was less complete than [he] would like it to be" and that "the arcane subject matter * * * was sometimes over the heads of all of us to one height or another").

decision on prudential-standing or displacement grounds would be a more appropriate means of withholding judicial relief. TVA Br. 39-40.

Plaintiffs' attempt to limit the political-question doctrine to cases involving constitutional claims or foreign affairs (States Br. 27-31; Land Trusts Br. 44) is inconsistent with *Baker* v. *Carr*, 369 U.S. 186 (1962), which recognized that a nonjusticiable political question may arise "in various settings," and that the doctrine renders a question nonjusticiable out of concern for preserving the proper "relationship between the judiciary and the coordinate branches of the federal government." *Id.* at 210. Here, the factual assessments, predictive determinations, and weighing of a complex mix of factors going to costs, benefits, economics, fairness, and international implications that are relevant to addressing global warming would call for judgments of the sort that under the Constitution are appropriately made by Congress and the Executive, not the courts. Such judgments would pervade any finding of liability and fashioning of an appropriate remedy by the courts. Both inquiries would be fraught with numerous difficulties that cannot be decided by plaintiffs' invocation of the "unreasonable interference" standard from public-nuisance law.

The States seek to force defendants to "achieve *their share* of the carbon dioxide emission reductions necessary to significantly slow the rate and magnitude of warming," J.A. 102 (emphasis added), asserting that any remedy-phase considerations would not need to "focus on * * * broad policy issues such as determining the reasonable level of global emissions or emissions from sources that are not a party to this lawsuit." States Br. 35. The Land Trusts similarly assert that an "appropriate remedy" would be limited to "the reasonable reme-

dial measures that these particular defendants should be required to take," purportedly making it unnecessary for a court "to set a reasonable level for *all* global emissions." Land Trusts Br. 35. But what can properly be regarded as these particular defendants' "share" of emissions reductions for public-nuisance purposes cannot be divorced from the various considerations identified above, or from "broad policy issues" concerning "the reasonable level of global emissions" or emissions from other sources that contribute to the problem. Again, dismissal on prudential-standing grounds would appropriately take account of those concerns.

Finally, notwithstanding plaintiffs' implicit recognition that any ultimate remedy in this case would be equitable and discretionary, they do not respond to TVA's contention that the Court could determine that equitable grounds warrant dismissal of plaintiffs' claims at the outset, in light of the separation-of-powers concerns present here. TVA Br. 41-42 & n.19.

II. ANY FEDERAL COMMON-LAW CLAIMS HAVE BEEN DISPLACED BY EPA'S REGULATORY ACTIONS UNDER THE CLEAN AIR ACT

As TVA explained in its opening brief (at 46-51), since this Court held that the CAA authorizes EPA to regulate greenhouse gases as air pollutants, see *Massachusetts* v. *EPA*, 549 U.S. 497, 528-535 (2007), EPA has taken several significant actions to address greenhouse-gas emissions. Carbon dioxide is now a "pollutant subject to regulation under [the CAA]," 42 U.S.C. 7475(a)(4), and is therefore addressed by the CAA's provisions for the prevention of significant deterioration (PSD) of air quality, 42 U.S.C. 7475. See TVA Br. 47. EPA has issued a regulation to phase-in the application of those

PSD provisions to major new and modified sources (including power plants). See *id.* at 49-50. Moreover, under a settlement that was finalized on March 2, 2011, EPA has committed to deciding by May 26, 2012, whether and to what extent certain existing stationary sources (including power plants like defendants') will be subject to greenhouse-gas-emissions limitations under 42 U.S.C. 7411, even if they have not undergone any modifications. See TVA Br. 50-51. As a result of EPA's regulatory actions, any federal common-law cause of action that plaintiffs might otherwise have had against those who contribute to a global-warming public nuisance by emitting carbon dioxide has been displaced.

a. Plaintiffs contend (States Br. 51; Land Trusts Br. 47) that displacement has not occurred because EPA's regulatory regime does not currently impose carbon-dioxide-emissions limits on each of defendants' existing power plants. In the States' view, "regulatory actions 'occupy the field' under *Milwaukee II* only when they address the challenged nuisance." Br. 51 (citation omitted). But EPA *is* addressing the nuisance that plaintiffs allege—global warming (J.A. 57, 119)—in multiple ways, even if it happens not to be addressing all potential contributions to that nuisance or not to be addressing particular sources in the way plaintiffs prefer. Plaintiffs themselves characterize the nuisance as the result of many actors (not just the six defendants here), so the problem of which they complain is being addressed. There is no support for plaintiffs' proposed definition of the relevant "field" as excluding every portion not already covered by specific regulatory standards, and such a definition would be inconsistent with this Court's decisions.

Middlesex County Sewerage Authority v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981), demonstrates that EPA's exercise of authority over greenhouse-gas emissions and the steps it has already taken toward regulating the specific emissions at issue here suffice to displace any federal common-law claims. *Sea Clammers* held that a statute displaced federal public-nuisance claims even though it permitted the dumping of certain materials to persist unrestricted for a period of time. *Id.* at 22 n.32. In so doing, the Court held that federal common law could not be used to substitute a different regulatory scheme for the one Congress had deemed appropriate.[10]

The same is true here. EPA has determined that the appropriate way to address climate change is to regulate under the CAA "one step at a time." 75 Fed. Reg. at 31,544-34,545. Apparently impatient with that deliberative approach, plaintiffs ask the federal courts to use federal common law to impose additional limits on the particular sources plaintiffs have singled out. Such an exercise of judicial authority would effectively deny EPA the opportunity to "refine[] [its] preferred approach as circumstances change and [it] develop[s] a more nuanced understanding of how best to proceed," *Massachusetts* v. *EPA*, 549 U.S. at 524. See also Con-

---

[10] The States try to distinguish *Sea Clammers* on the ground that, in their view, the statute provided relief "in increments," while "EPA has as yet provided *no* relief at all for emissions at issue here." Br. 51-52. But the plaintiffs in *Sea Clammers* were also afforded no relief under the statute—and they were *never* going to receive the relief they sought (compensation for historic harm that ocean dumping had caused to their fishing grounds). 453 U.S. at 4-5. Under plaintiffs' view, that denial of relief should have been a regulatory void to be filled by federal common law, but the Court rejected that conclusion. *Id.* at 22 n.32.

sumer Energy Alliance Amicus Br. 30-31 (describing risk that public-nuisance suits will force defendants to lock-in inferior technologies to comply with short-term reduction requirements). By overriding Congress's determination that EPA, and not the federal courts, should prescribe federal law's regulation of greenhouse-gas emissions, plaintiffs' suits would also contravene this Court's judgment that courts should not create "federal common law" to "provid[e] a different regulatory scheme" than the one prescribed by the CAA. *Milwaukee II*, 451 U.S. at 324 n.18.

Defendants' existing power plants are subject to regulation for greenhouse-gas emissions with respect to certain modifications.[11] That EPA still retains discre-

---

[11] Plaintiffs acknowledge (States Br. 52; Land Trusts Br. 48) that defendants' already-existing facilities will be subject to current greenhouse-gas-emissions standards if they are deemed to have been modified. See also TVA Br. 49 n.23; Office of Air & Radiation, EPA, *PSD and Title V Permitting Guidance for Greenhouse Gases* 6-9 (Mar. 2011), http://www.epa.gov/nsr/ghgdocs/ghgpermittingguidance.pdf (explaining that modifications will trigger greenhouse-gas permitting standards under the phase-in steps that begin in January and July 2011). That is not merely a theoretical possibility. In previous cases, EPA has argued that defendants' existing facilities had become subject to new emissions limits as a result of certain physical or operational changes. See, *e.g.*, *TVA* v. *EPA*, 278 F.3d 1184, 1187-1188 (11th Cir. 2002) ("Centrally at issue * * * is EPA's determination that certain maintenance and repair projects conducted by TVA at many of its coal-fired power plants in the past twenty years constituted 'modifications' that required TVA * * * to bring the plants into compliance with the more stringent emissions limitations that apply to new facilities."), withdrawn in part, *TVA* v. *Whitman*, 336 F.3d 1236 (11th Cir. 2003), cert. denied, 541 U.S. 1030 (2004); *United States* v. *Duke Energy Corp.*, No. 1:00cv1262, 2010 WL 3023517, at *1 (M.D.N.C. 2010) (EPA alleged "Duke Energy made modifications to coal-fired electrical generating plants * * * without obtaining permits in violation of the [PSD] provisions of the CAA.").

tion about precisely how and whether to limit carbon-dioxide emissions from existing power plants that are *not* modified does not forestall displacement. EPA is now active in that portion of the field as well (TVA Br. 50-51), and it has, in any event, established more generally that greenhouse gases are pollutants subject to regulation under the CAA. With the agency exercising its statutory authority to determine whether, when, and to what extent to limit greenhouse-gas emissions from different categories of sources, there is no remaining role for federal common-law regulation. See TVA Br. 44-45. Indeed, EPA's discretion (such as over what standards will issue by May 2012) simply reflects the basic point: These are complex technical, scientific, economic, and policy decisions that should be made by an expert body with authorization from the political Branches.

b. The States suggest (Br. 49-50) that the Court should refrain from deciding whether EPA's regulatory actions have displaced plaintiffs' nuisance claims, because they say that question was not decided by the court of appeals and is not included in the question presented. But the court of appeals recognized that EPA's regulatory efforts were relevant to the displacement analysis. See Pet. App. 144a (holding that, because EPA had not yet completed its then-pending rulemaking, the CAA "does not (1) regulate greenhouse gas emissions or (2) regulate such emissions from stationary sources"). TVA fully explained the intervening regulatory developments in the discussion of displacement in its certiorari-stage brief (at 23-32), and those regulatory actions are plainly relevant to determining whether "the Clean Air Act * * * assigns federal responsibility for regulating

[carbon-dioxide] emissions to the Environmental Protection Agency." Pet. i.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

APRIL 2011

AMICUS CURIAE BRIEF

13 2011

No. 10-174

IN THE

Supreme Court of the United States

AMERICAN ELECTRIC POWER CO., INC., *et al.*,
Petitioners,

v.

STATE OF CONNECTICUT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF ALLEARTH RENEWABLES, INC., NAMASTÉ SOLAR, PETERSENDEAN, INC., REVISION ENERGY AND WESTINGHOUSE SOLAR AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

LORI POTTER
COUNSEL OF RECORD
JOHN PUTNAM
KAPLAN KIRSCH & ROCKWELL LLP
1675 BROADWAY, STE 2300
DENVER, CO 80202
(303) 825-7000
lpotter@kaplankirsch.com
jputnam@kaplankirsch.com

STEPHEN F. HINCHMAN
THE LAW OFFICES OF STEPHEN F. HINCHMAN, LLC
537 FOSTERS POINT
WEST BATH, ME 04530
(207) 443-6924
stevehinchman@gmail.com

Attorneys for the Amici

March 18, 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTERESTS OF THE *AMICI* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. NUISANCE LAW IS AN APPROPRIATE MECHANISM TO CORRECT THE MARKET FAILURES CAUSED BY EXTERNALIZING CARBON DIOXIDE EMISSIONS 4

II. LEVELING THE FIELD WOULD DISCOURAGE FURTHER POLLUTION AND ENCOURAGE DEPLOYMENT OF CLEAN ENERGY 13

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Center for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172 (9th Cir. 2008) 9

Connecticut v. American Elec. Power Co., Inc., 582 F. 3d 309 (2d Cir. 2009) 9

Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) 11

Illinois v. City of Milwaukee, 406 U.S. 91 (1972) 12

Illinois v. City of Milwaukee, 599 F.2d 151 (7th Cir. 1979) 5

Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987) 12

Massachusetts v. EPA, 549 U.S. 497 (2007) 8, 10

Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981) 5

Milwaukee v. Illinois, 451 U.S. 304 (1981) 5

Missouri v. Illinois, 180 U.S. 208 (1901) 11

Mugler v. Kansas, 123 U.S. 623 (1887) 11

Nat'l Sea Clammers Ass'n v. City of New York, 616 F.2d 1222 (3d Cir. 1980) 5

OTHER AUTHORITIES

Anthony Owen, *Renewable Energy: Externality Costs as Market Barriers*, 34 Energy Policy 632 (2006) 7, 15, 16, 17

Benjamin K. Sovacool & Charmaine Watts, *Going Completely Renewable: Is It Possible (Let Alone Desirable)?*, 22:4 Elec. J. 95 (2009) 14, 19

Benjamin K. Sovacool, *Renewable Energy: Economically Sound, Politically Difficult*, 21:5 Elec. J. 18 (2008) 13, 14, 15

Cass Sunstein, *Of Montreal and Kyoto: A Tale of Two Protocols*, 31 Harv. Envtl. L. Rev. 2 (2007) 8, 10

Claudia Kemfert, *Global Climate Protection—Immediate Action Will Avert High Costs*, 1:12 DIW Wkly. Rep. 135 (Apr. 12, 2005) 16

David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 Colum. J. Envtl. L. 1 (2003) 15

Dr. Pieter Tans, National Oceanic & Atmospheric Administration Earth System Research Laboratory, *Trends in Atmospheric Carbon Dioxide* (March 2011) 8

Garrett Hardin, *The Tragedy of the Commons*, 162 Sci. 1243 (1968) 6

Hans-Werner Sinn, *Public Policies Against Global Warming: A Supply Side Approach*, 15 Int. Tax Pub. Fin. 360 (2008) 8

Intergovernmental Panel On Climate Change, *Climate Change 2007: Synthesis Report* (2007).....8, 9

James Hansen, *et al.*, *Target Atmospheric CO2: Where Should Humanity Aim?*, 2 The Open Atmospheric Sci. J. 217 (2008)....9, 10

James L. Huffman, *Environmental Protection and the Politics of Property Rights: The Public Interest in Private Property Rights*, 50 Okla. L. Rev. 377 (1997) 6

Mass. Dep't Pub. Utilities, Order No. D.P.U. 86-38-G (Jan. 1998) 7

National Academy of Sciences, *Understanding and Responding to Climate Change* (2008) 9

Restatement (Second) of Torts § 821B(1) (1979).....5, 11

Restatement (Second) of Torts § 821B(2) (1979).....12

Reuven S. Avi-Yonah & David M. Uhlmann, *Combating Global Climate Change: Why a Carbon Tax is a Better Response to Global Warming than Cap and Trade*, 28 Stan. Envtl. L. J. 3 (2009) 11

Richard L. Ottinger, *et al.*, *Environmental Costs of Electricity* 127 (Oceana Publications 1990) 8

Robert H. Cutting & Lawrence B. Cahoon, *The Gift That Keeps on Giving: Global Warming Meets the Common Law*, 10 Vt. J. Envtl. L. 109 (2008) 16

Roberta Mann, *Waiting to Exhale?: Global Warming and Tax Policy*, 51 Am. U. L. Rev. 1135 (2002) 8, 15, 18

Rudy Perkins, Note, *Electricity Deregulation, Environmental Externalities and the Limitations of Price*, 39 B.C.L. Rev. 993 (1998).....6, 7, 8

Sir Nicholas Stern in Her Majesty's Treasury, *The Stern Review on the Economics of Climate Change* (2006).....10

Sir Nicholas Stern, *The Economics of Climate Change*, 98:2 Am. Econ. Rev. 1 (2008) 10

Steven Ferrey, *Why Electricity Matters, Developing Nations Matter, and Asia Matters Most of All*, 15 N.Y.U. Envtl. L. J. 113 (2007).....17

The Council on Environmental Quality, *The State of the Environment* (1970).....5

Thomas Sundqvist & Patrik Soderholm, *Valuing the Environmental Impacts of Electricity Generation: A Critical Survey*, 8:2 J. Energy Lit. 3 (2002).....14

William Funk, *Constitutional Implications of Regional CO2 Cap-and-Trade Programs: The Northeast Regional Greenhouse Gas Initiative as a Case in Point*, 27 UCLA J. Envt. L. & Pol'y 353 (2009) 17

Xinyu Hua and Kathryn E. Spier, *Information and Externalities in Sequential Litigation*, 161 J. Institutional & Theoretical Econ. 215 (2005) 16

Zygmunt J.B. Plater, *et al.*, *Environmental Law and Policy: Nature, Law, and Society* (1992) 6

INTERESTS OF THE *AMICI*[1]

Amici curiae are renewable energy businesses that provide grid-connected solar and wind energy systems for commercial and residential customers throughout the country. The renewable energy *amici* compete directly with many of the electrical generators that are Defendants in this case.

As described more fully in the argument below, the renewable industry *amici* have a strong interest in supplying the Court with information regarding the market distortions and unfair competitive advantage created when carbon-intensive electrical energy providers are allowed to freely discharge large volumes of greenhouse gas ("GHG") pollution and thereby externalize what should be a normal cost of doing business. *Amici* concur with Plaintiff-respondents that the federal common law of nuisance should apply to greenhouse gas emissions just as it does to other interstate pollutants, and that this case should be allowed to proceed to the merits stage. To create a categorical exception to nuisance doctrines for GHG emissions would perpetuate these market imbalances, incentivize further pollution and penalize clean energy providers such as *amici*.

AllEarth Renewables, Inc.,[2] is a Vermont company that specializes in the design, manufacture

---

[1] The parties have consented to the filing of this brief in letters of consent on file with the Clerk. No counsel for any party authored this brief in whole or in part or provided financial support. This brief was funded by the *amici curiae* and their counsel, with the assistance of grants from the Oak Foundation, USA, and the Swift Foundation.

[2] *See* www.allearthrenewables.com.

and installation of complete grid-connected wind and solar renewable energy systems that lessen dependence on nuclear and fossil fuels and reduce greenhouse gas emissions.

Namasté Solar Electric, Inc. ("Namasté Solar"),[3] is a Colorado company that has expertise in residential and commercial solar photovoltaic project development, design, installation, operations, maintenance and related professional services. Namasté Solar enables the responsible use of customer-sited solar energy and pioneers conscientious business practices. Namasté Solar is a leading solar company in Colorado.

PetersenDean, Inc. ("PetersenDean"),[4] is a full-service, national roofing and solar contractor, with 27 years of experience in complex residential, commercial, institutional and government projects. PetersenDean's "Smarter Roof Systems" include design and installation of a variety of solar energy systems, including photovoltaic solar panels, integrated solar roofing tiles and shingles and integrated solar laminates for metal roofing. PetersenDean is headquartered in northern California and maintains fifteen regional offices in the states of California, Texas, Arizona, Florida and Nevada.

ReVision Energy[5] is a full-service renewable energy contracting company that designs, installs and services solar electric energy systems for homes, businesses, municipal buildings and nonprofits

---

3 *See* www.namastesolar.com.

4 *See* www.petersendean.com.

5 *See* www.revisionenergy.com.

throughout northern New England. ReVision Energy helps people and businesses transition away from fossil fuels to sustainable solar energy.

Westinghouse Solar[6] is a manufacturer, designer and distributor of solar-power systems. The company has over 25 pending or issued patents related to solar-panel technology. It sells its products through multiple channels that currently include a growing distribution network of Westinghouse Solar Authorized Dealers throughout the United States, as well as through retail at Lowe's Home Improvement stores. Westinghouse Solar is headquartered in Campbell, California.

SUMMARY OF ARGUMENT

At present, it is generally more expensive to produce electricity using renewable solar technologies than using carbon-intensive fossil fuels. That cost differential is due in large part to the fact that fossil fuel-based companies can discharge massive amounts of carbon dioxide ("CO_2") into the atmosphere for free, imposing the costs of such emissions upon others without their consent. The practice of externalizing the cost of GHG pollution distorts the marketplace and exacerbates climate change by incentivizing further pollution while impeding urgently needed clean energy solutions.

Application of the federal common law of nuisance can provide a significant step in the process of internalizing these costs. Nuisance law has addressed a wide range of other interstate air and water pollution problems. There is no principled

---

6 *See* www.westinghousesolar.com.

distinction between those kinds of pollution and the carbon dioxide pollution at issue here. For this reason, *amici* urge the Court to affirm the decision below and allow the District Court to proceed to the merits of Plaintiffs' claims.

While no one would suggest that nuisance law, standing alone, can solve global warming, it has traditionally been a flexible, adaptable body of law that has helped address serious problems that share the same essential features of the problem of global warming. On the other hand, the exemption sought by Defendants, if granted, would amount to an extraordinary grant of tort immunity to the largest sources of greenhouse gases in the nation. That exemption would permanently distort energy markets in favor of polluting industries and against the clean companies that provide a similar product but without infringing upon the public good. Such a result is unwarranted and is patently contrary to our nation's legal tradition and economic principles.

For these reasons, the Court should affirm the decision of the Court of Appeals.

ARGUMENT

I. NUISANCE LAW IS AN APPROPRIATE MECHANISM TO CORRECT THE MARKET FAILURES CAUSED BY EXTERNALIZING CARBON DIOXIDE EMISSIONS

What the law calls a nuisance, economics terms an externality and market failure. Both definitions apply to the alleged harmful actions of Defendants in this case and support Plaintiffs' request to proceed with their nuisance claims on the merits.

A nuisance occurs under federal common law when "the defendant is carrying on an activity that is causing an injury or significant threat of injury to some cognizable interest of the complainant." *Illinois v. City of Milwaukee*, 599 F.2d 151, 165 (7th Cir. 1979), *vacated on other grounds, Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981); *see also* Restatement (Second) of Torts § 821B(1) (1979) (defining public nuisance as an "unreasonable interference with a right common to the general public").[7]

The nuisance doctrine, in turn, reflects long-held economic principles disfavoring conduct that re-allocates part of the cost of doing business to other parties without their consent.

> Our price system fails to take into account the environmental damage that the polluter inflicts on others. Economists call these damages "external social costs" (externalities). They reflect the ability of one entity, *e.g.*, a company, to use water or air as a free resource for waste disposal, while others pay the cost in contaminated air or water.

The Council on Environmental Quality, *The State of the Environment* (1970). *See also* James L. Huffman, *Environmental Protection and the Politics of Property Rights: The Public Interest in Private Property*

---

[7] *See Nat'l Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222, 1234 (3d Cir. 1980) (applying Restatement's definition of public nuisance in federal common law of nuisance litigation), *vacated on other grounds, Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981).

Rights, 50 Okla. L. Rev. 377, 380 n.11, 383-84 (1997) (when "costs are 'externalized' to third parties, there is a market failure in the sense that one of the assumed conditions of an efficient market is missing").

Allowing private parties to externalize the costs of their pollution damages the common good and produces economic distortions and inefficiencies.[8]

In the electrical sector, the social costs and market-distorting effect of externalizing pollution are well documented: low-priced power is not the same thing as low-cost power.[9] To the extent that consumers do not pay for the cost of pollution, or do not compensate people for harm done to them, "they do not face the full cost of the services they purchase (*i.e.*, their energy use is being implicitly subsidised) and, thus, energy resources will not be allocated

---

[8] *See, e.g.*, Zygmunt J.B. Plater, *et al.*, *Environmental Law and Policy: Nature, Law, and Society* (1992) (in absence of legal rule forbidding pollution or requiring payment for pollution harms, rational producer will not undertake pollution controls because it would increase costs and thereby reduce profit); Garrett Hardin, *The Tragedy of the Commons*, 162 Sci. 1243, 1245 (1968) (same).

[9] *See, e.g.*, Rudy Perkins, Note, *Electricity Deregulation, Environmental Externalities and the Limitations of Price*, 39 B.C.L. Rev. 993, 1015-23 (1998) (cataloguing history of externalities in the electrical sector and attempts by state public utility commissions to include an assumed price, or "adder", for planning purposes to account for such costs). Examples of externalities range from localized impacts, such as water consumption, to regional impacts such as acid rain and haze caused by emissions of sulfur and nitrous oxides and particulates, to global and temporal impacts caused by global warming and the creation of long-term radioactive waste. *Id.*

efficiently." Anthony Owen, *Renewable Energy: Externality Costs as Market Barriers*, 34 Energy Policy 632, 633-34 (2006). *See also* Mass. Dep't Pub. Utilities, Order No. D.P.U. 86-38-G, at 79 (Jan. 1998) (failure to consider environmental externalities "increases the likelihood of selecting suboptimal energy projects"), *quoted in* Rudy Perkins, Note, *Electricity Deregulation, Environmental Externalities and the Limitations of Price*, 39 B.C.L. Rev. 993, 1015-23 (1998) [hereinafter *Electricity Deregulation*].

Use of the atmosphere as a free and unlimited waste repository for emissions of carbon dioxide is simply an old problem on a larger scale. Although the effects are global, such behavior still externalizes interstate pollution in a manner that harms others, including Plaintiffs and *amici*.

> "The earth's atmosphere is a global commons into which the world's population emits the gaseous by-products of its activities . . . ." *If fuel costs included the full cost of the environmental consequences of the combustion of the fuel, there would be no marginal benefit to increased use of currently low cost fuels such as coal that emit large amounts of CO_2 into the global commons.* "Unfortunately, the tragedy the world now faces is that the economic benefits that each electricity generator derives from emitting more CO_2 are greater than the harm to it resulting from the increased emissions."

Roberta Mann, *Waiting to Exhale?: Global Warming and Tax Policy*, 51 Am. U. L. Rev. 1135, 1144 n.38

(2002) (emphasis added) (quoting Richard L. Ottinger, *et al.*, *Environmental Costs of Electricity* 127 (Oceana Publications 1990)). [10]

"The harms associated with climate change are serious and well recognized." *Massachusetts v. EPA*, 549 U.S. 497, 521 (2007). Atmospheric concentrations of carbon dioxide, the primary greenhouse gas, have risen from approximately 280 parts per million ("ppm") before the Industrial Revolution to over 390 ppm and counting. Dr. Pieter Tans, National Oceanic & Atmospheric Administration Earth System Research Laboratory, *Trends in Atmospheric Carbon Dioxide* (March 2011)[11]; Intergovernmental Panel On Climate Change (IPCC), *Climate Change 2007: Synthesis Report* 37 (2007) [hereinafter *IPCC Synthesis Report*]. Almost a third of the accumulated inventory of CO_2 in the atmosphere derived from activities in the United States. *See* Cass Sunstein, *Of Montreal and Kyoto: A Tale of Two Protocols*, 31 Harv. Envtl. L. Rev. 2, 50 (2007) [hereinafter *Two Protocols*] (U.S. is responsible for 30 percent of cumulative world CO_2 emissions between 1850 and 2002). Substantial portions of those U.S. emissions have come from the electrical sector, including the activities of the Defendant utilities.[12] *See Electricity Deregulation*,

---

[10] *See also* Hans-Werner Sinn, *Public Policies Against Global Warming: A Supply Side Approach*, 15 Int. Tax Pub. Fin. 360, 372 (2008) (GHG emissions are "an externality *par excellence* as they distribute evenly around the globe, damaging air quality, the world's most precious public good").

[11] Available at http://www.esrl.noaa.gov/gmd/ccgg/trends/.

[12] Defendant utilities are alleged to be the five largest sources of GHG emissions in the U.S. and among the largest in the

supra, at 1050-51 (U.S. electricity production responsible for approximately seven percent of aggregate world CO_2 output).

The ever-rising level of carbon dioxide pollution has already triggered climate changes, with concomitant impacts to property, health and natural resources. *See, e.g.*, National Academy of Sciences, *Understanding and Responding to Climate Change* 16-18 (2008).[13] Even with no further emissions, warming will continue and may accelerate in coming years due to the long-lived nature of CO_2 pollution. James Hansen, *et al.*, *Target Atmospheric CO2: Where Should Humanity Aim?*, 2 The Open Atmospheric Sci. J. 217, 221 (2008) [hereinafter *Target Atmospheric CO2*].[14] With continuing emissions, the rate of warming will accelerate. *Id.*

The bill for this pollution is now coming due, in the form of increased severe weather events, droughts, reduced snowpack levels, depletion of arctic ice and gradually rising seas. *IPCC Synthesis Report*, *supra*, at 30-33. Estimates of the potential financial impact from these and future impacts are in the trillions of dollars, ranging from, on the low side, one to five percent of the world's gross domestic product ("GDP") to six to 20 percent or more of GDP.

---

world. *Connecticut v. American Elec. Power Co., Inc.*, 582 F. 3d 309, 314-16 (2d Cir. 2009).

[13] Available at http://dels-old.nas.edu/dels/rpt_briefs/climate_change_2008_final.pdf.

[14] *See also Center for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1190-91 (9th Cir. 2008) (summarizing science on climate change).

Two Protocols, *supra*, at 32.[15] Anthropogenic emissions risk triggering catastrophic impacts. *Massachusetts v. EPA*, 549 U.S. at 526.[16]

Climate change is correctly viewed in economic terms as the "greatest and widest-ranging market failure ever seen." Sir Nicholas Stern in Her Majesty's Treasury, *The Stern Review on the Economics of Climate Change i* (2006) [hereinafter *Stern Review 2006*].[17] Given the scale of the climate threat, the ability of very large polluters, such as the Defendants here, to emit greenhouse gases without limit is already a "market failure of epic proportions, since free market forces have failed to account for the enormous economic and social costs that would accompany global climate change." Reuven S. Avi-

---

[15] In *Two Protocols*, Sunstein quotes a range of climate change damage estimates from recent economic studies, including Frank Ackerman & Ian J. Finlayson, *The Economics of Inaction on Climate Change: A Sensitivity Analysis*, Tufts Univ. Global Dev. & Env. Inst. Working Paper No. 06-07 (2006); Sir Nicholas Stern in Her Majesty's Treasury, *Stern Review on the Economics of Climate Change* (2006); Claudia Kemfert, *Global Climate Protection—Immediate Action Will Avert High Costs*, DIW Wkly. Rep. 135 (2005); Richard Posner, *Catastrophe* 161–63 (2004); James Houghton, *Global Warming: The Complete Briefing* 17 (3d ed. 2004); and William Nordhaus & Joseph Boyer, *Warming the World* 162–68 (2000). *Two Protocols* at 32.

[16] *See also Target Atmospheric CO2*, *supra*, at 228 ("If we stay our present course, using fossil fuels to feed a growing appetite for energy-intensive life styles, we will soon leave the climate of the Holocene, the world of prior human history.").

[17] Available at http://www.hm-treasury.gov.uk/sternreview_index.htm. *See also* the Stern Review's subsequent update and response to criticisms: Sir Nicholas Stern, *The Economics of Climate Change*, 98:2 Am. Econ. Rev. 1 (2008).

Yonah & David M. Uhlmann, *Combating Global Climate Change: Why a Carbon Tax is a Better Response to Global Warming than Cap and Trade*, 28 Stan. Envtl. L. J. 3, 30 (2009).

Defendants ask this Court to categorically exempt global warming pollution from the tort doctrines that apply to other pollutants on grounds of the magnitude of the problem and number of contributors. They argue for dismissal even before the district court can hear the merits and consider the proof. But the scale of the problem does not negate Plaintiffs' nuisance claims; it underscores them. *Cf. Missouri v. Illinois*, 180 U.S. 208, 248-49 (1901) (nuisance claim may apply to alleged water-borne hazard of vast and new scale; issues such as causation and cure must be addressed on merits). There is no basis in legal or economic principles to find that interstate nuisances otherwise cognizable under federal law somehow lose cognizability because of their scale. Under long established law, Plaintiffs have the same right to seek abatement of Defendants' carbon dioxide emissions as the plaintiffs in *Georgia v. Tennessee Copper Co.* had to seek abatement of sulfur dioxide emissions more than a century ago. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907). *See also Missouri v. Illinois*, 180 U.S. at 244-45 (equity is "a salutary jurisdiction, especially where a nuisance affects the health, morals or safety of the community") (quoting *Mugler v. Kansas*, 123 U.S. 623, 673 (1887)); Restatement (Second) of Torts § 821B(1) (1979).[18] There is no

---

[18] Interference with a public right under § 821B(1) is unreasonable and therefore tortious when the "conduct involves a significant interference with the public health, the public

basis to depart from these long-standing precedents here.[19]

One does not gain the unfettered right to continue to pollute the global atmospheric commons for free simply because the magnitude of the harm is great and because others contribute to the harm.[20] Under both nuisance doctrine and economic principles,

---

safety, the public peace, the public comfort or the public convenience," Restatement (Second) of Torts § 821B(2)(a) (1979), or when "the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right." *Id.* § 821B(2)(c). These factors could not more perfectly describe global warming.

[19] Defendants also suggest that the complaint must be dismissed on political question grounds, because the judiciary cannot make an initial policy decision about who should bear the cost of global warming. But this is not a case in which judges abstain from politics by refusing to engage. If the Court were to categorically remove GHG emissions from the traditional realm of nuisance law, it would in effect be making the political decision to assign the burden of nuisance costs to the public and to competing firms that do not export their business cost onto the public.

[20] To be sure, Congress – as part of a comprehensive climate change legislation or otherwise – might choose to displace some or all kinds of nuisance claims directed at GHG emissions. *Cf. Int'l Paper Co. v. Ouellette,* 479 U.S. 481, 494-98 (1987) (concluding that Clean Water Act preempted some state nuisance claims but not others). However, in the absence of Congressional action, there is no basis for exempting such emissions from the operation of the common law. *See Illinois v. City of Milwaukee,* 406 U.S. 91, 107 (1972) (until Congress intervenes, federal courts are empowered to appraise the equities of suits alleging creation of a public nuisance by pollution).

emitters of GHGs should face the same common law standards that have constrained other polluters. Plaintiffs should be entitled to make their case on the merits, based on the same principles that apply to other cases of alleged interstate pollution. *Amici* and similar clean energy firms should not be forced to compete against energy companies bearing an artificial shield against nuisance law and a judicially-approved license to pollute for free.

II. LEVELING THE FIELD WOULD DISCOURAGE FURTHER POLLUTION AND ENCOURAGE DEPLOYMENT OF CLEAN ENERGY

The Court should also decline Defendants' requests to create exceptions to the law of nuisance because such a decision would (1) institutionalize market inefficiencies that are impeding adoption of urgently needed low carbon energy alternatives, and (2) negate market signals that would otherwise drive innovation and development of new and improved technologies to reduce GHG emissions from the electrical sector.

As noted above, "utilities endorse centralized fossil and nuclear power plants because they are able to pass most of the costs from these polluting power systems directly onto consumers and society at large. Renewable power sources, in contrast, provide public benefits that are not yet priced into the electricity market." Benjamin K. Sovacool, *Renewable Energy: Economically Sound, Politically Difficult*, 21:5 Elec. J. 18, 19 (2008) [hereinafter *Renewable Energy*].

Drawing upon a survey of 38 environmental externality studies and 132 emissions estimates from

individual electrical generators, Dr. Sovacool found that the seven electric generating technologies with the lowest true costs – energy efficiency, offshore wind, onshore wind, geothermal, hydroelectric, biomass and solar thermal – are all zero or low-carbon energy fuel sources. *Id.* at 25 (citing and updating Thomas Sundqvist & Patrik Soderholm, *Valuing the Environmental Impacts of Electricity Generation: A Critical Survey*, 8:2 J. Energy Lit. 3 (2002)).

Most surveys in the study, however, omitted the externality costs of carbon dioxide emissions. *Id.* at 26. Inclusion of such costs would further reinforce these results. In the aggregate, renewable power sources – wind, solar, biomass, hydropower and geothermal – emit an average of between 5.1 and 59.6 grams of CO_2 per kilowatt hour ("kWh") over their full generation lifecycles.[21] Benjamin K. Sovacool & Charmaine Watts, *Going Completely Renewable: Is It Possible (Let Alone Desirable)?*, 22:4 Elec. J. 95, 100 (2009) [hereinafter *Going Renewable*]. The next closest, nuclear power, emits twice that, 124 gCO_2/kWh. *Id.* Clean coal with carbon capture and storage systems (theoretically) emits 439 gCO_2/kWh. *Id.* Natural gas emits a lifecycle average of 443 gCO_2/kWh and conventional coal 1,005 gCO_2/kWh. *Id.*

The range of estimated carbon dioxide externality costs from conventional electric generating plants is wide – 1.4 to 700 cents/kWh. *Renewable Energy*,

---

[21] The full lifecycle for energy production includes the emissions associated with the manufacture, transportation and construction of the equipment needed to produce the power, such as solar panels, wind turbines or coal-fired boilers.

supra, at 26. However, no matter how it is measured, the price of conventional electricity is considered cheap only because these costs are left out. *See, e.g.*, Owen, *supra*, at 642 ("damage costs resulting from combustion of fossil fuels, if internalised into the price of the resulting output of electricity, could clearly lead to a number of renewable technologies . . . being financially competitive with generation from coal plants"); *Renewable Energy*, *supra*, at 26 ("If priced to include the risks from greenhouse gas emissions and climate change, the costs of coal would rise 35 to 70 percent more; oil 9 to 18 percent more; natural gas 6 to 12 percent more."). *See also* Mann, *supra*, at 1144, n.8 ("If fuel costs included the full cost of the environmental consequences of the combustion of the fuel, there would be no marginal benefit to increased use of currently low cost fuels such as coal that emit large amounts of CO_2 into the global commons."); David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 Colum. J. Envtl. L. 1, 5 (2003) (internalizing the costs of climate change through tort litigation would "make alternative energy sources and more efficient consumption of fossil fuels more desirable, thereby reducing the level of greenhouse gas emissions").

Failure to include the public cost of carbon emissions in the price of electricity also distorts energy markets in ways that prevent cost-effective solutions to, climate change. First, the inherent environmental subsidy gained from externalizing these costs encourages utilities to increase rather than reduce their GHG emissions. "The cost savings from avoiding GHG reductions are enormous, a huge short term incentive to pollute." Robert H. Cutting

& Lawrence B. Cahoon, *The Gift That Keeps on Giving: Global Warming Meets the Common Law*, 10 Vt. J. Envtl. L. 109, 113-114 (2008). Nuisance law would eliminate at least some portion of this incentive to pollute. Early emissions reductions are intrinsically more cost effective, because GHG pollution is aggregative and long-lived; reductions in emissions now decrease both the degree of future adverse impacts and the need for drastic and rapid later reductions. Claudia Kemfert, *Global Climate Protection—Immediate Action Will Avert High Costs*, 1:12 DIW Wkly. Rep. 135 (Apr. 12, 2005).

Second, "changes in technology are triggered principally by price signals." Owen, *supra*, at 632. Incentivizing carbon-intensive energy sources through environmental subsidies – including potential judicial exemptions from nuisance law – blocks those signals. *See* Xinyu Hua and Kathryn E. Spier, *Information and Externalities in Sequential Litigation*, 161 J. Institutional & Theoretical Econ. 215 (2005) (nuisance actions tend to increase economic efficiency by spreading information about costs, allowing future defendants to determine which precautions to take to mitigate risks and avoid future injuries). Choices made today between deploying a new conventional fossil-fueled power plant or a sustainable renewable option are "hard infrastructure" choices and once installed will affect emissions for many decades to come. Additionally,

> . . . once the transmission infrastructure is established to carry power out of a large fossil-fueled-plant to load centers, this creates a transmission and distribution corridor, system hardware,

> and distribution patterns . . . [that also becomes] "hard" embedded infrastructure . . . . "Hard" infrastructure choices of any kind, once embedded in the physical and distributional fabric of a country, are not easily removed or altered.

Steven Ferrey, *Why Electricity Matters, Developing Nations Matter, and Asia Matters Most of All*, 15 N.Y.U. Envtl. L. J. 113, 157-58 (2007). To get future energy choices right, the cost of GHG emissions must be incorporated into investment decisions. "[I]f significant externalities are not priced into the marketplace then associated environmental degradation will also be 'locked-in' and, as a consequence, more environmentally benign technologies could be 'locked-out'." Owen, *supra*, at 634.

Third, the market distortions that would result from a blanket rule against the application of nuisance law for high-carbon electricity sources would detract from the effectiveness of programs aimed at reducing carbon dioxide emissions. For example, state and regional efforts to limit carbon dioxide emissions through a carbon allowance system (such as the northeast's Regional Greenhouse Gas Initiative or the Western Climate Initiative) can be undermined by the availability of low-priced, carbon-intensive power in adjacent states,[22] such as power generated by Defendants. Plaintiffs' nuisance claims, if successful, would reduce the potential for

---

[22] *See, e.g.*, William Funk, *Constitutional Implications of Regional CO2 Cap-and-Trade Programs: The Northeast Regional Greenhouse Gas Initiative as a Case in Point*, 27 UCLA J. Envt. L. & Pol'y 353, 363-64 (2009).

the importation of dirtier power from unregulated, out-of-program sources, because it would require the five dirtiest power sources in the U.S. to clean up.

Similarly, reducing the inherent environmental subsidy Defendants gain from externalizing the costs of their GHG emissions would boost the effectiveness of federal and state renewable energy incentives and other carbon dioxide reduction programs, by helping to level the economic playing field.

> Applying [] incentives for [greenhouse gas] reduction without repealing existing subsidies for fossil fuel use just puts window dressing on the greenhouse effect. It is hard to see what could be less economically efficient than paying for both incentives to use and incentives to stop using fossil fuels.

Mann, *supra*, at 1219-20.

Finally, claims by Defendants and their *amici curiae* that the intermittency of some renewable resources and the lack of baseload production in the renewable energy sector would necessarily force a "dash to gas" are premature and wholly without merit.[23] A Rule 12 motion is far too soon to debate the terms, reasonableness or cost of any potential injunction. Further, it is incorrect to assume that gas is the only economically viable solution. It is becoming increasingly clear that – when full costs are accounted for – renewable energy resources can efficiently address many issues besides the power sector's GHG emissions problem. For instance, there

---

[23] *See, e.g.*, Brief for the Edison Electric Institute, *et al.*, as *Amici Curiae* in Support of Petitioners, 18-20.

is a close match between hourly photovoltaic ("PV") solar power generation and peak demand, making it possible for PV power to cost-effectively reduce the need to build and operate some expensive fossil-fueled "peaking" plants. *See, e.g.*, *Going Renewable*, *supra*, at 97-98.

> Renewable power plants have a number of [other] advantages over their conventional alternatives: they are more modular and can be distributed through a utility's service area, helping to minimize grid congestion and displacing the need to construct expensive transmission and distribution infrastructure. They have quicker lead times, reducing the risk of cost overruns and inflation and improving debt to equity ratios. They use widely available and non-depletable forms of fuel, which are not subject to the speculation and price volatility exhibited by coal, oil, natural gas, and uranium.

Id. Moreover, wind and solar energy generate more jobs and more high-skilled jobs per megawatt of installed capacity than fossil-fueled plants, reduce energy imports, improve national security and energy independence, lower trade imbalances, keep more money in local economies, eliminate toxic waste generation and preserve water supplies. *Id.* at 101.

In sum, Petitioners' speculation about the impact of this case to the nation's economy is not relevant to the claims at issue here (nor will it be relevant to the district court on remand), is based on fundamental distortions of the market and ignores the substantial collateral benefits of renewable power. While no one

expects a single lawsuit to fully correct all of the market failures noted above, requiring these five companies – the five largest emitters in the U.S. – to reduce emissions would constitute a significant step in the vital process of internalizing some costs. This is an appropriate role for tort law.

Accordingly, the Court should not create an exception in the common law of nuisance for the most serious interstate pollution challenge of our time.

CONCLUSION

The Court of Appeals' decision should be affirmed.

Respectfully submitted,

LORI POTTER
COUNSEL OF RECORD
JOHN PUTNAM
KAPLAN KIRSCH & ROCKWELL LLP
1675 BROADWAY, STE 2300
DENVER, CO 80202
(303) 825-7000
lpotter@kaplankirsch.com
jputnam@kaplankirsch.com

STEPHEN F. HINCHMAN
THE LAW OFFICES OF STEPHEN F. HINCHMAN, LLC
537 FOSTERS POINT
WEST BATH, ME 04530
(207) 443-6924
stevehinchman@gmail.com

Attorneys for the Amici

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
FEB 7 - 2011
OFFICE OF THE CLERK

No. 10-174

In The
Supreme Court of the United States

AMERICAN ELECTRIC
POWER COMPANY, INC., *et al.*,

Petitioners,

v.

STATE OF CONNECTICUT, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR AMERICAN CHEMISTRY COUNCIL; AMERICAN COATINGS ASSOCIATION; NATIONAL ASSOCIATION OF MANUFACTURERS; PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA; AND PUBLIC NUISANCE FAIRNESS COALITION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

RICHARD O. FAULK*
JOHN S. GRAY
GARDERE WYNNE SEWELL LLP
1000 Louisiana, Suite 3400
Houston, TX 77002-5007
(713) 276-5500
rfaulk@gardere.com

Counsel for Amici Curiae

February 7, 2011

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

41695cl
50

QUESTION PRESENTED

The court of appeals held that governmental and private plaintiffs may pursue public nuisance actions under federal common law to cap defendants' greenhouse gas emissions at judicially-determined levels. This brief addresses the third issue specified by the Court in its order granting the petition for certiorari, namely:

> Whether claims seeking to cap defendants' carbon dioxide emissions at "reasonable" levels, based on a court's weighing of the potential risks of climate change against the socioeconomic utility of defendants' conduct, would be governed by "judicially discoverable and manageable standards" or could be resolved without "initial policy determination[s] of a kind clearly for nonjudicial discretion."

TABLE OF CONTENTS

Page

Question Presented i

Amici Curiae Brief 1

Identity and Interests of *Amici Curiae* 1

Summary of the Argument 3

Argument 4

I. Courts Cannot Entertain Controversies That Are Not Subject to Judicially Discoverable Standards 4

II. Courts Lack the Resources and Tools to Develop Guiding Standards for Resolving Public Nuisance Cases Involving Global Climate Change 7

A. Using Public Nuisance as an Aggregative Tort Creates "Standardless" Liability That Implicates the Political Question Doctrine 7

B. Traditional Public Nuisance Cases Avoided Standardless Liability by Addressing Only Discrete and Localized Grievances 11

1. The Subjectivity of Public Nuisance 11

2. Traditional Common Law Constraints 14

C. Global Climate Change Claims Transcend the Rational Boundaries of Traditional Public Nuisance Litigation 18

TABLE OF CONTENTS – Continued

Page

D. A Comparative Analysis Demonstrates that the Political Branches Are Far Better Equipped to Craft Standards Governing Climate Change 26

E. Lack of Action by the Political Branches Does Not Empower Common Law Creativity 34

Conclusion 37

TABLE OF AUTHORITIES

Page

CASES

Baker v. Carr, 369 U.S. 186 (1962) 3, 4, 5, 26

Bartnicki v. Vopper, 532 U.S. 514 (2001) 30

Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989).....12

Camfield v. United States, 167 U.S. 518 (1897) 13

Carlson v. Green, 446 U.S. 14 (1980) 6

Carver v. Nixon, 72 F.3d 633 (8th Cir. 1995) 30

City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002).....29

Cleveland v. United States, 329 U.S. 14 (1946).....34

Coleman v. Miller, 307 U.S. 433 (1939).....5

Connecticut v. Am. Elec. Power Co., 582 F.3d 309 (2d Cir. 2009).....*passim*

Detroit Bd. of Educ. v. Celotex Corp., 493 N.W.2d 513 (Mich. Ct. App. 1992) 14

Foster v. Mansfield, 146 U.S. 88 (1892).....21

People ex rel. Gallo v. Acuna, 929 P.2d 596 (Cal.), *cert. denied*, 521 U.S. 1120 (1997).....10, 17

Georgia v. Tenn. Copper Co., 240 U.S. 650 (1916)..... 15

Georgia v. Tenn. Copper Co., 237 U.S. 474 (1915)..... 15

Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907)..... 16

Helvering v. Davis, 301 U.S. 619 (1937) 30

Helvering v. Hallock, 309 U.S. 106 (1940).....35

TABLE OF AUTHORITIES – Continued

Page

Illinois v. City of Milwaukee, 406 U.S. 91 (1972) 15, 17, 20

In re Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990) 26

In re Lead Paint Litig., 924 A.2d 484 (N.J. 2007) 36

Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987) 29

Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) 28

Massachusetts v. EPA, 549 U.S. 497 (2007) ..... *passim*

Miller v. Mayor of New York, 109 U.S. 385 (1883) 23

Missouri v. Illinois, 180 U.S. 208 (1906) 15

Missouri v. Illinois, 200 U.S. 496 (1901) 15

Native Vill. of Kivalina v. ExxonMobil, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal filed*, No. 09-17490 (9th Cir. Nov. 5, 2009) 15, 16

Negusie v. Holder, 555 U.S. ___, 129 S.Ct. 1159 (2009) 31

New Jersey v. City of New York, 283 U.S. 473 (1931) 16

New York v. New Jersey, 256 U.S. 296 (1921) 15

New York Times Co. v. United States, 403 U.S. 713 (1971) 20

North Carolina ex rel. Cooper v. TVA, 615 F.3d 291 (4th Cir. 2010) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

North Dakota v. Minnesota, 263 U.S. 365 (1923) 16

Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518 (1851) 16

People v. Lim, 118 P.2d 472 (Cal. 1941) 9, 10, 17

Richard v. Washington Terminal Co., 233 U.S. 546 (1914) 32

Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917) 35

Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co., 984 F.2d 915 (8th Cir. 1993) 36

Transportation Co. v. Chicago, 99 U.S. 635 (1879) 23

Turner Broadcasting Sys., Inc. v. Federal Communications Comm'n, 512 U.S. 622 (1994) 29

United States v. Bushey & Sons, 363 F. Supp. 110 (D.Vt. 1973), *aff'd without opinion*, 487 F.2d 1393 (2d Cir. 1973) 16

Vieth v. Jubelirer, 541 U.S. 267 (2004) ..... *passim*

Village of Euclid v. Amber Realty Co., 272 U.S. 365 (1926) 12, 14

Wilkie v. Robbins, 551 U.S. 537 (2007) 5, 6

Zuber v. Allen, 396 U.S. 168 (1969) 34

CONSTITUTION AND STATUTES

U.S. Const. art. III, § 1 25

33 U.S.C. § 1251 *et seq.* 17

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 7401 *et seq.* 27

§ 7401(a)(3).....27

§ 7411(b)(1).....28

§ 7411(d) 28

§ 7475.....28

§ 7521(a)(1).....27

§ 7602(g) 27

§ 7607(d) 29

REGULATIONS

74 FED. REG. 56260 (Oct. 30, 2009) 21

74 FED. REG. 66496 (Dec. 15, 2009).....28

75 FED. REG. 25324 (May 7, 2010) 28

75 FED. REG. 31514 (June 3, 2010).....28

75 FED. REG. 74152 (Nov. 30, 2010) 28

75 FED. REG. 82390 (Dec. 30, 2010).....28

75 FED. REG. 82392 (Dec. 30, 2010).....28

SCHOLARLY AUTHORITIES

BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113 (1921).....36

Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755 (2001).....23, 24

TABLE OF AUTHORITIES – Continued

Page

Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741 (2003) 11, 12, 15

Edwin S. Mack, *Revival of Criminal Equity*, 16 HARV. L. REV. 389 (1903) 9

F. H. Newark, *The Boundaries of Nuisance*, 65 L.Q. REV. 480 (1949) 13

FRANCIS HILLIARD, THE LAW OF TORTS FOR PRIVATE WRONGS 631 (2d ed. 1861) 24

Hans A. Linde, *Courts and Torts: "Public Policy" Without Public Politics?*, 28 VAL. U. L. REV. 821 (1994) 31, 33

HORACE WOOD, THE LAW OF NUISANCES iii (3d ed. 1893) 13

J. R. Spencer, *Public Nuisance: A Critical Examination*, 48(1) CAMBRIDGE L.J. 55 (1989) 13

James A. Henderson, Jr., *The Lawlessness of Aggregative Torts*, 34 HOFSTRA L. REV. 329 (2005) 7, 8

John E. Bryson and Angus Macbeth, *Public Nuisance, the Restatement (Second) of Torts, and Environmental Law*, 2 ECOLOGY L.Q. 241 (1972) 13

TABLE OF AUTHORITIES – Continued

Page

John S. Gray, *The Use of Public Nuisance Suits to Address Climate Change: Are These Really "Ordinary Tort Lawsuits?"* in THE LEGAL IMPACT OF CLIMATE CHANGE 127 (2010) 22

Joseph Forderer, *State Sponsored Global Warming Litigation: Federalism Properly Utilized or Abused?*, 18 MO. ENVTL. L. & POLICY REV. 23 (2011).....33

Laurence H. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515 (1982).....34

Reimund Schwarze, *Liability for Climate Change: The Benefits, the Costs, and the Transaction Costs*, 155 U. PA. L. REV. 1947 (2007).....21

Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 MICH. ST. L. REV. 941 (2007).....9, 12

Richard O. Faulk, *Uncommon Law: Ruminations on Public Nuisance*, 18 MO. ENVTL. L. & POLICY REV. 1 (2011).....10, 15, 23

Shi-Ling Hsu, *A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Lawsuit*, 79 U. COLO. L. REV. 701 (2008).....20

TABLE OF AUTHORITIES – Continued

Page

THOMAS REED POWELL, *The Still Small Voice of the Commerce Clause* in 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW 931 (Ass'n of American Law Schools, 1938) 34

Timothy D. Lytton, *Lawsuit Against the Gun Industry: A Comparative Institutional Analysis*, 12 CONN. L. REV. 1247 (2000) 30

Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541 (2006) 12

W. PAGE KEETON, ET AL., PROSSER & KEETON ON TORTS 616 (5th ed. 1984) 13, 23

Warren A. Seavey, *Nuisance: Contributory Negligence and Other Mysteries*, 65 HARV. L. REV. 984 (1952) 13

William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997 (1966) 24

WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 71, at 557-58 (1941) 23

William Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399 (1942) 13

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Charles H. Mollenberg, Jr., *No Gap Left: Getting Public Nuisance Out of Environmental Regulation and Public Policy*, 7 EXPERT EVIDENCE REPORT 474 (Sept. 24, 2007) 10

David A. Dana, *The Mismatch between Public Nuisance Law and Global Warming* 3 (Nw. Univ. Sch. of Law Pub. Law & Legal Theory Series, Paper No. 08-16, Law & Econ., Paper No. 08-05, 2008) 25, 33

Eckardt C. Beck, *The Love Canal Tragedy*, EPA JOURNAL (Jan. 1979).....10

H.J. Schellnhuber, NATURE 402 Suppl. C21 (1999).....19

Kevin A. Baumert, *et al.*, *Navigating the Numbers: Greenhouse Gas Data and International Climate Policy*, WORLD RESOURCES INSTITUTE (2005).....33

Laurence H. Tribe, *et al.*, *Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine*, WASH. LEGAL FOUND. CRITICAL ISSUES SERIES (Jan. 2010).....22, 33

Nathan Richardson, *et al.*, *The Return of an Old and Battle-Tested Friend, The Clean Air Act*, 166 RESOURCES 25, 29 (Fall 2010).....27

TABLE OF AUTHORITIES – Continued

Page

P. Forster, *et al.*, CHANGES IN ATMOSPHERIC CONSTITUENTS AND IN RADIATIVE FORCING, IN: CLIMATE CHANGE 2007. THE PHYSICAL SCIENCE BASIS, Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (S. Solomon, *et al.* eds. Cambridge Univ. Press 2007) 18

RESTATEMENT (SECOND) OF TORTS § 821A 32

RESTATEMENT (SECOND) OF TORTS § 821B 7

Richard O. Faulk and John S. Gray, *A Lawyer's Look at the Science of Global Climate Change,* 44 WORLD CLIMATE CHANGE REPORT 2 (BNA, Mar. 10, 2009) 19

AMICI CURIAE BRIEF

Amici Curiae American Chemistry Council, American Coatings Association, the National Association of Manufacturers, the Property Casualty Insurers Association of America, and Public Nuisance Fairness Coalition, respectfully submit this *amici curiae* brief, on behalf of themselves and their members, in support of Petitioners. Pursuant to Supreme Court Rule 37.3(a), this *amici curiae* brief is filed with the consent of all the parties.[1]

IDENTITY AND INTERESTS OF *AMICI CURIAE*

Amicus Curiae American Chemistry Council ("ACC"), represents the leading companies engaged in the business and science of chemistry to make innovative products and services that make people's lives better, healthier and safer. *See* ACC's website, http://www.americanchemistry.com. *Amicus Curiae* American Coatings Association ("ACA") represents both companies and professionals working in the

[1] Pursuant to Supreme Court Rule 37, all parties have issued blanket consents to the filing of *amicus* briefs. *Amici Curiae* affirm that no counsel for a party authored this brief in whole or in part, or made a monetary contribution for the preparation or submission of this brief. No persons other than *amici*, their members, or their counsel made a monetary contribution to this brief's preparation or submission.

paint and coatings industry. *See* ACA's website, http://www.paint.org. *Amicus Curiae* The National Association of Manufacturers (the "NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. *See* the NAM's website, http://www.nam.org/. *Amicus Curiae* Property Casualty Insurers Association of America ("PCIAA") is a national trade association comprised of more than 1,000 member companies, representing the broadest cross-section of insurers of any national trade association. *See* PCIAA's website, http://www.pciaa.net/. *Amicus Curiae* Public Nuisance Fairness Coalition ("PNFC") is a coalition composed of major corporations, industry organizations, legal reform organizations and legal experts concerned with the growing misuse of public nuisance lawsuits.

Amici Curiae are coalitions and trade organizations whose members include organizations and companies doing business in the United States including some companies that are both directly and indirectly affected by the public nuisance litigation governed by this Court's decisions. As regulated entities, *amici's* members are especially concerned by the intrusion of standardless public nuisance litigation into areas traditionally reserved for the political branches of government. Such forays threaten the regulatory clarity and predictability necessary for successful business planning and operations.

SUMMARY OF THE ARGUMENT

Amici Curiae submit this brief to highlight particular problems in the Second Circuit's decision regarding the "political question" doctrine. *Amici* focus on the second test stated in *Baker v. Carr*, 369 U.S. 186 (1962), namely, whether courts lack "judicially discoverable and manageable standards" for resolving public nuisance cases involving global climate change. *Id.* at 278. In this brief, *amici* will show that such cases raise quintessential "political questions" because their standardless nature requires policy judgments that courts have "neither the expertise nor the authority" to make. *Massachusetts v. EPA*, 549 U.S. 497, 533-34 (2007).

The history of public nuisance, especially under federal common law, reflects that its use has never been approved when the proscribed conduct and other liability criteria are not constrained by geographical boundaries and defined circumstances. Similar reasoning applies to the "political question" doctrine, which requires dismissal of claims not subject to judicially discoverable and manageable standards. As this action is framed, these principles are inseparably conjoined. Far from being an "ordinary tort suit," this expansive claim sits squarely at the "crossroads" of substantive law and justiciability.

Some controversies, such as the extraordinarily broad and standardless public nuisance claims alleged here, require the resolution of questions that courts lack the tools and resources to adjudicate in a way

that is principled, rational, and based upon reasoned distinctions. When such political questions are raised, courts must decide whether they have the technical and scientific expertise necessary to create standards and rules to resolve the controversy justly. Such inquiries go to the very heart of the political question analysis. In public nuisance cases of global dimensions, courts should defer to the political branches of government to set and adjust, if warranted, the standards and rules by which courts judge the reasonableness of defendants' actions.

Even when the political branches have not acted, common law courts are not necessarily free to "fill the void." Irrespective of whether the executive or legislative branches have yet spoken, due respect for their constitutional responsibilities – combined with awareness of the judiciary's own limitations – mandate judicial restraint.

ARGUMENT

I. COURTS CANNOT ENTERTAIN CONTROVERSIES THAT ARE NOT SUBJECT TO JUDICIALLY DISCOVERABLE STANDARDS

In *Baker v. Carr*, 369 U.S. 186 (1962), and its progeny, *see, e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (plurality), this Court held that lower courts cannot entertain a dispute when it lacks "judicially discoverable and manageable standards for resolving it." *Baker*, 369 U.S. at 278 (describing the second, and

one of the most critical, of several tests to determine the existence of a political question). As Justice Scalia stated in *Vieth v. Jubelirer*, "[o]ne of the most obvious limitations imposed by that requirement is that judicial action must be governed by *standard, by rule*." 541 U.S. at 278 (emphasis in original). "Laws promulgated by the Legislative Branch can be inconsistent, illogical, and *ad hoc*; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions." *Id.* (emphasis in original).

Even before *Baker* and *Vieth* were decided, this Court recognized that ascertainable principles were indispensable to justicability. The "lack of satisfactory criteria for a judicial determination" has historically influenced the Court to defer to the political branches, especially when "considerations of policy, considerations of extreme magnitude" render the controversy "entirely incompetent to the examination and decision of a court of justice." *Coleman v. Miller*, 307 U.S. 433, 454-55 (1939).

The requirement of guiding "standards" is especially important when federal common law causes of action are alleged. The Court has refused to extend federal common law liabilities when doing so presented serious difficulties in devising workable judicial standards. *See Wilkie v. Robbins*, 551 U.S. 537, 562 (2007) (declining to extend liability when the standard "would be endlessly knotty to work out"). This is particularly true where, as here, plaintiffs have "alternative remedies" in the regulatory arena to vindicate their rights and there are "special factors"

that counsel hesitation before authorizing a new federal cause of action. *Id.* at 575 (citing *Carlson v. Green*, 446 U.S. 14, 18-19 (1980)).

For courts to entertain controversies, they must have legal tools that enable them to grant relief that is "principled, rational, and based upon reasoned distinctions." *Vieth*, 541 U.S. at 278. If they lack those tools, the proceeding presents a "political question" that must be solved by the political branches, which have the resources and authority to redress them.

As *amici* will show below, the tort of public nuisance is extraordinarily subjective and notoriously difficult to define and apply. For that reason, it has always been constrained by defined causal circumstances and geographic limits. If those constraints are abandoned, the tort becomes an impermissibly "standardless," discretionary, and ultimately, lawless exercise that exceeds legitimate judicial authority. Given the political question doctrine's insistence on "judicially discoverable and manageable standards," public nuisance cases based on global conditions are inherently non-justiciable. The possibility that manageable standards may be discovered in the future as a result of Congressional or Executive action does not change the fact that such controversies are "standardless" today. *Id.* at 311.

II. COURTS LACK THE RESOURCES AND TOOLS TO DEVELOP GUIDING STANDARDS FOR RESOLVING PUBLIC NUISANCE CASES INVOLVING GLOBAL CLIMATE CHANGE

A. Using Public Nuisance as an Aggregative Tort Creates "Standardless" Liability That Implicates the Political Question Doctrine

Although the Second Circuit insisted that its expansive application of public nuisance was consistent with the Restatement (Second) of Torts, *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 328 (2d Cir. 2009), the court failed to heed a dispositive warning – a warning that is central to determining whether this case presents a "political question."

In his comments to § 821B, Dean Prosser, the official reporter, warned that "[i]f a defendant's conduct does not come within one of the traditional categories of the common law crime of public nuisance or is not prohibited by a legislative act, *the court is acting without an established and recognized standard*." RESTATEMENT (SECOND) OF TORTS § 821B cmt. e (1979) (emphasis added). Dean Prosser's concerns were recently reinforced by one of the reporters for the Third Restatement, Professor James A. Henderson, who warned about the "lawlessness" of expansive tort liability, including public nuisance litigation. James A. Henderson, Jr., *The Lawlessness of Aggregative Torts*, 34 HOFSTRA L. REV. 329, 330 (2005). According to Professor Henderson, these amorphous tort

theories have the potential to be lawless not simply because they are non-traditional or court-made, or because the financial stakes are high. Instead, "the lawlessness of these aggregative torts inheres in the extent to which they combine sweeping, social-engineering perspectives with vague, open-ended legal standards for determining liability and measuring damages." *Id.* at 338.

Such paths lead inevitably to controversies where liability is controlled by the discretion of individual courts, rather than by rules of law. If cases like the present controversy are allowed to proceed, judges and juries will be empowered "to exercise regulatory power at the macro-economic level of such a magnitude that even the most ambitious administrative agencies could never hope to possess." *Id.* In exercising these extraordinary regulatory powers via tort litigation, courts (including juries) "exceed the legitimate limits of both their authority and their competence." *Id.* Although the Second Circuit stressed that tort cases rarely involve political questions, *Am. Elec. Power Co.*, 582 F.3d at 326-29, aggregative torts, such as public nuisance, raise unique "lawlessness" concerns that transcend routine tort cases and cross the political question threshold. *See* Henderson, at 338.

Dean Prosser's wise advice, as well as Professor Henderson's concerns about "lawlessness," are substantiated by the history of public nuisance – a history that underscores the limitations of the law of public nuisance. In the early twentieth century, litigants argued that public nuisance should be expanded to

address activities that were not criminal and that did not implicate property rights or enjoyment. *People v. Lim*, 118 P.2d 472, 475 (Cal. 1941) (noting that courts justified "public nuisance" abatement because "public and social interests, as well as the rights of property, are entitled to the protection of equity"). Proponents of this expansion argued that the "end justified the means" by highlighting the tort's remarkable effectiveness and claiming "that [otherwise] there is no adequate remedy provided at law." *See* Edwin S. Mack, *Revival of Criminal Equity*, 16 HARV. L. REV. 389, 400-03 (1903); *see also* Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 MICH. ST. L. REV. 941, 974-75 (2007) (chronicling the reemergence of these arguments as governmental authorities employ public nuisance litigation to address complex problems such as urban violence and public health issues).

Legal commentators and authorities objected, however, when public authorities sought to use public nuisance to address broad societal problems such as over-reaching monopolies, restraint of trade activities, prevention of criminal acts, and labor controversies such as strikes. Mack, 16 HARV. L. REV. 397-99 (noting that the expanding boundaries of public nuisance law made courts of equity of that time period careless of their traditional jurisdictional limits). They warned that this "solution" was planting the seeds of abuse that would ultimately weaken the judicial system. *Id.* at 400-03.

Finally, when public nuisance was used as a precursor to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") to address environmental contamination in the Love Canal controversy, a decade of nuisance litigation failed to produce a solution. *See* Eckardt C. Beck, *The Love Canal Tragedy*, EPA Journal (Jan. 1979) ("no secure mechanisms [were] in effect for determining such liability"); Charles H. Mollenberg, Jr., *No Gap Left: Getting Public Nuisance Out of Environmental Regulation and Public Policy*, 7 EXPERT EVIDENCE REPORT 474, 475-76 (Sept. 24, 2007). Thereafter, arguments urging expansion were increasingly rejected, most notably in California, where the state's Supreme Court ultimately deferred to the legislature's "statutory supremacy" to define and set standards for determining liability. *See Lim*, 118 P.2d at 475. Significantly, the court did so because judicial creativity would otherwise result in "standardless" liability. *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 606 (Cal.), *cert. denied*, 521 U.S. 1120 (1997).

There is plainly an overlap between this jurisprudential principle and the "political question" doctrine. Although the concepts are inextricably linked, their conjunction has been inexplicably overlooked. *See generally*, Richard O. Faulk, *Uncommon Law: Ruminations on Public Nuisance*, 18 MO. ENVTL. L. & POLICY REV. 1, 10-21 (2011).

Just as courts have traditionally resisted invitations to expand public nuisance liability in the absence of clear boundaries and guiding principles,

courts also must resist deciding political question controversies where they cannot devise definitive standards and rules for their adjudication. Each principle informs courts when advocates invite creative excursions, and in both contexts, respect for the legislative and executive spheres and the constitutional limits of judicial power is essential. Because of this confluence, it is important to understand how the Second Circuit's decision departed from the traditional constraints under which public nuisance has been applied.

B. Traditional Public Nuisance Cases Avoided Standardless Liability by Addressing Only Discrete and Localized Grievances

Public nuisance has always been a "local tort." It has been limited to controversies caused by identifiable actors and to situations circumscribed by discrete geographic limits. Typically, public nuisance cases are localized and linked to impairment of property, or to injuries resulting from such effects. *See* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 830-33 (2003). These limits assisted courts in managing the tort's notorious subjectivity and naturally minimized the risk of "standardless liability."

1. The Subjectivity of Public Nuisance

The law of public nuisance is ancient – and its vagueness has vexed courts and litigants throughout

its history. The tort's origins can be traced to the English feudalism of the Middle Ages. It was used by the English crown to stop "quasi-criminal" conduct such as blocking a public road or waterway – actions that were deemed unreasonable because they could injure persons exercising common societal rights. *See* Faulk & Gray, 2007 MICH. ST. L. REV. at 948-49; *see also* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541, 543-45 (2006).

Historically, public nuisance generally was not regarded as a tort, but rather as a basis for public officials to prosecute crimes or to seek injunctions to abate harmful conduct. Only rarely was a tort remedy made available to a citizen, and apparently never to a state or municipality. Gifford, 71 U. CIN. L. REV. at 745-46. The "quasi-criminal" nature of public nuisance persists to this day, particularly where, as here, contempt is employed as an enforcement mechanism. For that reason, some scholars believe that the tort's subjectivity implicates prohibitions against unconstitutional vagueness. *See id.* at 787.

Confusion regarding liability standards for public nuisance is as ancient as the tort itself. The foundation of common law nuisance lies in the legal maxim "*sic utere tuo ut alienum non laedas*" which means that property is held subject to the condition that its use should not injure the equal rights of others or impair the community's public right. *See Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 433-34 (1989); *Village of Euclid*

v. Amber Realty Co., 272 U.S. 365, 387 (1926); *Camfield v. United States*, 167 U.S. 518, 522-23 (1897).

Since its creation, this principle, as well as others coined to govern liability, have proven difficult to explain and apply. As a result, public nuisance historically has "meant all things to all people." W. PAGE KEETON, ET AL., PROSSER & KEETON ON TORTS 616 (5th ed. 1984); *see also* J. R. Spencer, *Public Nuisance: A Critical Examination*, 48(1) CAMBRIDGE L.J. 55, 56 (1989) (Because of its vagueness and mutability outside of defined boundaries, public nuisance has even been characterized as a "chameleon word").

When Horace Wood published the first American treatise on nuisance in 1875, he described public nuisance as a "wilderness of law." HORACE WOOD, THE LAW OF NUISANCES iii (3d ed. 1893). William Prosser, reporter for the Restatement (Second) of Torts, described nuisance law as an "impenetrable jungle," and as a "legal garbage can" full of "vagueness, uncertainty and confusion." William Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 410 (1942). By 1949, the tort's boundaries were so "blurred" that public nuisance had become a "mongrel" tort that was "intractable to definition." F. H. Newark, *The Boundaries of Nuisance*, 65 L.Q. REV. 480, 480 (1949). Additional time and experience have not clarified the situation. *See, e.g.*, Warren A. Seavey, *Nuisance: Contributory Negligence and Other Mysteries*, 65 HARV. L. REV. 984, 984 (1952) (a "mystery"); John E. Bryson and Angus Macbeth, *Public Nuisance, the Restatement*

(Second) of Torts, and Environmental Law, 2 ECOLOGY L.Q. 241, 241 (1972) (a "quagmire.").

Given this subjectivity, it is not surprising that courts have confessed "bewilderment" regarding the tort's boundaries. *See, e.g., Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513, 520 (Mich. Ct. App. 1992) ("Suffice it to say that, despite attempts by appellate courts to rein in this creature, it, like the Hydra, has shown a remarkable resistance to such efforts").

2. Traditional Common Law Constraints

Notwithstanding these problems, courts devised practical ways to manage and resolve public nuisance cases. For example, Justice George Sutherland, writing for this Court, once described a public nuisance as "merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard." *Euclid*, 272 U.S. at 388. Justice Sutherland's statement is more than a colorful illustration. He explained that whether a particular thing is a nuisance cannot be determined by "abstract considerations," but rather "by considering it *in connection with the circumstances and the locality*." *Id.* (emphasis added).

The Court's insistence on defined "circumstances and locality" is important because it identifies the objective criteria essential to a public nuisance finding. Indeed, every public nuisance case decided in this Court's history has involved limited geographic locales. Without that limitation, there is no standard

by which the effect of the alleged nuisance can be measured. Similarly, each of the Court's prior public nuisance decisions involved defined circumstances where the controversy could actually be resolved by an abatement order. In the absence of defined circumstances that can be meaningfully redressed, there is no standard by which an equitable remedy can be designed, and no basis for projecting or evaluating its efficacy. *See* Faulk, 18 MO. ENVTL. L. & POLICY REV. at 14-15; Gifford, 71 U. CIN. L. REV. at 830-33.

Significantly, all of the pollution-based public nuisance precedents upon which the Second Circuit relied are within that narrow tradition. *See Am. Elec. Power Co.*, 582 F.3d at 326-29. Each concerned a localized controversy traceable to specific actions by identifiable defendants,[2] such as the discharge of sewage or chemicals into waterways,[3] emission of noxious fumes from copper foundries that destroyed forests, orchards, and crops;[4] dumping garbage into the ocean

---

[2] *See Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 875 (N.D. Cal. 2009) ("The common thread running through each of those cases is that they involved a discrete number of 'polluters' that were identified as causing a specific injury to a specific area"), *appeal filed*, No. 09-17490 (9th Cir. Nov. 5, 2009).

[3] *See, e.g., Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee I*"); *New York v. New Jersey*, 256 U.S. 296 (1921) (one bay); *Missouri v. Illinois*, 200 U.S. 496 (1906) (one water system); *Missouri v. Illinois*, 180 U.S. 208 (1901) (same).

[4] *See Georgia v. Tenn. Copper Co.*, 240 U.S. 650 (1916) (two copper smelters near state line); *Georgia v. Tenn. Copper Co.*,

(Continued on following page)

that fouled beaches;[5] irrigation projects that contributed to flooding;[6] construction bridges that interfered with navigation;[7] and pollution of lakes by vessels transporting oil.[8] Although the Second Circuit identified these nuisance actions as "the common law backbone of modern environmental law," *Am. Elec. Power Co.*, 582 F.3d at 328, it failed to acknowledge and address two important distinctions.

First, the harm claimed to have been caused by the alleged unreasonable conduct occurred within a circumscribed "zone of discharge," the conduct affected defined geographic locations, and all of the actors whose conduct had to be reached in order to effect a complete abatement of the nuisance were before the court. *Cf. Kivalina*, 663 F. Supp. 3d at 881 (stressing that conduct creating the public nuisance must occur within a specified "zone of discharge" to satisfy standing requirements). Likewise, each localized grievance resulted solely from human activity and was created over a relatively short period of time. None of these

---

237 U.S. 474 (1915) (same); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907) (same).

[5] *New Jersey v. City of New York*, 283 U.S. 473 (1931) (one city's actions).

[6] *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (state's project that harmed downstream land).

[7] *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1851) (state's decision to build a bridge).

[8] *United States v. Bushey & Sons*, 363 F. Supp. 110, 120-21 (D.Vt. 1973), *aff'd without opinion*, 487 F.2d 1393 (2d Cir. 1973) (vessels owned by two corporations and operating on one lake).

conditions exists here. Instead, under Respondents' theory, the "zone of discharge" is global and the "defined geographic location" is universal. The few defendants sued in this matter could not possibly redress such a condition. According to the Respondents' allegations, contribution from non-human, natural forces as well as anthropogenic sources is undeniable, and the alleged condition arose, at a minimum, over hundreds of years.

Second, when the earlier cases were decided, there were no laws regulating or prohibiting pollution. Consequently, the only redress available was a public nuisance lawsuit. The cases cited by the Second Circuit therefore predate the alternative administrative methods created by Congress to address pollution. Indeed, the last time this Court recognized a federal common-law pollution-based public nuisance claim was *before* Congress passed the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (1972). *See Milwaukee I*, 406 U.S. 91 (1972).

Much has changed since 1972. Today's local, state and federal pollution laws have largely eliminated the need for pollution-based public nuisance litigation, except in those particular instances where the political branches have expressly defined specific situations, activities and behaviors as nuisances. *See, e.g.*, *Lim*, 118 P.2d at 476 ("In a field where the meaning of terms is so vague and uncertain it is a proper function of the legislature to define those breaches of public policy which are to be considered public nuisances within the control of equity"); *Acuna*, 929 P.2d at 606

(stating that "[t]his lawmaking supremacy serves as a brake on any tendency in the courts to enjoin conduct and punish it with the contempt power under a standardless notion of what constitutes a 'public nuisance'").

Despite this history, Respondents demand that objective constraints be abandoned. In their place, Respondents propose that courts create *ad hoc* common law standards to regulate the perceived threat of global climate change. By expanding public nuisance beyond its traditional boundaries, however, and by entrusting regulation solely to subjective judicial discretion, Respondents not only forsake centuries of sound jurisprudence, but also abandon the rule of law.

C. Global Climate Change Claims Transcend the Rational Boundaries of Traditional Public Nuisance Litigation

The predicate for Respondents' lawsuit is climate change, a form of air pollution caused by the emission of greenhouse gases from countless manmade and natural sources all around the world. Scientists suggest that anthropogenic greenhouse gas pollution began more than 250 years ago at the start of the Industrial Revolution. *See generally*, P. Forster, *et al.*, CHANGES IN ATMOSPHERIC CONSTITUENTS AND IN RADIATIVE FORCING, IN: CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS, CONTRIBUTION OF WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE

INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 137 (S. Solomon, *et al.* eds. Cambridge Univ. Press 2007); *see also* Richard O. Faulk and John S. Gray, *A Lawyer's Look at the Science of Global Climate Change*, 44 WORLD CLIMATE CHANGE REPORT 2 (BNA, Mar. 10, 2009) (providing scientific references).

Given climate change's extraordinary causal chain, it is impossible to distinguish one exhalant's contribution from vehicular or industrial emissions today, much less since the start of the Industrial Revolution. *See* Faulk and Gray, 44 WORLD CLIMATE CHANGE REPORT at 16 (citing figure 8, causation diagram by H.J. Schellnhuber, NATURE 402 suppl. C21 (1999). There are no processes to differentiate, calculate and account for the impact of biological emissions from the trillions of organisms which inhabit the planet. Nor can the role of titanic natural forces, such as volcanism, be calculated reliably. Moreover, no method exists to account for the myriad confounding forces that impact the relative degree of liability attributable to these or any potential defendants – such as events responsible for changes to forests and seas which absorb emissions. *See generally*, *id.* at 12-14.

Nothing in the history of the law of public nuisance allows Respondents to single out these few defendants and require them to "abate" their "contributions" to a condition that spans the globe and jointly took the entire industrialized world – in combination with natural forces – more than 150 years to create. Yesteryear's pollution-based public nuisance

cases simply do not provide "judicially discoverable and manageable standards" to guide courts to decisions that are "principled, rational, and based upon reasoned distinctions" in this scenario. *Vieth*, 541 U.S. at 278.

This controversy differs profoundly from the "simple" public nuisance cases cited as precedent by the Second Circuit. *See, e.g., Milwaukee I*, 406 U.S. 91, 106, n.8 (1972) (describing interstate water pollution scenario as "a public nuisance of simple type for which a State may properly ask an injunction"). In each of those cases, the nuisance could be abated by enjoining the offending activity. Here, Respondents cannot secure meaningful relief. At best, the rate of global warming may be slowed infinitesimally. Consequently, any relief awarded in this case will be merely symbolic – a gesture of speculative hope rather than a definitive solution. *Vieth*, 541 U.S. at 304 (observing that "it is the function of the courts to provide relief, not hope"). As one scholar concluded, "climate change litigation is unlikely to play a significant role in arresting global climate change. In the end, the bulk of the work in reducing greenhouse gases must be undertaken by nation states and international agreements." Shi-Ling Hsu, *A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Lawsuit*, 79 U. COLO. L. REV. 701, 701-02 (2008).

Such vain pursuits are not consistent with equitable maxims – which preclude idle gestures. *See New York Times Co. v. United States*, 403 U.S. 713, 744

(1971) ("It is a traditional axiom of equity that a court of equity will not do a useless thing . . . "); *Foster v. Mansfield*, 146 U.S. 88, 101-02 (1892) ("A court of equity is not called upon to do a vain thing. It will not entertain a bill simply to vindicate an abstract principle of justice, or to compel the defendants to buy their peace"). While the requested injunction will not impact climate change in any measurable manner, it will significantly impact Petitioners because massive amounts of time, effort and resources will be wasted in litigation where the ultimate "relief" is merely symbolic, not efficacious. *See* Reimund Schwarze, *Liability for Climate Change: The Benefits, the Costs, and the Transaction Costs*, 155 U. PA. L. REV. 1947, 1947 (2007) ("claims for climate change-related damages could become crushingly expensive and cause high transaction costs").

If public nuisance can be used to redress climate change symbolically, then this case is merely the first wave of an impending litigation flood. Here, Petitioners merely sued a handful of entities that operate power plants – a "drop in the bucket" compared to countless activities in the national economy that emit greenhouse gases, to say nothing of emissions by international sources. *See* EPA, *Mandatory Reporting of Greenhouse Gases*; Final Rule 74 FED. REG. 56260, 56363 (Oct. 30, 2009) (estimating that there are 54,229 known facilities that annually emit more than 1,000 tons of greenhouse gases (in carbon dioxide equivalents) in the United States alone). Indeed, every living creature, corporation, special interest,

and governmental entity that is potentially affected by climate change is also an emissions source. Under Respondents' theory in this case, the types and numbers of potential litigants, whether plaintiffs or defendants, is limited only by the ingenuity of lawyers and the tolerance of the judiciary.

For this reason, the Second Circuit's characterization of this case as an "ordinary tort suit," *Am. Elec. Power Co.*, 582 F.3d at 329, trivializes the significance and scope of Respondents' climate change allegations. Climate change allegations are plainly extraordinary – and labeling them otherwise is not a helpful exercise. *See* Laurence H. Tribe, *et al.*, *Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine*, WASH. LEGAL FOUND. CRITICAL ISSUES SERIES (Jan. 2010) at 13-14 (observing that the Second Circuit "essentially confus[ed] a label with an argument" and "the political question doctrine is about more than wordplay"); *see generally*, John S. Gray, *The Use of Public Nuisance Suits to Address Climate Change: Are These Really "Ordinary Tort Cases"?* in THE LEGAL IMPACT OF CLIMATE CHANGE 127 (2010). In fact, the judiciary has no experience dealing with public nuisance litigation stemming from a global phenomenon putatively caused by the release of greenhouse gases by millions, if not billions, of sources (including natural events) worldwide – very few of which are subject to the jurisdiction of American courts or under the control of these defendants. The judiciary's past experience provides no guidance for determining

what standards and rules should be applied to resolve this controversy. *See* Faulk, 18 MO. ENVTL. L. & POLICY REV. at 14-17.

Far from an "ordinary tort suit," this case frames wholly new claims that are unbounded by any rational constraints. As the Fourth Circuit recently observed in *North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291, 302 (4th Cir. 2010):

> [W]hile public nuisance law doubtless encompasses environmental concerns, it does so at such a level of generality as to provide almost no standard of application. If we are to regulate smokestack emissions by the same principles we use to regulate prostitution, obstacles in highways, and bullfights, *see* [W. Page Keeton, Torts at 643-45], we will be hard pressed to derive any manageable criteria.

Both "political question" considerations and the substantive law of public nuisance wisely preclude courts from resolving controversies when fair standards cannot be devised to resolve amorphous claims. For example, the law of public nuisance requires more than an "injury in fact" to justify recovery. To be a nuisance, a defendant's interference with the public right must be "substantial." It cannot be a "mere annoyance," a "petty annoyance," a "trifle," or a "disturbance of everyday life." *See generally* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 71, at 557-58 (1941); *see also* Denise E. Antolini, *Modernizing*

Public Nuisance: Solving the Paradox of the Special Injury Rule, 28 ECOLOGY L.Q. 755, 772 (2001). The defendant's interference must also be objectionable to the ordinary reasonable person, and one that materially interferes with the ordinary physical comfort of human existence according to plain, sober, and simple notions. William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 1002-03 (1966); *see also* Antolini, 28 ECOLOGY L.Q. at 772 n.57 (citing FRANCIS HILLIARD, THE LAW OF TORTS FOR PRIVATE WRONGS 631 (2d ed. 1861)).

Under these authorities, the alleged causal link must be more than conjectural or hypothetical, and merely speculative connections between the defendant's conduct and the alleged injury are insufficient. In a global context, where countless untraceable and unquantifiable natural, biological, and anthropogenic emissions allegedly act cumulatively over centuries to produce harm, determining whether any particular emissions constitute a "substantial interference" is objectively impossible. As one scholar has observed:

> Unless the suit brings in all the major greenhouse gas emitters in the world, it will be impossible for the plaintiff to show (or even really allege) that it is more likely than not that the defendants' emissions, and in [sic] of themselves, caused the warming that allegedly caused or will cause the harm to the state. Greenhouse gas emissions, individually, do not translate into warming or indeed any identifiable harm at all. Moreover, it will be impossible to show that the

> defendants' emissions were even part of the total emissions that caused the alleged harm, since even in the absence of the defendants' emissions, it will be plausible to suppose that the same degree of warming would have occurred or will occur.

David A. Dana, *The Mismatch between Public Nuisance Law and Global Warming* 3, 10 (Nw. Univ. Sch. of Law Pub. Law & Legal Theory Series, Paper No. 08-16, Law & Econ., Paper No. 08-05, 2008), *available at* http://ssrn.com/abstract=1129838. For these reasons, "climate change is best conceptualized as an over-exploitation-of-a-commons problem . . . and public nuisance law has never been touted as, or served to effectively address, the tragedy of the commons." *Id.* at 11-12.

Simply stated, the immeasurable scope of the controversy matters. Using public nuisance law in an attempt to redress alleged harms from global climate change far exceeds the tort's common law boundaries – and while venturing beyond those fences may be intellectually adventurous, there are no standards or rules that guarantee that such explorations will result in justice. *See Vieth*, 541 U.S. at 278. ("'The judicial Power' created by Article III, § 1, of the Constitution is not whatever judges choose to do . . . "). Indeed, this Court has already warned that it has "neither the expertise nor the authority" to evaluate the many policy judgments involved in climate change issues. *Massachusetts*, 549 U.S. at 533-34.

The Court must not dispense with objective standards by abandoning the issue of "substantial interference" to the factfinder's subjective speculations. Such a standardless exercise is not jurisprudential. Instead, it transforms courts across the United States into regulatory agencies, requires them to devise *ad hoc* standards for each case, applies *ex post facto* rules to impose liability, and then mandates enforcement using the threat of contempt to motivate compliance. Such a proceeding may be "called a trial, but it is not." *See In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990) ("The Judicial Branch can offer the trial of lawsuits. It has no power or competence to do more. We are persuaded on reflection that the procedures here called for comprise something other than a trial within our authority. It is called a trial, but it is not").

D. A Comparative Analysis Demonstrates that the Political Branches Are Far Better Equipped to Craft Standards Governing Climate Change

The nonjusticiability of a political question is "primarily a function of the separation of powers." *Baker*, 369 U.S. at 210. To determine whether a matter has been committed to a particular branch of government, or whether that branch exceeds whatever authority has been committed, is a "delicate exercise" that needs a "case-by-case" inquiry. *Id.* at 201-11. In public nuisance cases based upon global climate change, where no standards presently exist to

assess or measure responsibility or to determine appropriate reductions in greenhouse gas emissions, "political question" arguments necessarily require a comparative evaluation of the resources needed to craft appropriate rules. When such an evaluation is conducted here, the balance weighs decisively in favor of the political branches.

Congress enacted the Clean Air Act ("CAA") to generally address air pollution in the United States. Nathan Richardson, *et al.*, *The Return of an Old and Battle-Tested Friend, The Clean Air Act*, 166 RESOURCES 25, 29 (Fall 2010). This Court has already held that the CAA is applicable to greenhouse gases. *Massachusetts*, 549 U.S. at 528-29. Through the Clean Air Act ("CAA"), 42 U.S.C. § 7401 *et seq.*, Congress established a comprehensive framework for regulating air pollution. Congress found that "air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3).

The greenhouse gases involved in this case are considered "air pollutants" under the broad language of Section 302(g) of the CAA, 42 U.S.C. § 7602(g). *Massachusetts*, 549 U.S. at 528-29. More importantly, this Court held that EPA has authority to regulate greenhouse gas emissions under Section 202 of the CAA, 42 U.S.C. § 7521(a)(1) if it finds that greenhouse gases cause or contribute to air pollution that

may reasonable be anticipated to "endanger public health or welfare." *Massachusetts*, 549 U.S. at 528. The CAA also includes other provisions under which EPA has regulated or is contemplating regulating greenhouse gases using different mechanisms.[9] *See, e.g.*, 42 U.S.C. §§ 7411(b)(1), 7411(d), 7475.

The contrast between the CAA scheme to regulate air pollution and public nuisance – an "ill-defined omnibus tort of last resort" where "one searches in vain . . . for anything resembling a principle" – could not be more stark. *TVA*, 615 F.3d at 302 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting)). Attempting to resolve the issue using federal common law at the same time EPA is invoking the CAA's regulatory structure to address it would be to condone the use of multiple standards. One can imagine situations where facilities are subject to EPA-sanctioned state permits that set one standard, a federal court in a nearby state set

---

[9] Endangerment Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 FED. REG. 66496 (Dec. 15, 2009); *see also* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25324 (May 7, 2010); Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 FED. REG. 31514 (June 3, 2010); Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium and Heavy-Duty Engines and Vehicles: Proposed Rule, 75 FED. REG. 74152 (Nov. 30, 2010); proposed settlement agreement addressing refineries, 75 FED. REG. 82390 (Dec. 30, 2010); proposed settlement agreement, addressing greenhouse gas emissions standards for certain electric generating facilities, 75 FED. REG. 82392 (Dec. 30, 2010).

another, and a federal court in another state sets yet a third. Such a scenario ultimately leads one to question "[w]hich standard is the hapless source to follow?" *Id.* (citing *Ouellette*, 479 U.S. at 496 n.17).

If Respondents are unhappy with how and at what pace EPA regulates emissions of greenhouse gases under the CAA, they may seek to pursue avenues of judicial review pursuant to federal statutory law. *Massachusetts*, 549 U.S. at 516-20. As Judge Wilkinson observed, using the tort of public nuisance to enjoin air pollution would encourage the "use of vague public nuisance standards to scuttle the nation's carefully created system for accommodating the need for energy production and the need for clean air. The result would be a balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike." *TVA*, 615 F.3d at 296.

As an institution, "Congress is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon ['complex and dynamic' issues]." *Turner Broadcasting Sys., Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 665-66 (1994); *see also City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 440 (2002) (acknowledging legislative bodies are "in a better position than the judiciary to gather and evaluate data"). Unlike courts, the political branches can consider all pertinent issues in their entirety through either hearings or required notice and comment procedures. *See, e.g.*, 42 U.S.C. § 7607(d). As a result, political policy choices

can strike fairer and more effective balances among competing interests because they can be based on broader perspectives and ample information rather than being limited to issues raised only by litigants. *See Helvering v. Davis*, 301 U.S. 619, 642-44 (1937) (noting that instead of just improvising a judgment when confronted with a national problem, Congress holds hearings to gather "a great mass of evidence" considering the problem from many perspectives and ultimately "supporting the policy which finds expression in the act"). *See also* Timothy D. Lytton, *Lawsuit Against the Gun Industry: A Comparative Institutional Analysis*, 12 CONN. L. REV. 1247, 1271 (2000). Moreover, in contrast to courts, which lose jurisdiction upon rendition of final judgment, political branches have continuing authority to revisit statutes and rules to modify or tailor their provisions. *See Bartnicki v. Vopper*, 532 U.S. 514, 541 (2001).

Political branches are also better equipped to deal with broad issues because they, unlike trial and appellate courts, represent a quorum of the people. While the process of enacting a statute is "perhaps not always perfect, [it] includes deliberation and an opportunity for compromise and amendment and usually committee studies and hearings." *Carver v. Nixon*, 72 F.3d 633, 645 (8th Cir. 1995). Before any law is enacted, it must garner the support of a majority of the people through their elected representatives. Once enacted, the legislation is subject to executive veto and must judicially pass any constitutional or interpretational challenges. These "checks

and balances" ensure the efficacy of our democracy. When courts bypass these political safeguards to implement their own common law solutions, the judiciary – the least political branch of government – declares policy unilaterally and the "will of the people" is expressed not through their elected representatives, but through a plebiscite of jurors. *See* Hans A. Linde, *Courts and Torts: "Public Policy" Without Public Politics?*, 28 VAL. U. L. REV. 821, 852 (1994) (explaining that the court must "identify a public source of policy outside the court itself, if the decision is to be judicial rather than legislative. A court may determine some facts as well [as] or better than legislators, but it cannot derive public policy from a recital of facts").

Courts and juries play an enormously important role in our system of government, but they are not a substitute for decision-making by democratically-elected representatives. As the Fourth Circuit recently observed: "[W]e doubt seriously that Congress thought that a judge holding a twelve-day bench trial could evaluate more than a mere fraction of the information that regulatory bodies can consider. 'Courts are expert at statutory construction, while agencies are expert at statutory implementation.'" *TVA*, 615 F.3d at 305 (quoting *Negusie v. Holder*, 555 U.S. ___, 129 S.Ct. 1159, 1171 (2009)). For these reasons, it is crucial that in this highly technical arena, courts respect the strengths of the rulemaking processes on which Congress placed its imprimatur. Unlike *ad hoc* lawsuits, regulations and permits provide an opportunity

for predictable standards that are scientifically grounded. *Id.* at 305-06.

Finally, air emissions from all of the facilities at issue in this case are already permitted and extensively regulated by both federal and state governments. The applicable statutes and regulations addressing air pollution represent decades of thought, work and compromises by legislative bodies and agencies and a vast array of special interests seeking to influence the choices being made. "To say this regulatory and permitting regime is comprehensive would be an understatement. To say it embodies carefully wrought compromises states the obvious." *Id.* at 298.[10]

In the global public nuisance context, these considerations call for judicial deference – not "common law" policy making. They expose "the limits within

---

[10] The *TVA* decision also recognized yet another reason why the decision below should be reversed, namely, that the "legislative authorization" defense bars a public nuisance suit when the defendants' air emissions have been authorized by both the current regulations as well as permits. *See TVA*, 615 F.3d at 309 ("[T]here can be no abatable nuisance for doing in a proper manner what is authorized by law"). As regulated facilities operating under existing permits, Petitioners' operations "while properly conducted and regulated, cannot be deemed to be a public nuisance." *Richard v. Washington Terminal Co.*, 233 U.S. 546, 551 (1914); *Miller v. Mayor of New York*, 109 U.S. 385, 394 (1883) (similar); *Transportation Co. v. Chicago*, 99 U.S. 635, 640 (1879) (similar); *see also* RESTATEMENT (SECOND) OF TORTS § 821A, cmt. f ("Although it would be a nuisance at common law, conduct that is fully authorized by statute, ordinance or administrative regulation does not subject the actor to tort liability").

which courts, lacking the tools of regulation and inspection, of taxation and subsidies, and of direct social services, can tackle large-scale problems . . . " Linde, 28 VAL. U. L. REV. at 853. *See generally*, Joseph Forderer, *State Sponsored Global Warming Litigation: Federalism Properly Utilized or Abused?*, 18 MO. ENVTL. L. & POLICY REV. 23, 49-51 (2011); Dana, (Nw. Univ. Sch. of Law Pub. Law & Legal Theory Series, Paper No. 08-16, Law & Econ., Paper No. 08-05, 2008) at 3.

Given the global scope of this controversy,[11] the depth of the inquiries needed to develop fair standards for its resolution, the comparative resources available to the judiciary and the political branches, and the extreme difficulty, if not impossibility, of fair adjudication – the primacy of political solutions is apparent. Indeed, as Professor Tribe recently wrote, "[W]hatever one's position in the . . . debate over the extent or . . . reality of anthropogenic climate change, one thing is clear: legislators, armed with the best economic and scientific analysis, and with the capability of binding or at least strongly incentivizing, all involved parties, are the only ones constitutionally entitled to fight that battle." *See* Tribe, WASH. LEGAL FOUND. CRITICAL ISSUES SERIES (Jan. 2010) at 23.

---

[11] *See* Kevin A. Baumert, *et al.*, *Navigating the Numbers: Greenhouse Gas Data and International Climate Policy*, WORLD RESOURCES INSTITUTE (2005) at 12 (listing greenhouse gas emissions by country) *available at* http://pdf.wri.org/navigating_numbers.pdf.

E. Lack of Action by the Political Branches Does Not Empower Common Law Creativity

Contrary to the Second Circuit's conclusions, legislative and regulatory silence are not dispositive of whether courts are competent and authorized to decide climate change controversies pursuant to public nuisance law. Indeed, there has been "a longstanding resistance, as a matter of law, to the idea that legislative inaction or silence, filtered through a judicial stethoscope, can be made to sound out changes in the law's lyrics – altering the prevailing patterns of rights, powers, or privileges that collectively constitute the message of our laws." Laurence H. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515, 516, 522 (1982) (quoting THOMAS REED POWELL, *The Still Small Voice of the Commerce Clause*, in 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW 931, 932 (Ass'n of American Law Schools, 1938)). Moreover, this Court has condemned reliance on congressional silence as "a poor beacon to follow." *Zuber v. Allen*, 396 U.S. 168, 185 (1969). *See also Cleveland v. United States*, 329 U.S. 14, 22 (1946) (noting that "[t]here [are] vast differences between legislating by doing nothing and legislating by positive enactment"). More pointed – and remarkably similar to the concerns of Dean Prosser and Professor Henderson – is Justice Frankfurter's warning that "*we walk on quicksand* when we try to find in the absence of . . .

legislation a controlling legal principle." *Helvering v. Hallock*, 309 U.S. 106, 121 (1940) (emphasis added).

The absence of action by the political branches does not empower common law adventures. This is especially true in public nuisance cases based upon global climate change, where there are no "controlling legal principles" to frame the controversy, fully investigate the issues, adjudicate liability or allocate responsibility. In such cases, courts must consider the question whether they have the resources to investigate and devise a proper remedy, and whether they are capable of creating definitive standards and rules to resolve the controversies fairly. These questions – which for the reasons discussed above, must be answered in the negative – goes to the very heart of the political question doctrine. *See Vieth*, 541 U.S. at 277 ("Sometimes, however, the law is that the judicial department has no business entertaining the claim of unlawfulness – because the question is entrusted to one of the political branches *or involves no judicially enforceable rights*") (emphasis added)). Unless this inquiry is answered correctly, the judiciary, the parties, and the public interest will be sacrificed to the shifting sands of "standardless" liability.

* * *

If, as Justice Holmes counsels, the development of the common law should be "molar and molecular,"[12]

---

[12] *See Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J.) ("I recognize without hesitation that judges

(Continued on following page)

the transmutation of "public nuisance" concepts to address global climate change requires more rumination and digestion than the judiciary can prudently provide. Advocates who tout public nuisance litigation as a panacea should pay careful attention to the "rumination" analogy. Despite the tort's ravenous reputation as a potential "monster" capable of devouring time-honored legal precedents in a single gulp,[13] that appetite has in the past properly been constrained by the common law's tendencies to move in a "molar and molecular" fashion – to chew thoroughly – and then to swallow, if at all, only small bits at a time.

Faced with a planetary controversy, this Court should consider whether the judiciary has the resources and tools to investigate, evaluate, and fairly resolve this action. *Amici* urge the Court to consider the unique role of the judiciary in our tripartite system of government, and to decide that the standards and rules necessary to resolve this controversy can be developed justly and reliably only outside the

---

do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions"). *See also* BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113 (1921) (stating that courts make law only within the "gaps" and "open spaces of the law").

[13] *See In re Lead Paint Litig.*, 924 A.2d 484, 505 (N.J. 2007) (holding that, if public nuisance law expanded beyond its traditional boundaries, it "would become a monster that would devour in one gulp the entire law of tort"); *see also Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993) (originating the quote above).

judiciary's limited realm. The limits of judicial competency lead to the conclusion that forbearance is the only response that is consistent with the recognized boundaries of federal jurisdiction.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

GARDERE WYNNE SEWELL LLP

RICHARD O. FAULK*
*Counsel of Record
JOHN S. GRAY
1000 Louisiana, Suite 3400
Houston, Texas 77002-5007
(713) 276-5500 (Telephone)
(713) 276-6458 (Facsimile)

Attorney for Amici Curiae American Chemistry Council, American Coatings Association, National Association of Manufacturers, Property Casualty Insurers Association of America, and Public Nuisance Fairness Coalition

February 7, 2011

AMICUS CURIAE BRIEF

FILED
FEB 7 - 2011
OFFICE OF THE CLERK

No. 10-174

IN THE

Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY INC., *et al.*,
Petitioners,

v.

CONNECTICUT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* AMERICAN FARM BUREAU FEDERATION AND NATIONAL MINING ASSOCIATION IN SUPPORT OF PETITIONERS

ELLEN STEEN
DANIELLE QUIST
AMERICAN FARM BUREAU FEDERATION
600 Maryland Avenue, S.W.
Suite 1000
Washington, D.C. 22024

KATIE SWEENEY
General Counsel
NATIONAL MINING ASSOCIATION
101 Constitution Avenue, N.W.
Suite 500 East
Washington, D.C. 20001

PETER S. GLASER
Counsel of Record
MARK E. NAGLE
TROUTMAN SANDERS LLP
401 9th Street, N.W.
Suite 1000
Washington, D.C. 20004
(202) 274-2998
peter.glaser@troutmansanders.com

DOUGLAS A. HENDERSON
TROUTMAN SANDERS LLP
600 Peachtree Street, NE
Suite 5200
Atlanta, GA 30308-2216

Counsel for the American Farm Bureau Federation and National Mining Association

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

41693 b (31)

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTERESTS OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THE COMPLAINT PRESENTS POLICY QUESTIONS THAT ARE NOT APPROPRIATE FOR JUDICIAL RESOLUTION	5
A. Overview	5
B. Policy Considerations in Determining What Level of Greenhouse Gas Emissions Is Legal	10
1. Multiplicity of Emitters Worldwide	10
2. The Benefits of Using Fossil Fuels	16
3. Who Suffers if Fossil Fuel Usage Is Penalized?	20
CONCLUSION	24

TABLE OF AUTHORITIES

CASES Page

California v. Gen. Motors Corp., No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), *appeal dismissed*, No. 07-16908 (9th Cir. June 24, 2009) 4, 9

Comer v. Murphy Oil, USA, No. 05-436, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007), *rev'd* 585 F.3d 855 (5th Cir. 2009), *reh'g granted*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010) 4, 8-9

Connecticut v. AEP, 582 F. 3d 309 (2d Cir. 2009) 7, 8

Native Vill. of Kivilina v. Exxon-Mobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal pending*, No. 09-17490 (9th Cir. Nov. 5, 2009) 4, 9

Southeastern Legal Foundation, Inc., et al. v. Environmental Protection Agency, No. 10-1083 (D.C. Cir. Apr. 15, 2010) .....

Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001) 16

LEGISLATIVE MATERIALS

154 CONG. REC. S5197 (daily ed. June 5, 2008) 6

154 CONG. REC. S5179 (daily ed. June 5, 2008) 6

155 CONG. REC. H7471 (June 26, 2009) 6

Hearings Before the Senate Committee on Energy and Natural Resources, 100th Cong., 2d Sess. (1988) 6

TABLE OF AUTHORITIES—Continued

Page

Hearings Before the Subcomm. on Clean Air and Nuclear Regulation of the Senate Comm. on Environment and Public Works, 103d Cong., 2d Sess. (April 14, 1994) 5

Hearings Before the Senate Comm. on Energy and Natural Resources, 106th Cong. (March 25, 1999) 11

Senate Report 111-121, 111th Congress, 2d Sess. (Feb. 2, 2010) 6

MISCELLANEOUS

ACCESS TO ELECTRICITY AND WATER FOR DOMESTIC USE (UNESCO 2009), *available at* http://www.unesco.org/water/wwap/wwdr/indicators/ 19

Neil A. Armstrong, *The Engineered Century*, BRIDGE, Spring 2000, *available at* http:// www.nae.edu/Publications/TheBridge/Archives/V30-1TheVertiginousMarchofTechnology/TheEngineeredCentury.aspx 18

Central Intelligence Agency, THE WORLD FACTBOOK 2009 (2009), *available at* https:// www.cia.gov/library/publications/the-world-factbook/index.html 19

Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922 (Sept. 8, 2003) 5

TABLE OF AUTHORITIES—Continued

Page

CRA International, ECONOMIC ANALYSIS OF THE LIEBERMAN-WARNER CLIMATE SECURITY ACT OF 2007 USING CRA'S NRA-NEEM MODEL (April 2008), *available at* http://www.nma.org/pdf/040808_crai_presentation.pdf 21

EIA International Energy Statistics, *available at* http://tonto.eia.doe.gov/cfapps/ipdbproject/IEDIndex3.cfm?tid=2&pid=2&aid=12 14

EIA, INTERNATIONAL ENERGY OUTLOOK (2004), *available at* http://tonto.eia.doe.gov/ftproot/forecasting/0484(2004).pdf..... 13

EIA, INTERNATIONAL ENERGY OUTLOOK (2008), *available at* http://www.eia.doe.gov/oiaf/archive/ieo08/pdf/0484(2008).pdf 13-14

EIA, INTERNATIONAL ENERGY OUTLOOK (2009), *available at* http://www.eia.doe.gov/oiaf/ieo/pdf/0484(2009).pdf..... 13, 14

EPA ANALYSIS OF THE LIEBERMAN-WARNER CLIMATE SECURITY ACT OF 2008, S. 2191 IN 110TH CONGRESS (March 14, 2008), *available at* http://www.epa.gov/climatechange/downloads/s2191_EPA_Analysis.pdf..... 15, 21

International Energy Agency, WORLD ENERGY OUTLOOK (2007), *available at* http://www.iea.org/textbase/nppdf/free/2007/weo_2007.pdf..... 17

TABLE OF AUTHORITIES—Continued

Page

IPCC Fourth Assessment Report: CLIMATE CHANGE 2007: WORKING GROUP III: MITIGATION OF CLIMATE CHANGE (Cambridge University Press 2007) 12

IPCC Third Assessment Report, CLIMATE CHANGE 2001: MITIGATION (Cambridge University Press 2001), *available at* http://www.ipcc.ch/publications_and_data/publications_and_data_reports.htm 11, 12

Key Judge Downplays Prospects for Successful Climate Damages Suits, Clean Air Report, Mar. 2, 2010, *available at* http://carboncontrolnews.com/2010030219610/Carbon-Control-Daily-News/News/key-judge-downplays-prospects-for-successful-climate-damages-suits/menu-id-202.html 9-10

Management Information Services, Inc., POTENTIAL IMPACT OF THE EPA ENDANGERMENT FINDING ON LOW INCOME GROUPS AND MINORITIES (March 2010), *available at* http://www.affordablepoweralliance.org/Home.aspx 22

North Korea Is Dark, graphic, *available at* http://www.globalsecurity.org/military/world/dprk/dprk-dark.htm 19

Article, N.Y. TIMES, Sept. 6, 1936, p. E7 18

Proposed Consent Decree, Clean Air Act Citizen Suit, 68 Fed. Reg. 52,922 (Sept. 8, 2003) 11

TABLE OF AUTHORITIES—Continued

Page

Sam H. Schurr, *Electricity in the American Economy, Agent of Technological Progress*, Greenwood Press (1990) 18

Daniel Schwekendieka and Sunyoung Pak, *Recent growth of children in the two Koreas: A meta-analysis*, 7 ECON. & HUMAN BIOLOGY 109 (2009) 19

World Bank Data, *available at* http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/SOUTHASIAEXT/INDIAEXTN/0,,menuPK:295589~pagePK:141159~piPK:141110~theSitePK:295584,00.html 17

World Bank Indicators, *available at* http://data.worldbank.org/country/united-states 17

IN THE

Supreme Court of the United States

No. 10-174

AMERICAN ELECTRIC POWER COMPANY INC., *et al.*,
Petitioners,

v.

CONNECTICUT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* AMERICAN FARM BUREAU FEDERATION AND NATIONAL MINING ASSOCIATION IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICI CURIAE*

This *amicus* brief is filed in support of the Petitioners in this proceeding. *Amici* are representatives of farming and mining businesses.[1] Specifically, *Amici* are:

[1] All parties have consented to the filing of this brief. Their consents are on file with the Clerk of the Court. *Amici* state that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *Amici* and its counsel, contributed monetarily to the preparation and submission of this brief.

- The American Farm Bureau Federation, the largest non-profit general farm organization in the United States, representing more than 6 million member families in all fifty states and Puerto Rico;
- The National Mining Association, a non-profit, incorporated national trade association representing all major producers of coal, metals, and minerals in the United States as well as numerous ancillary mining-related businesses.

The agricultural and mining sectors are particularly vulnerable to the type of greenhouse gas ("GHG") emission limitations that Plaintiffs seek to impose in their tort lawsuit, and not just because both sectors, like almost every other sector of the American economy, produce GHG emissions. The economics of agriculture are highly sensitive to the cost of fuel (gasoline and diesel) and fertilizer, both of which are produced in processes that release GHG emissions. Imposition of GHG limitations will therefore make fuel and fertilizer more expensive, threatening the viability of many family-owned farms. Mining economics are similarly highly sensitive to electricity costs, and electricity in the United States is primarily produced through the combustion of fossil fuels which inherently produces GHG emissions. Moreover, because coal usage will be especially targeted by the wave of climate change lawsuits that the Panel decision at issue here will unleash—for instance, each of the electric generation stations as to which Plaintiffs in the instant suit seek an injunction are fueled with coal—coal mining may decline significantly if electric generation becomes subject to judicially imposed GHG emissions limits.

SUMMARY OF ARGUMENT

Contrary to the Second Circuit's holding, the Complaint raises fundamental issues of American energy, economic, environmental, and international policy. By every measure, climate change is a non-justiciable "political question" that should be resolved by the People's elected representatives, not the Judiciary. The policy issues are inescapable. Plaintiffs' lawsuit asks a United States District Court judge to order Defendants, who are all major providers of electricity to the public, to reduce their GHG emissions to a level that the Court determines to be "reasonable." Lowering Defendants' GHG emission levels will require them to increase their rates to electric consumers, and those rate increases will in turn have both economic and health and welfare effects on society, as consumers, particularly lower-income consumers, will have less money to spend on food, healthcare and the other necessities of life. Balancing the benefits to the public from reducing Defendants' GHGs with the detriments to the public of higher electricity costs is a quintessentially legislative function that the Judiciary is not empowered to resolve.

Although the Court below insisted its decision only concerns the appropriate emission levels of the five specific Defendants, the decision has a far wider reach. GHGs are the inevitable byproduct of combusting fossil fuel to produce energy. Under the Court's approach, virtually anyone in the United States, no matter where they are located, could bring an action in any federal district court in the Second Circuit against virtually any company in the United States that uses fossil fuel for energy, no matter where that company is located, and seek judicially-

imposed limits on that company's emissions of GHGs and therefore its use of fossil fuel. Such an outcome is not fanciful speculation. The lawsuit here has already been followed by three other lawsuits in different Circuits, including one (the *Comer* case) brought against virtually every major fossil fuel producing and using company in America. *See Comer v. Murphy Oil, USA*, No. 05-436, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007), *rev'd* 585 F.3d 855 (5th Cir. 2009), *reh'g granted*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010); *California v. Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), *appeal dismissed*, No. 07-16908 (9th Cir. June 24, 2009); *Native Vill. of Kivilina v. Exxon-Mobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), appeal pending, No. 09-17490 (9th Cir. Nov. 5, 2009). Under the Second Circuit decision below, similar additional cases could find a home in district courts in the Second Circuit. Since eighty-five percent of American energy is produced from fossil fuels, the Second Circuit would become the arbiter of how America uses energy, weighing on a lawsuit-by-lawsuit basis the benefits and detriments to society of using fossil fuel and emitting GHGs as compared with more costly substitutes. The role of energy czar is not for the Judiciary.

The briefs of the Defendants and other *Amici* provide an exhaustive discussion of the political question doctrine. *Amici*'s brief will not duplicate that discussion but will instead provide a more thorough discussion of the type of broad policy factors that a court would need to consider in determining, as Plaintiffs seek in their Complaint here, a "reasonable" level of GHG emissions, and therefore fossil fuel usage, in any particular GHG tort action.

ARGUMENT

I. THE COMPLAINT PRESENTS POLICY QUESTIONS THAT ARE NOT APPROPRIATE FOR JUDICIAL RESOLUTION

A. Overview

The claim that human emissions of GHGs are changing the global climate has unquestionably become the most important issue at the intersection of American energy and environmental policy in decades and perhaps ever. No other issue engenders such extreme predictions of catastrophic global environmental damage as are made by those who advocate the necessity of limiting GHG emissions. At the same time, because significant cuts in GHG emissions would require substantial reductions in the use of fossil fuels such as oil, coal and natural gas even as the economy continues to grow, no other issue creates economic and social challenges of such magnitude. For instance, EPA has observed both that (1) climate change is "perhaps the biggest environmental threat to the planet," *Hearings Before the Subcomm. On Clean Air and Nuclear Regulation of the Senate Comm. On Environment and Public Works*, 103d Cong., 2d Sess. (April 14, 1994) (testimony of Robert Sussman, EPA Deputy Administrator), and (2) "[i]t is hard to imagine any issue in the environmental area having greater 'economic and political significance' than regulation of activities that might lead to global climate change," *Control of Emissions from New Highway Vehicles and Engines*, 68 Fed. Reg. 52,922, 52,928 (Sept. 8, 2003).

The possibility that human emissions of GHGs may change the climate for the worse has been an issue of public prominence since at least 1988, with widely

reported Congressional testimony by NASA scientist James Hansen in 1988 as to a potentially runaway greenhouse effect, *see Hearings Before the Senate Committee on Energy and Natural Resources*, 100th Cong., 2d Sess. 39 (1988), and the formation of the International Panel on Climate Change ("IPCC") that year. Since then, various congressional committees have held hundreds of public hearings on the matter, climate change legislation has been introduced in every Congress, and climate change policy has become a staple of public debate, including in at least the last four presidential campaigns. Last year, for the first time, a GHG cap-and-trade bill passed the House of Representatives. 155 CONG. REC. H 7471 (June 26, 2009) (Waxman-Markey American Clean Energy and Security Act of 2009 (H.R. 2454)). Similar legislation was passed out of the Senate Environment and Public Works Committee on February 2, 2010, Senate Report 111-121, 111th Congress, 2d Sess. (Feb. 2, 2010) (reporting S. 1733, the Kerry-Boxer Clean Energy Jobs and American Power Act), but no cap-and-trade bill has been brought to the floor this year.

The failure to enact cap-and-trade legislation so far is a direct consequence of the enormity and complexity of the issues at stake, as is reflected in the 2008 Senate floor debate on the Lieberman-Warner cap-and-trade bill. On the one hand, "strong and swift action to reduce greenhouse gas emissions is needed to prevent catastrophic effects of climate change." 154 Cong. Rec. S5197 (daily ed. June 5, 2008) (statement of Sen. Boxer). On the other hand, "[t]his is a massive tax increase on the American people" and "the killer for jobs in America." 154 Cong. Rec. S5179 (daily ed. June 5, 2008) (statement of Sen. Inhofe).

The Court of Appeals decision below injects the Judicial Branch into this long-running climate change policy fray. Indeed, the Court's decision threatens to make the Judiciary the arbiter of how the country should use energy and at what cost. The Defendants here do not emit GHGs in a vacuum—they do so because they combust fossil fuel in order to produce electricity, as they are required by law to do in response to every consumer demand, and because that process—oxidizing carbon to produce energy—releases carbon dioxide. Plaintiffs' request for a permanent injunction requiring Defendants to lower their GHG emissions would therefore require the district court to order Defendants to use less fossil fuel in favor of more expensive substitutes or prohibitively expensive improvements in efficiency, assuming such improvements were technologically feasible. Such an order in turn would lead to higher rates to electric consumers, creating both detrimental economic and detrimental health and welfare consequences as consumers, particularly lower-income ones, would have less money to spend on the necessities of life. In resolving the issue of what level of GHG emissions is appropriate given the cost of reducing emissions, the Court would have no choice but to weigh and balance exactly the same type of economic and environmental policy considerations that have made determination of national GHG policy by the People's elected representatives so difficult.

For the Panel, the case merely involves a single nuisance action against specific defendants that does not require resolution of questions that are fundamentally political in nature, *Connecticut v. AEP*, 582 F. 3d 309, 325 (2d Cir. 2009). But that reasoning is artificially narrow. It is true that the specific relief sought in the Complaint is a limitation on the GHG

emissions of five electric utilities. But a court cannot determine whether the Defendants' energy choices here, and accordingly their GHG emissions, constitute a nuisance without determining whether those energy choices and GHG emissions levels are "reasonable."[2] And what is a reasonable level of fossil fuel usage—as compared to more expensive substitutes—is a fundamentally political question requiring the weighing of the public policy interest in addressing concerns about climate change with the public policy interest in protecting electric consumers against rate increases.

More fundamentally, the Panel's view that all that is at stake here is "a decision by a single federal court," *id.* at 325, entirely misses the broad precedential effect that its decision will have. The Panel's decision allows anyone claiming damage from possible climate change, no matter where that Plaintiff is located, to sue any GHG emitter, no matter where that emitter is located and to seek an injunction limiting emissions and even damages. Given the succeeding similar lawsuits already filed against an even larger group of defendants, the prospect of such lawsuits is hardly speculative.[3] Indeed, it is hard to

---

[2] The Panel states that "Federal courts have applied well-settled tort rules to a variety of new and complex problems," 582 F.3d at 328, and notes that, "as a general matter, the Supreme Court and this Court have often turned to the Restatement (Second) of Torts for assistance in developing standards in a variety of tort cases," *id.* at 327. As the Panel noted, the Restatement specifically requires the court in a nuisance claim to address the "reasonableness" of the conduct in question. *Id.* at 369.

[3] *See Comer v. Murphy Oil, USA*, No. 05-436, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007), *rev'd* 585 F.3d 855 (5th Cir. 2009), *reh'g granted*, 598 F.3d 208 (5th Cir. 2010), *appeal*

discern an intelligible principle in the Second Circuit decision as to which among the multitude of GHG-emitting companies in the United States could not be sued.

If the Panel decision stands, District Courts will become the locus of a multitude of climate change tort lawsuits. Each lawsuit will put at issue the proper amount of fossil fuel usage by the particular defendant or defendants, and whether they should use more expensive substitutes, and if they do what the impact will be on their businesses, their customers and society at large. The courts, not the elected branches of government, would decide how we use and generate energy in this country.

This is a daunting prospect. The U.S. economy runs on fossil fuels, and fossil fuel usage therefore cannot be significantly reduced without producing fundamental economic consequences. Judges, however, are neither empowered nor equipped to determine on a lawsuit-by-lawsuit basis the extent to which economic output should be reduced in order to accommodate reductions in fossil fuel usage. Indeed, the author of the Panel opinion conceded the political nature of the Panel's decision when he told a conference following the decision that Plaintiffs' "nuisance action by nuisance action" approach to forcing industry to reduce emissions reductions may "help in a political sense" by creating an "impetus" for legislative or regulatory action. *Key Judge Down-*

---

dismissed, 607 F.3d 1049 (5th Cir. 2010); *California v. Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), *appeal dismissed*, No. 07-16908 (9th Cir. June 24, 2009); *Native Vill. of Kivilina v. Exxon-Mobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), appeal pending, No. 09-17490 (9th Cir. Nov. 5, 2009).

plays Prospects for Successful Climate Damages Suits, Clean Air Report, Mar. 2, 2010, http://carboncontrolnews.com/20100302l9610/Carbon-Control-Daily-News/News/key-judge-downplays-prospects-for-successful-climate-damages-suits/menu-id-202.html.

And to illustrate this point in more detail, *Amici* discuss below the important public policy issues that courts would have to confront if the Court of Appeals decision below stands and the Judiciary must determine "reasonable" levels of GHG emissions and therefore fossil fuel usage.

B. Policy Considerations in Determining What Level of Greenhouse Gas Emissions Is Legal

1. Multiplicity of Emitters Worldwide

In adjudicating the reasonableness of a particular defendant's GHG emissions in a climate change tort lawsuit, the court will be forced to examine those emissions in their global context. Because GHGs mix in the global atmosphere, a ton of GHGs emitted in, for instance, New York has the same effect on overall global atmospheric concentrations of GHGs—and therefore the climate effects of which Plaintiffs complain—as a ton emitted in China or India. Moreover, because fossil fuels are so fundamental to all societies, GHGs are emitted by an almost incomprehensively vast number of sources across the entire economic spectrum globally. As discussed in more detail below, the rest of the world emits far more GHGs than the United States, and that disparity is growing as developing nations continue to grow their economies. In this context, the court in any global warming tort lawsuit, in determining a "reasonable" level of GHG emissions, would have to consider that

any remedy it could impose on any defendant or group of defendants—and even on all major GHG-emitting facilities in the United States—would not meaningfully affect global atmospheric GHG concentrations and therefore would not meaningfully affect the global warming injury the plaintiff asserts.

As the IPCC, a source on which Plaintiffs rely in their Complaint, has noted, "[e]missions of GHGs are associated with an extraordinary array of human activities." IPCC Third Assessment Report, CLIMATE CHANGE 2001: MITIGATION 608 (Cambridge University Press 2001) ("IPCC 2001"), *available at* http://www.ipcc.ch/publications_and_data/publications_and_ data_reports.htm. The United States Energy Information Administration ("EIA") reached the same conclusion: "there are a vast number of entities that emit carbon—homes, factories, vehicles, commercial facilities, and agricultural resources...." *Hearings Before the Senate Comm. on Energy and Natural Resources*, 106th Cong. (March 25, 1999) (testimony of Jay Hakes, EIA Administrator). According to EPA, "[v]irtually every sector of the U.S. economy is either directly or indirectly a source of GHG emissions." Proposed Consent Decree, Clean Air Act Citizen Suit, 68 Fed. Reg. 52,922, 52,928 (Sept. 8, 2003).

Because the use of fossil fuels is so fundamental to the U.S. and global economies, the IPCC has concluded that "[t]he global nature of the problem . . . implies that the full breadth of human social structures is encompassed." IPCC 2001 at 607. The IPCC noted:

> A combination of several features lends the climate problem its uniqueness. They include public good issues raising from the concentration of GHGs in the atmosphere that requires collec-

> tive global action, the multiplicity of decision makers ranging from global down to the micro level of firms and individuals, and the heterogeneity of emissions and their consequences around the world. Moreover, the long-term nature of climate change originates from the fact that it is the concentration of GHGs that matters rather than their annual emissions and this feature raises the thorny issues of intergenerational transfers of wealth and environmental goods and bads. Next, human activities associated with climate change are widespread, which makes narrowly defined technological solutions impossible, and the interactions of climate policy with other broad socioeconomic policies are strong. Finally large uncertainties or in some areas even ignorance characterize many aspects of the problem and require a risk management approach to be adopted in all [decisionmaking frameworks] that deal with climate change.

Id. at 66. Given the complexity of the issue, the latest IPCC report recommends that all of the many sectors that produce GHGs must be addressed as part of a coordinated approach. According to the IPCC, "[n]o one sector or technology can address the entire mitigation challenge. This suggests that a diversified portfolio is required based on a variety of criteria. All the main sectors contribute to the total." IPCC Fourth Assessment Report: CLIMATE CHANGE 2007: WORKING GROUP III: MITIGATION OF CLIMATE CHANGE 621 (Cambridge University Press 2007). This includes energy supply, transport and its infrastructure, residential and commercial buildings, industry, agriculture, forestry and waste management. *Id.*, Chs. 4-10.

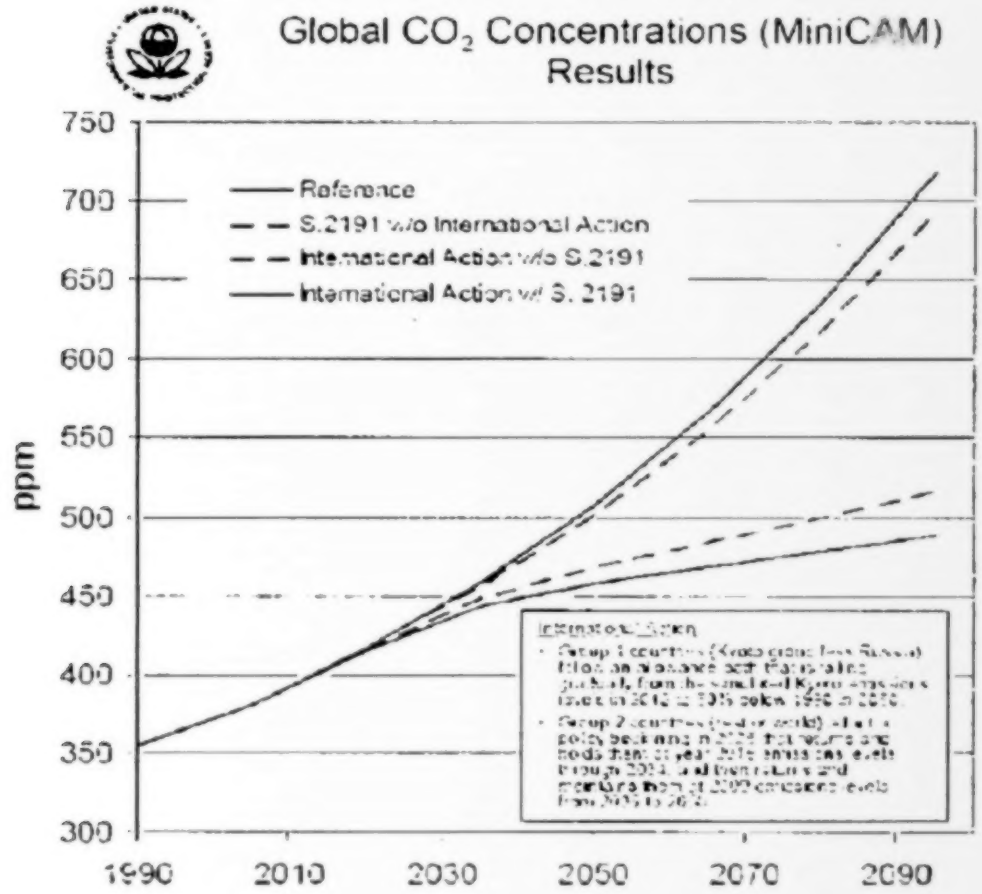
Not only are there many and diverse GHG emitters worldwide, emissions from foreign sources are increasing much more rapidly than domestic emissions, and that trend will accelerate in the future regardless of any action the United States may take. EIA, INTERNATIONAL ENERGY OUTLOOK 131 (2009), *available at* http://www.eia.doe.gov/oiaf/ieo/pdf/0484(2009).pdf. Recent data shows that the emissions from China alone, which is building a coal-fired electric generating station every week, have surpassed those of the United States, and China's energy usage continues to rise at an ever increasing pace. *Id.* Indeed, although the International Energy Agency ("IEA") in 2004 forecast that China's emissions would still be less than U.S. emissions even in 2025, in fact, China's emissions exceeded those of the U.S. by 2006. *See* EIA, INTERNATIONAL ENERGY OUTLOOK 172 (2004), *available at* http://tonto.eia.doe.gov/ftproot/forecasting/0484(2004).pdf and EIA, INTERNATIONAL ENERGY OUTLOOK 131 (2009), *available at* http://www.eia.doe.gov/oiaf/ieo/pdf/0484(2009).pdf. China's carbon dioxide emissions are forecast by the EIA to be about 12 billion metric tons by 2030 as compared with U.S. emissions of 6.8 billion metric tons. EIA, INTERNATIONAL ENERGY OUTLOOK 196 (2009), *available at* http://www.eia.doe.gov/oiaf/ieo/pdf/0484(2009).pdf.

The trend toward greater international GHG emissions is likely to continue. Given global development, energy decisions made in the United States are increasingly less important to the world's GHG emissions profile. As the current century proceeds, generation of electricity is poised for staggering growth. The EIA predicts a 75% increase in the next two decades alone. EIA, INTERNATIONAL ENERGY OUTLOOK 507 (2008), *available at* http://www.eia.

doe.gov/oiaf/archive/ieo08/pdf/0484(2008).pdf. The locus of that incremental growth reflects a major shift in the global situation. From 1980-2000, almost one-fourth of the global increase in electric generation came from the United States. EIA International Energy Statistics, *available at* http://tonto.eia.doe.gov/cfapps/ipdbproject/IEDIndex3.cfm?tid=2&pid=2&aid=12. Over the next 20 years, the U.S. will be a relatively minor player in an ever larger drama. According to the EIA, between 2006 and 2030, electricity generation in the U.S. will increase by 1,090 billion kWh, whereas electricity generation will increase by 12,710 billion kWh in the rest of the world. EIA, INTERNATIONAL ENERGY OUTLOOK 196 (2009), *available at* http://www.eia.doe.gov/oiaf/ieo/pdf/0484(2009).pdf.

It is no surprise that unilateral action by the United States, as in the tort lawsuit that the Plaintiffs have brought here, and that others will bring if the Panel decision stands, will not meaningfully affect atmospheric GHG concentrations. For instance, the United States Environmental Protection Agency produced an analysis last year of the effect on global GHG concentrations over a 100-year period if S. 2191, the Lieberman-Warner climate change legislation that was reported by the Senate Committee on Environment and Public Works in 2008, were enacted into law. The Lieberman-Warner bill did what Plaintiffs want the courts to do here—it set an amount of GHG emissions that fossil fuel industries could legally produce (in the bill this was called a "cap"). The analysis is reproduced below and shows that, without legally binding international action, U.S. efforts at reducing GHG emissions will

have almost no impact on overall GHG concentrations and the injury which Plaintiffs assert.[4]



[4] *See* EPA ANALYSIS OF THE LIEBERMAN-WARNER CLIMATE SECURITY ACT OF 2008, S. 2191 IN 110TH CONGRESS (March 14, 2008) at 192, *available at* http://www.epa.gov/climatechange/downloads/s2191_EPA_Analysis.pdf. The solid top line in the graph assumes the legislation is not enacted; the dotted top line assumes that the legislation is enacted. Both top lines assume the rest of the world does not take action to significantly reduce its GHG emissions as compared with efforts they are already undertaking. As can be seen, at the end of the 100-year period 1990-2010, the bill would result in only a six-year delay of the GHG levels predicted without the bill. The bottom two show that the rest of the world must reduce GHG emissions if overall atmospheric concentrations are to be meaningfully reduced.

In sum, given that GHGs are emitted by a very large and diverse number of sources globally, arriving at a "reasonable" amount of GHG emissions for the American fossil fuel industry involves highly difficult policy decisions. Given the difficult policy choices that such a decision entails, it is not surprising that the Lieberman-Warner bill consumed 252 pages of legislative text. But these policy choices belong with Congress, not a court.

2. The Benefits of Using Fossil Fuels

Another factor a court would need to consider in any particular climate change tort lawsuit is the benefits society derives from fossil fuels, benefits that will be jeopardized if the defendants do not engage in their allegedly unreasonable conduct of using fossil fuels to produce energy. Indeed, because the use of fossil fuels and the attendant GHG emissions are so closely tied with all facets of modern life, a finding that using fossil fuels and emitting GHGs constitute a nuisance is akin to saying that modern life constitutes a nuisance. That may be true in some sense, but the necessary rejoinder is: compared to what? Certainly not as compared with pre-industrial society with pre-industrial levels of atmospheric GHG concentrations. As Justice Breyer stated in his concurring opinion in *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 496 (2001) in the context of air pollution regulations designed to protect the public health, "[p]reindustrial society was not a very healthy society; hence a standard demanding the return of the Stone Age would not prove 'requisite to protect the public health.'"

Although energy production results in GHG emissions, it also yields significant benefits for the health and welfare of all Americans. The benefits to

the United States in fossil fuels usage can be seen by comparing energy usage in the developed world with energy usage in the developing world. The disparity and its consequences are striking. The average consumer in the United States, for example, uses 13,652 kWh of power each year. The average Indian uses just 542 kWh. In the United States, virtually no household lacks access to electricity. World Bank Indicators, *available at* http://data.worldbank.org/country/united-states (2007 data). In India, more than 400 million people have no electricity, 600 million cook with wood or dung and more than 900 million have no refrigeration. IEA, WORLD ENERGY OUTLOOK 482 (2007), *available at* http://www.iea.org/textbase/nppdf/free/2007/weo_2007.pdf.

The human and economic consequences of these differences in access to electricity are stark indeed. In the United States, the per capita Gross National Income is $46,400. In India, it is $950. In the United States, a new baby can expect to live 78 years, in India only 63. In the United States, there is virtually no serious child malnourishment. In India, about half the children are malnourished and tens of millions are classified as "stunted." World Bank Data, *available at* http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/SOUTHASIAEXT/INDIAEXTN/0,,menuPK:295589~pagePK:141159~piPK:141110~theSitePK:295584,00.html.

Energy usage, and in particular electricity usage, is the *sine qua non* of modern society. The National Academy of Engineering has identified societal electrification as the "most significant engineering achievement" of the twentieth century—a century that saw population growth of more than four billion people, the rise of the metropolis, dramatic improve-

ments in diet and health, and the emergence of a vast system of electronic communication. *See* Neil A. Armstrong, *The Engineered Century*, BRIDGE, Spring 2000, at 18, *available at* http://www.nae.edu/Publications/TheBridge/Archives/V30-1TheVertiginousMarchofTechnology/TheEngineeredCentury.aspx. In 1930, *The New York Times* stated, "Nothing in modern life so raises the standard of living of high and low income groups as the use of electricity." N.Y. TIMES, Sept. 6, 1936, p. E7.

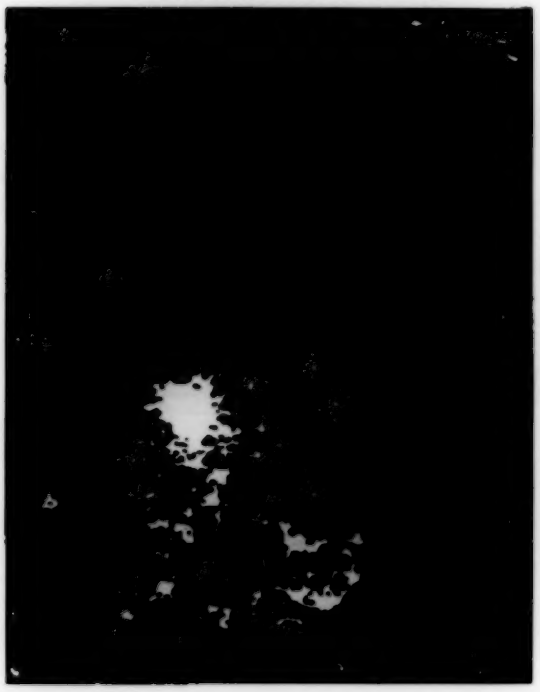
Energy is a key factor in economic development, transforming agrarian societies to modern industrial ones. This societal transformation driven by the accumulation of income and wealth eliminates many contagious diseases, reduces child mortality, and lengthens adult life expectancy. This virtuous cycle has been demonstrated over the past two centuries in dozens of countries around the world. The emergence from poverty begins as countries develop transportation networks using petroleum and electricity networks, often based upon coal. These systems are capable of achieving massive economies of scale that provide large amounts of energy at low cost. These abundant and reliable supplies of energy spur technological change, productivity growth and living standards. Sam H. Schurr, *Electricity in the American Economy, Agent of Technological Progress*, Greenwood Press, 1990.

It is no coincidence then that the world energy complex is built upon fossil fuels. Consumers prefer low-cost, reliable power, and producers who provide these services prosper. The fact that the U.S. economy currently derives 85 percent of its total energy from coal, oil and natural gas is a testament to the competitive advantage of fossil fuels. These

fuels have empowered modern industrial societies to raise living standards for billions of people.

The benefits of energy usage can be demonstrated graphically in the following satellite picture of the Korean peninsula at night. One part of the peninsula is a modern country and the other part is one of the most backward countries in the world: the difference is access to electricity and the energy from which the electricity is produced.[5]

Electricity Makes
the Difference: Korea



South Korean preschool children average 3 inches taller and 7 pounds heavier than North Korean Children

The Infant Mortality Rate in North Korea is 12 times higher than South Korea

South Korea ranks 49st in GDP/capita. North Korea Ranks 188th

Only 20% of North Koreans have access to electric power. South Korean access approaches 100%

---

[5] *See* http://www.globalsecurity.org/military/world/dprk/dprk-dark.htm. The statistics in the above graphic are taken from Daniel Schwekendieka and Sunyoung Pak, *Recent growth of children in the two Koreas: A meta-analysis*, 7 ECON. & HUMAN BIOLOGY 109 (2009); Central Intelligence Agency, THE WORLD FACTBOOK 2009 (2009), *available at* https://www.cia.gov/library/publications/the-world-factbook/index.html and ACCESS TO ELECTRICITY AND WATER FOR DOMESTIC USE (UNESCO 2009), *available at* http://www.unesco.org/water/wwap/wwdr/indicators/.

In sum, the benefits of using fossil fuels have been demonstrated by remarkable socioeconomic progress first in the United States and the developed world and currently in China, India and the rest of the developing world. Plaintiffs' view that fossil fuel usage is nevertheless "unreasonable" thus would require the court to weigh whether the benefits of fossil fuel usage are outweighed by the asserted detriments. That determination, however, is a quintessentially legislative task.

3. Who Suffers if Fossil Fuel Usage Is Penalized?

The necessary implication of Plaintiffs' assertion that Defendants unreasonably use fossil fuels and produce GHG emissions is that Defendants should use less fossil fuels in order to reduce their GHG emissions. That is why Plaintiffs seek an injunction ordering Defendants to reduce their GHG emissions and therefore use less fossil fuel. But because significantly controlling GHG emissions would entail fundamental changes to our economy and the way we live, a variety of authorities have concluded that the cost of reducing GHG emissions would be massive. Thus, in any particular climate change tort lawsuit, the trier of fact would have to engage in a kind of cost-benefit analysis in order to determine whether the defendant's level of emissions was reasonable or whether the defendant should have emitted some other level of GHGs.

To give context to this issue, it is instructive to understand how substantial the cost burden is of reducing GHG emissions. For instance, in EPA's March 2008 analysis of the Lieberman-Warner cap-and-trade bill, annual GDP is modeled to be between

0.9 percent ($238 billion) and 3.8 percent ($983 billion) lower in 2030 and between 2.4 percent ($1,012 billion) and 6.9 percent ($2,856 billion) lower in 2050 than in the Reference Scenario. Consumption is modeled to be between 0.9 percent ($180 billion) and 1.4 percent ($233 billion) lower in 2030 and between 2.1 percent ($670 billion) and 3.3 percent ($843 billion) lower in 2050 than in the Reference Scenario. The average annual growth rate of consumption is ~0.08 percentage points lower than the reference case. In 2030 per household average annual consumption is ~$1,375 lower and gasoline prices increase ~$0.53 per gallon. In 2050 per household average annual consumption is ~$4,377 lower and gasoline prices increase ~$1.40 per gallon. *See* EPA ANALYSIS OF THE LIEBERMAN-WARNER CLIMATE SECURITY ACT OF 2008, S. 2191 IN 110TH CONGRESS (March 14, 2008), *available at* http://www.epa.gov/climatechange/downloads/s2191_EPA_Analysis.pdf. Other studies have showed even higher costs, some much higher.[6]

Plaintiffs, of course, are not proposing judicial imposition of the Lieberman-Warner bill on society. But by suing major fossil fuel-using companies on a theory that they acted unreasonably in not lowering their GHG emissions profile, they are asserting that

---

[6] *See, e.g.*, CRA International, ECONOMIC ANALYSIS OF THE LIEBERMAN-WARNER CLIMATE SECURITY ACT OF 2007 USING CRA'S NRA-NEEM MODEL (April 2008), *available at* http://www.nma.org/pdf/040808_crai_presentation.pdf. (4 million jobs will be lost in 2015 alone, and growing on a year-by-year basis to more than 7 million jobs lost in 2050; overall cost of the bill to the average household of 2.6 persons will exceed $2,300 annually in 2015, which approximates the amount households now spend annually on healthcare; large year-over-year losses in GDP accumulating to $5.3 trillion (present value 2007$).

these companies should have used more expensive substitutes. The cost of those substitutes would have been passed on to consumers, and these costs would have been substantial because it is demonstrably not possible to achieve significant GHG emission reductions without incurring significant costs.

Without question, these costs would fall disproportionately on the poor. According to a recent study, GHG regulation:

> ...will impact low income groups, the elderly, and minorities disproportionately, both because they have lower incomes to begin with, but also because they have to spend proportionately more of their incomes on energy, and rising energy costs inflict great harm on minority families. Lower-incomes families are forced to allocate larger shares of the family budget for energy expenditures, and minority families are significantly more likely to be found among the lower-income brackets.
>
> This disparity between racial groups means that rising energy costs have a disproportionately negative effect on the ability of minority families to acquire other necessities such as food, housing, childcare, or healthcare.

Management Information Services, Inc., POTENTIAL IMPACT OF THE EPA ENDANGERMENT FINDING ON LOW INCOME GROUPS AND MINORITIES (March 2010) at iv-v, *available at* http://www.affordablepoweralliance.org/Home.aspx.

Agriculture is also particularly vulnerable to attempts to restrict GHG emissions. Animal agriculture is a significant source of methane emissions. Nitrous oxide, another GHG, is also produced in

animal agriculture operations. Most farms typically have both stationary and mobile engines that are a source of CO_2, and the economics of farming are highly sensitive to the cost of fuel and fertilizer, both of which would be affected by higher energy prices. As a result, restricting GHG emissions will cause an increase in food prices to the consumer and may drive many smaller farms out of business.

In sum, the reasonableness of the Defendants' conduct here can only be determined in the context of what the costs of alternative action would have been. But, again, weighing the costs of action or inaction on GHG emissions is a legislative function, not a judicial one.

CONCLUSION

Determining "reasonable" levels of GHG emissions is a fundamentally legislative task not appropriate for the Judicial Branch. Neither a judge nor a jury should determine energy policy in the United States.

Respectfully submitted,

ELLEN STEEN
DANIELLE QUIST
AMERICAN FARM BUREAU FEDERATION
600 Maryland Avenue, S.W.
Suite 1000
Washington, D.C. 22024

KATIE SWEENEY
General Counsel
NATIONAL MINING ASSOCIATION
101 Constitution Avenue, N.W.
Suite 500 East
Washington, D.C. 20001

PETER S. GLASER
Counsel of Record
MARK E. NAGLE
TROUTMAN SANDERS LLP
401 9th Street, N.W.
Suite 1000
Washington, D.C. 20004
(202) 274-2998
peter.glaser@troutmansanders.com

DOUGLAS A. HENDERSON
TROUTMAN SANDERS LLP
600 Peachtree Street, NE
Suite 5200
Atlanta, GA 30308-2216

Counsel for the American Farm Bureau Federation and National Mining Association

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
FEB 7 - 2011
OFFICE OF THE CLERK

No. 10-174

In the Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY, INC., ET AL.,
Petitioners,

v.

STATE OF CONNECTICUT, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMERICAN PETROLEUM INSTITUTE AND NATIONAL PETROCHEMICAL AND REFINERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

CHARLES FRIED
Counsel of Record
1545 MASSACHUSETTS AVENUE
CAMBRIDGE, MA 02138
(617) 495-4636
fried@law.harvard.edu

Counsel for Amici Curiae

PETER SACRIPANTI
MCDERMOTT WILL & EMERY LLP
40 MADISON AVENUE
NEW YORK, NY 10173-1922
(212) 547-5400

JEFFREY BATES
SUSAN COOKE
MCDERMOTT WILL & EMERY LLP
28 STATE STREET
BOSTON, MA 02109
(617) 535-4000

February 7, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800 890 5001

41704 m 33

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTERESTS OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. TORT LITIGATION, AND PARTICULARLY THE PUBLIC NUISANCE DOCTRINE, ARE INAPT FOR ADDRESSING THE NATURE AND SCOPE OF CLIMATE CHANGE 4

II. LEGISLATION, INTERNATIONAL NEGOTIATIONS AND AGREEMENTS, AND PROPER REGULATION BY AGENCIES ARE THE ONLY AVAILABLE MODES FOR RATIONALLY ADDRESSING CLIMATE CHANGE 18

CONCLUSION 24

TABLE OF AUTHORITIES

CASES

California v. Gen. Motors Corp.,
No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), *appeal dismissed*, No. 07-16908 (9th Cir. June 24, 2009) 15

City of Chicago v. American Cyanamid Co.,
355 Ill. App. 3d 209, 823 N.E.2d 126 (2005) . . 10

City of Milwaukee v. Illinois,
451 U.S. 304 (1981) 3, 24

City of St. Louis v. Benjamin Moore & Co.,
226 S.W.3d 110 (Mo. 2007) 10

Comer v. Murphy Oil USA, No. 05-436, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007) (unpublished ruling), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010), *mandamus denied*, No. 10-294 (U.S. Jan. 10, 2011) 15, 17

Connecticut v. American Elec. Co.,
582 F.3d 309 (2d Cir. 2009) 22

Conner v. Aerovox, Inc.,
730 F.2d 835 (1st Cir. 1984) 22, 23, 24

Consol. Rail Corp. v. Gottshall,
512 U.S. 532 (1994) 9

County of Oneida v. Oneida Indian Nation of N.Y. State,
470 U.S. 226 (1985) 21, 22

Elk Grove Unified Sch. Dist. v. Newdow,
542 U.S. 1 (2004) 3

Georgia v. Tenn. Copper Co.,
206 U.S. 230 (1907) 15

Illinois v. Milwaukee,
406 U.S. 91 (1971) 15

International Paper Co. v. Ouellette,
479 U.S. 481 (1987) 22

In re Lead Paint Litigation,
191 N.J. 405, 924 A.2d 484 (2007) 10

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) 16

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 3

Massachusetts v. EPA,
549 U.S. 497 (2007) 5, 18, 19, 21, 22

Mattoon v. City of Pittsfield,
980 F.2d 1 (1st Cir. 1992) 23, 24

Medellin v. Texas,
552 U.S. 491 (2008) 19

Metro-North Commuter Railroad Co. v. Buckley,
521 U.S. 424 (1997) 9

Missouri v. Illinois,
180 U.S. 208 (1901) 15

Mugler v. Kansas,
123 U.S. 623 (1887) 15

Native Village of Kivalina v. ExxonMobil Corp., 663 F.Supp.2d 863 (N.D. Cal. 2009), *appeal filed*, No. 09-17490 (9th Cir. Nov. 5, 2009) 15

New Jersey v. New York,
283 U.S. 473 (1931) 15

North Carolina v. TVA,
615 F.3d 291 (4th Cir. 2010) 13, 14, 25

North Dakota v. Minnesota,
263 U.S. 365 (1923) 15

Ohio v. Wyandotte Chemicals Corp.,
401 U.S. 493 (1971) 12, 13, 14, 15

People of State of Illinois v. Illinois Outboard Marine,
680 F.2d 473 (7th Cir.1982) 24

Rhode Island v. Lead Indus. Ass'n, Inc.,
951 A.2d 428 (R.I. 2008) 10

Tex. Indus. v. Radcliff Materials, Inc.,
451 U.S. 630 (1981) 3

United States v. Standard Oil of California,
332 U.S. 301 (1947) 8, 9, 19, 21

Vieth v. Jubelirer,
541 U.S. 267 (2004) 3

STATUTES

Clean Air Act,
74 Fed. Reg. 66,496 (Dec. 15, 2009) . . . . passim,
Section 202(a) 5, 6

§ 1103(c), 101 Stat. 1409 18

REGULATIONS

EPA's "Tailoring Rule," 75 Fed. Reg. 31514 (June 3, 2010) 2, 20

OTHER AUTHORITIES

STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE (1994). 11

STEPHEN BREYER, REGULATION AND ITS REFORM (1984) 17

F.W. Brownell, *State Common Law of Public Nuisance in the Modern Administrative State,* 24 Nat. Resources & Env't 34 (Spring 2010) . 11

BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921) 26

R. Faulk, *Uncommon Law: Ruminations on Public Nuisance,* 18 Mo. Envtl. L. & Pol'y Rev. 1 (2010) 10, 16

R. Faulk and J. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation,* 2007 Mich. St. L. Rev. 941 10

Lon L. Fuller, The Forms and Limits of Adjudication, 92 HARV. L. REV. 353 (1978) 4

D. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741 (2003) . 10

D. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 Colum. J. Envtl. L. 1 (2003). 14

http://unfccc.int/meetings/cop_16/items/5571.php . 7

Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975) 21

UNFCCC, May 9, 1992, 1771 U.N.T.S 107, S. Treaty Doc. No. 102-38 ..... 6, 19

INTERESTS OF *AMICI CURIAE*

The American Petroleum Institute (API) and the National Petrochemical and Refiners Association (NPRA) are national trade associations, each of which represent more than 450 member companies. API members are dedicated to meeting environmental requirements while developing and supplying economic energy resources for consumers. API members are involved in all aspects of the oil and natural gas industry and provide the fuels that keep America running. NPRA member companies include virtually all U.S. refiners and petrochemical manufacturers. NPRA members supply consumers with a wide variety of products and services that are used daily in homes and businesses. These products include gasoline, diesel fuel, home heating oil, jet fuel, asphalt products, and the chemicals that serve as "building blocks" in making plastics, clothing, medicine, and computers. Like many industrial sectors, API and NPRA members are subject to regulation of greenhouse gas emissions.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners' greenhouse gases (GHGs) do not remain in areas near their source of emissions but are instead globally mixed with naturally-occurring GHGs

---

[1] The parties have filed blanket consents for *amicus* briefs. No counsel for a party authored this brief in whole or in part, and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amici* and their counsel, made a monetary contribution intended to fund its preparation or submission.

and the emissions of all other human activity. We will show in this brief that the decision of the Court of Appeals for the Second Circuit to apply public nuisance concepts under federal common law to GHG emissions is a misuse of tort litigation and of federal common law, and it disregards the role assigned by national legislation and international agreements ratified and implemented by the United States to agencies within the Executive Branch. We also will show that it is inappropriate, unreasonable, and unlawful for the Second Circuit to resolve such a question when the issues go far beyond the reach of any court and instead should be addressed by national and global decision makers.

The Petitioners and other *amici curiae* address issues relating to standing, political question, administrative law, and the proper scope of federal common law and the tort doctrine of public nuisance. We will discuss a common thread running through all of these issues, that is, the unsuitability of litigation-driven adjudication in the ordinary courts of law to resolve complex and interrelated policy and social issues, with which other institutions—such as EPA—having greater responsibilities, regulatory authority, and representation of the electorate are grappling.[2] Such unsuitability is magnified when addressing, or even progressing toward addressing, these issues also depends on the cooperation of other countries over whom a national court has no jurisdiction in this area, and can only be reached by diplomacy.

---

[2] *See* n. 46, *infra*, on the U.S. Environmental Protection Agency (EPA or Agency) "Tailoring Rule."

In this brief, we show that (I) tort litigation (and, particularly, tort litigation under the aegis of the public nuisance doctrine) is singularly inapt for addressing climate change; and (II) legislation, international negotiations and agreements, and reasonable and proper agency regulation are the only available modes for rationally addressing GHG emissions and climate change. These arguments provide the common thread for the fundamental cases cited by the Petitioners on Constitutional standing, *Lujan v. Defenders of Wildlife* (three factors: injury in fact and not conjectural or hypothetical; not the result of third parties not before the court; and not a speculative injury that could be redressed by a favorable decision);[3] prudential standing, *Elk Grove Unified Sch. Dist. v. Newdow* (limitations preclude courts from adjudicating generalized grievances more appropriately addressed in the representative branches);[4] federal common law, *Tex. Indus. v. Radcliff Materials, Inc.* (federal common law highly restricted);[5] displacement of federal common law, *City of Milwaukee v. Illinois* (when Congress addresses the problem previously governed by federal common law);[6] and non-justiciable political question, *Vieth v. Jubelirer* (claims that would cast judges upon a "sea of imponderables").

---

[3] 504 U.S. 555, 560–561 (1992).

[4] 542 U.S. 1, 12 (2004).

[5] 451 U.S. 630, 640–641 (1981).

[6] 451 U.S. 304, 314–315 (1981).

ARGUMENT

I. TORT LITIGATION, AND PARTICULARLY THE PUBLIC NUISANCE DOCTRINE, ARE INAPT FOR ADDRESSING THE NATURE AND SCOPE OF CLIMATE CHANGE

With regard to the forms and limits of tort litigation, as noted years ago by Lon L. Fuller, courts cannot resolve certain complex situations that he identifies as "polycentric" by their accustomed modes of adjudication, whether in tort or in other common law causes of action. Those polycentric situations with their numerous interests require a solution taking account of all of them.[7] Such numerous interests,

---

[7] Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978). In this article, Fuller introduces the concept of the polycentric task, a situation that engages numerous interests and any solution of which will affect all of them, by way of a spider's web, where "[a] pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions." This polycentric situation is "many centered," each crossing of strands constituting a distinct center for distributing tensions. *Id.* at 394–395. Although there are degrees to which a situation is polycentric, it is Fuller's central insight that the more polycentric a situation is, the less amenable it is to definitive resolution by adjudication. As the situation becomes more polycentric, it becomes more difficult and, finally, impossible to bring all the affected interests before a judge, and more difficult and, finally, impossible for the judge to render a stable judgment that—even if it were possible to take into account all interests—would retain balance for any but the shortest time. Such issues can only be reasonably addressed by other means: negotiation, legislation—usually framework

which can be satisfactorily addressed only by a variety of non-common law approaches, are clearly presented here. Some, but not all, of those interests were listed by EPA's Administrator in her final endangerment finding (Endangerment Finding) following the Court's decision in *Massachusetts v. EPA*,[8] in which she "recognize[d]":

> that human-induced climate change has the potential to be far-reaching and multi-dimensional, and in light of existing knowledge, that not all risks and potential impacts can be quantified or characterized with uniform metrics.[9]

The Administrator then "determined" that certain GHGs result from both natural causes and human

---

legislation—and measured and flexible regulation by responding agencies.

[8] 549 U.S. 497 (2007). It is noteworthy that this finding was made only after extensive public comments. Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009). Such comments were voluntarily submitted by multiple parties to an administrative agency which has been delegated rule-making authority by Congress, and some of the interests listed in that finding were opposed. *See id.* at 66,500. It is also noteworthy that this Court in *Massachusetts v. EPA* certainly did not attempt to resolve the issues around GHG emissions but, rather, remitted the matter to the EPA for consideration as part of its regulatory agenda. By contrast, in this case the Second Circuit took the first step in a process that would place the district court in the same role as an agency upon issuance of its decree.

[9] 74 Fed. Reg. at 66,497.

activities[10] and that a global GHG "pool" leads to impacts not only on the United States but all over the globe.[11] The Administrator found that "the global nature of the air pollution problem and the breadth of countries and sources emitting greenhouse gases means [sic] that no single country and no single source category dominate or are even close to dominating on a global scale,"[12] and thus "addressing a global air pollution problem may call for many different sources and countries to address emissions even if none by itself dominates or comes close to dominating the global inventory."[13]

In 1992, long before the Administrator's Endangerment Finding, the United States Senate advised and consented to ratification of the United Nations Framework Convention on Climate Change (UNFCCC),[14] and the United States Government has since then been an active participant in the UNFCCC meetings and Conferences of the Parties (COP) held over the last sixteen years. With respect to GHGs, Article 4.2(a) in the UNFCCC states that the United States, as a "developed country," "shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its

---

[10] *Id.* at 66,499.

[11] *Id.* at 66,522.

[12] *Id.* at 66,538.

[13] *Id.*

[14] UNFCCC, May 9, 1992, 1771 U.N.T.S 107, S. Treaty Doc. No. 102-38.

anthropogenic emissions of greenhouse gases." Pursuant to the Convention, the 16th Conference of the Parties (COP 16) which was held in Cancun, Mexico during December 2010, concluded, in an adopted cooperative text, that the shared "vision [of the Parties to the Convention] addresses mitigation, adaptation, finance, technology development and transfer, and capacity-building in a balanced, integrated and comprehensive manner to enhance and achieve the full, effective and sustained implementation of the Convention, now, up to and beyond 2012."[15]

Thus EPA, as well as the United States Government and the global community as a whole, are grappling with the issue of climate change and GHG emissions. Identifying possibly effective global actions to this polycentric situation is distinctly challenging. The United States' role in any global GHG emission reduction efforts requires sophisticated legislation, measured and flexible agency action, and cooperative diplomacy. Quite obviously, no federal district court has either the institutional capacity or the jurisdictional reach to formulate and enforce a solution while claiming to be acting only under the aegis of the common law. Were a court to attempt this, it would certainly unbalance any carefully crafted efforts taken

---

[15] http://unfccc.int/meetings/cop_16/items/5571.php. This text is set forth in this adopted document in a provision entitled "A shared vision for long-term cooperative action," which "*Affirms* that climate change is one of the greatest challenges of our time and that all Parties share a vision for long-term cooperative action in order to achieve the objective of the Convention under its Article 2."

at the legislative, regulatory, and diplomatic levels to address climate change.

When faced with numerous interests that must be addressed, and the fact that global actions lie beyond the capacity of ordinary adjudication, federal and state court decisions have recognized the inappropriateness of using the common law, and particularly the doctrine of public nuisance, to address the novel and diffuse elements of an issue such as this. A review of some of those decisions, from the general to the specific, is offered below.

In *United States v. Standard Oil of California*—a case seemingly far removed from the grand issues presented here—this Court declined to create under the rubric of federal common law a novel cause of action whereby the United States could recover the cost of caring for a soldier negligently injured by the defendant. The Court determined that "the exercise of judicial power to establish the new liability . . . would be intruding within a field properly within Congress' control and as to a matter concerning which it has seen fit to take no action." The Court went on to note that "making the liability effective in this case . . . would involve a possible element of surprise, in view of the settled contrary practice." The Court also explained that "[t]he only question is which organ of the Government is to make the determination that liability exists." The Court concluded that it was for "Congress, not for the courts," to make that decision, and until it was made, "this Court and others should

withhold creative touch."[16] The Second Circuit did not do so.

In *Metro-North Commuter Railroad Co. v. Buckley*, this Court examined tort law developed under the Federal Employers' Liability Act and reversed the Second Circuit's decision on expanding that law.[17] The majority opinion noted "the potential systemic effects of creating a new, full-blown, tort law cause of action," including "the effects upon interests of other potential plaintiffs who are not before the court and who depend on a tort system that can distinguish between reliable and serious claims on the one hand, and unreliable and relatively trivial claims on the other." "The reality," as the Court stated, "is that competing interests are at stake—and those interests sometimes can be reconciled in ways other than simply through the creation of a full-blown, traditional, tort law cause of action."[18] In addition, the Court noted that the statistics relevant to the plaintiff's claim of injury were controversial and uncertain, and that "neither . . . judges or juries are experts in statistics." Apropos of the case at bar, the Court then stated that "[t]he large number of those exposed and the uncertainties that may surround recovery suggest what *Gottshall* called the problem of 'unlimited and unpredictable liability.'"[19]

---

[16] 332 U.S. 301, 316–317 (1947).

[17] 521 U.S. 424 (1997).

[18] *Id.* at 443–444.

[19] *Id.* at 435 (quoting *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 557 (1994)).

A similar caution has been shown by state courts asked by ambitious government plaintiffs to invoke, as here, the doctrine of public nuisance, to solve not only the health but also the fiscal problems associated with the widespread use of lead paint in decades long past.[20] In a recent comprehensive review, the Rhode Island Supreme Court reversed a judgment for the state and explained the limits of public nuisance law, as explicated in treatises and other state court decisions, noting particularly the diffuse nature of the harm and the multiple causes contributing to it. After considering applying enterprise liability and public nuisance law to select defendants who were just some of many actors introducing risks "into the stream of commerce," the Rhode Island Supreme Court ruled out such a public nuisance cause of action. In reaching its decision, it cited a number of other state court opinions, including that rendered in an almost identical case by the New Jersey Supreme Court, in which that court stated that "were we to find a cause of action here, 'nuisance law would become a monster that would devour in one gulp the entire law of tort.'"[21]

---

[20] *Rhode Island v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428 (R.I. 2008); *In re Lead Paint Litigation*, 191 N.J. 405, 924 A.2d 484 (2007); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007); *City of Chicago v. American Cyanamid Co.*, 355 Ill. App. 3d 209, 823 N.E.2d 126 (2005).

[21] *Rhode Island v. Lead Indus. Ass'n, Inc.*, 951 A.2d at 456–457; *see also*, R. Faulk and J. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 Mich. St. L. Rev. 941, 953–957; D. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741 (2003); R. Faulk, *Uncommon Law: Ruminations on Public Nuisance*, 18 Mo. Envtl. L. & Pol'y

Such caution is particularly in order where the "creative touch" being invoked is not that of a state court developing state common law, but the rarer and more problematical instance of a federal court inventing novel liability under the sparingly invoked rubric of the federal common law.[22] As Justice Breyer noted in his Oliver Wendell Holmes Lectures in 1992:

> Courts also administer a system of tort law which discourages the negligent production of risky substances by forcing producers (or their insurers) to compensate those whom they injure. That system, however, leaves the determination of "too much risk" in the hands of tens of thousands of different juries who are forced to answer the question not in terms of statistical life, but in reference to a very real victim, needing compensation in the courtroom before them. The result is a system much criticized for its random, lottery-like results and its high "transaction costs" (i.e., legal fees) which eat up a large fraction of compensations awards. Whatever its merits and problems, I do not believe the tort system can serve as a substitute for government regulation.[23]

Indeed, exactly these cautions have been brought to bear in resisting other ambitious invocations of the

---

Rev. 1 (2010), F.W. Brownell, *State Common Law of Public Nuisance in the Modern Administrative State*, 24 Nat. Resources & Env't 34 (Spring 2010).

[22] *See* n. 16, *supra*; nn. 24–30, 36, 51–60, 62, *infra*.

[23] STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE 59 (1994).

federal common law of public nuisance. In *Ohio v. Wyandotte Chemicals Corp.*,[24] Ohio sued companies incorporated in Michigan, Delaware, and Canada which were alleged to have discharged mercury into Lake Erie. In his opinion for the Court, Justice Harlan noted the great difficulty the Court had experienced in identifying a suitable rule of law to govern state air and water pollution controversies due to their complex technical and legal nature, and that "[t]he solution finally grasped" has been "to saddle the party seeking relief with an unusually high standard of proof and the Court with the duty of applying only legal principles 'which [it] is prepared deliberately to maintain against all the considerations on the other side.'"[25]

Justice Harlan went on to note how Court intervention would interfere with agencies and processes specifically authorized to address the issue, citing both multi-state and international studies established under national and international agreements.[26] Accordingly, he reached a conclusion that should serve as the guiding principle here: "In view of all this, granting Ohio's motion for leave to file would, in effect, commit this Court's resources to the task of trying to settle a small piece of a much larger problem that many competent adjudicatory and

---

[24] 401 U.S. 493 (1971).

[25] *Id.* at 501–502.

[26] *Id.* at 503.

conciliatory bodies are actively grappling with on a more practical basis."[27]

Finally, there is the Fourth Circuit's decision in *North Carolina v. TVA*, involving the emission of regulated pollutants under the Clean Air Act.[28] In its decision, the Fourth Circuit rejected a claim of state common law nuisance against the Tennessee Valley Authority, which is the Respondent in Support of the Petitioner in this case. Judge Wilkinson's opinion accords with that in the preceding decisions. It notes that trials and private causes of action alleging public nuisance under common law cannot be brought when Congress has expressed its views on the intricate scientific and technical facts and has addressed the matter at hand through legislation that is being implemented by an agency charged with the task.[29]

With respect to the use of public nuisance injunctive remedies in resolving these issues, Judge Wilkinson had this to say:

> Injunctive decrees, of course, are rulemakings of a sort. While expressing the utmost respect for the obvious efforts the district court expended in this case, we doubt seriously that Congress thought that a judge holding a twelve-day bench trial could evaluate more than a mere fraction

---

[27] *Id*; *see also id*. at 498 n. 3 ("an action such as this, if otherwise cognizable in a district court, would have to be adjudicated under state law")

[28] 615 F.3d 291 (4th Cir. 2010).

[29] *Id*. at 304–305.

> of the information that regulatory bodies can consider. . . . In fact, the district court properly acknowledged that "public nuisance principles . . . are less well-adapted than administrative relief to the task of implementing the sweeping reforms that North Carolina desires."[30]

It is noteworthy that the court decisions identified above issued their warnings in common law tort cases having impacts that were far narrower and more limited than this one. In the pollution cases, *Wyandotte* and *North Carolina*, the sources of the alleged pollution were much more geographically limited than in the case before the Court today.[31] Prudence having dictated that federal courts withhold their "creative touch" in those cases, how much more insistently does that counsel of prudence speak here, where the plaintiffs seek to employ a public nuisance claim to "solve" the issue of climate change?[32] Instead, climate change and GHG emissions are far-reaching, multi-dimensional, and global, and they are fraught with scientific, economic, and political elements which

---

[30] *Id.* at 305.

[31] In *Wyandotte*, two companies were alleged to have discharged mercury into Michigan and Ontario tributaries that flowed into Lake Erie. 401 U.S. at 494–495. In *North Carolina*, the alleged emitters of air pollutants were located in Tennessee, Alabama, and Kentucky. 615 F.3d at 296. In the current case, the defendants operate, collectively, fossil fuel fired electric power plants in twenty states. Pet. App. 2a.

[32] The "roadmap" for bringing this public nuisance claim would appear to be rooted in D. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 Colum. J. Envtl. L. 1 (2003).

are controversial and rapidly evolving. Unlike the classic federal common law public nuisance cases noted in the Second Circuit's opinion,[33] this is not a case that is focused on the risks associated with individual emission sources, but instead concerns a combination of hundreds of thousands of sources across many states, regions, and countries.

The Second Circuit's opinion is only one in a recent round of climate change lawsuits with public nuisance claims.[34] These represent a marked departure from prior environmental claims in important respects. Traditionally, such public nuisance claims were directed at conditions within defined geographic bounds and were linked to the impairment of property, or to injuries related to such impairment. Furthermore, the defendants causing the tortious conduct were clearly identifiable. Indeed, all the

---

[33] *E.g.*, *Georgia v. Tenn Copper Co.*, 206 U.S. 230 (1907) (only a single, regional source), *Missouri v Illinois*, 180 U.S. 208 (1901) (only a single, regional source entity, a municipal sewer district); *Illinois v. Milwaukee*, 406 U.S. 91 (1971) (only regional municipalities); *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (regional ditches); *New Jersey v. New York*, 283 U.S. 473 (1931) (only a municipal sewer discharge); *Mugler v. Kansas*, 123 U.S. 623 (1887) (intoxicating liquors); *Ohio v. Wyandotte Chemicals Corp*, 401 U.S. 493 (1971) (mercury into Lake Erie).

[34] *See, e.g.*, *California v. Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), *appeal dismissed*, No. 07-16908 (9th Cir June 24, 2009); *Comer v. Murphy Oil USA*, No. 05-436, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007) (unpublished ruling), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010), *mandamus denied*, No. 10-294 (U.S. Jan. 10, 2011); *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F.Supp.2d 863 (N.D. Cal. 2009), *appeal filed*, No. 09-17490 (9th Cir. Nov. 5, 2009).

examples referred to in the Second Circuit's decision are so limited.[35] The number and variety of persons affected, the lack of metes and bounds to the alleged harms, and the difficulties in identifying which parties have allegedly caused what harm, present a fundamentally different challenge to fashioning appropriate remedies, a challenge beyond the competence of a district court to meet.

An alleged harm having such intricately interrelated elements, causes, and effects defies—like Fuller's polycentric "spider web"—the application of a single standard to the Petitioners' conduct. The difficulty of establishing a standard is also raised in Section 821B, comment e (*Unreasonable interference*), of the Restatement (Second) of Torts, which notes that when a defendant's conduct does not come within one of the traditional categories of the common law "crime" of public nuisance, or such conduct is not prohibited by a legislative act, a court would be forced to act without an established and recognized standard. Justice Blackmun's admonition against the use of common law nuisance in his dissent in *Lucas v. South Carolina Coastal Council* is entirely apposite: there "is no reason to believe that new interpretations of the hoary common law nuisance doctrine will be particularly 'objective' or 'value free,'" and "one searches in vain . . . for anything resembling a principle in the common law of nuisance."[36]

---

[35] See nn. 21 (R. Faulk), 28, *supra*.

[36] 505 U.S. 1003, 1055 (1992).

If a court were to expand tort and nuisance law into this climate change area, as Justice Breyer has written in a general discussion of pollution law, such a "decision to shift liability rules" would unquestionably be "difficult to make in practice, "[37] and, he concludes, "reliance upon court-enforced liability rules has not proven adequate to deal with the problem of pollution."[38] Of course courts must eventually be involved in the review and enforcement of the rules and decrees established by appropriate agencies. But in a climate change public nuisance case, with the number and variety of plaintiffs, defendants, statistics, venues, and jurisdictions, and the potential for dissonance in the conclusions of experts, judges, and juries, court adjudication of GHG emission issues, both making up the rules and enforcing them, threatens either a disaster or bonanza depending on one's point of view.[39]

---

[37] STEPHEN BREYER, REGULATION AND ITS REFORM 175 (1984).

[38] *Id.* at 177.

[39] *See, e.g., Comer v. Murphy Oil USA*, n. 34, *supra*, where a putative class action filed by residents and owners of lands and property along the Mississippi Gulf coast alleged that defendants' operation of energy, fossil fuels, and chemical industries in the United States caused the emission of greenhouse gases that contributed to global warming that in turn caused a rise in sea levels and added to the ferocity of Hurricane Katrina so as to destroy the plaintiffs' private property and public property useful to them, with the plaintiffs asserting claims for compensatory and punitive damages based on Mississippi common-law actions of public and private nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentation, and civil conspiracy.

II. LEGISLATION, INTERNATIONAL NEGOTIATIONS AND AGREEMENTS, AND PROPER REGULATION BY AGENCIES ARE THE ONLY AVAILABLE MODES FOR RATIONALLY ADDRESSING CLIMATE CHANGE

In the first two sections of its decision in *Massachusetts v. EPA*, this Court traced the history of climate change and GHG emissions. It stated in that history that Congress, EPA and other agencies, and international agreements would have the responsibility for addressing climate change.[40] The Court indicated that statutory text in the Clean Air Act was "sweeping" in the definition of an air pollutant and "unambiguous" in the inclusion of airborne compounds, and the Court then directed EPA to exercise its regulatory discretion within the limits of the Clean Air Act.[41]

In addition, the Court noted the significant foreign policy elements in any national approach to climate change: "In the Global Climate Protection Act of 1987, Congress authorized the State Department - not EPA—to formulate United States foreign policy with reference to environmental matters relating to climate."[42] The Court also stated that that Congressional legislation "ordered the Secretary of State to work 'through the channels of multilateral diplomacy' and coordinate diplomatic efforts to combat

---

[40] 549 U.S. at 506–514.

[41] *Id.* at 528–529.

[42] *Id.* at 534; *see also* § 1103(c), 101 Stat. 1409.

global warming."[43] Given this legislation that imposes responsibilities upon the Secretary of State, the nonbinding UNFCCC,[44] and the activities and agreements reached in the numerous COP and other meetings attended by representatives of the Executive Branch, the federal courts cannot, without serious unbalancing effects, insert themselves into the foreign policy and diplomatic processes that are mandated to address climate change issues, including those affecting GHG emissions.

As noted in *United States v. Standard Oil of California*, the federal courts should be especially reluctant to innovate under the distinctly problematic aegis of the federal common law without looking first to Congress.[45] Not only is the tort litigation embraced by the Second Circuit in this case spectacularly unsuited to addressing GHG emissions and their relation to climate change, but this is exactly the kind of polycentric situation that requires a legislative mandate and the assignment of an agency to implement that proper mandate and to coordinate with the Executive Branch on the international aspects of such implementation. Such a legislative mandate is necessary because it reflects a general political accommodation of the myriad interests affected by this situation and the myriad interests impacted by any solution to it. An agency can then be

---

[43] *Id.* at 508.

[44] *See id.* at 549 U.S. at 509 (UNFCCC is a nonbinding agreement); *Medellin v. Texas*, 552 U.S. 491, 504–506 (2008) (a nonbinding agreement may not be a part of federal law).

[45] *See* n. 16, *supra*.

assigned the task of properly and legally implementing that general accommodation in concrete, flexible ways, in a constantly changing physical, technological, economic, and political environment. In this regard, agencies must comply with their mandates under the legislation, which can be a difficult and polycentric process,[46] and which no court can do.

As Richard Stewart, one of the leading scholars in environmental and administrative law, has explained:

> [S]ome advocates of public interest representation have forthrightly asserted that it "is the job of the court" to decide "where the public welfare in balance lies." In addition to straining courts' competence to resolve policy questions involving complex scientific and economic issues, such an expansion of judicial power would give the courts a degree of across-the-board responsibility for social and economic policy-making that is wholly inconsistent with our received constitutional premises, under which the legislature remains free, subject to the minimal requirements of the doctrine against delegation of legislative power, to delegate a discretionary power of choice to agencies so long as the agencies stay within

---

[46] *See, e.g.*, EPA's "Tailoring Rule," 75 Fed. Reg. 31514 (June 3, 2010), issued under the Clean Air Act with respect to the phase-in of GHG emission standards for stationary sources. The preamble to that rule refers to the "doctrines" of "absurd results," "administrative necessity," and "one-step-at-a-time," *id.* at 31516, to justify its action, in contradiction to the provisions of the Clean Air Act, underscoring the complexity and difficulty of this polycentric task undertaken by EPA.

> statutory bounds and observe appropriate procedural safeguards. The expansion of participation rights to affected interests in itself provides no justification for abandoning these traditional premises. Indeed, the more the question of agency choice comes to resemble a political process of weighing the claims of competing interest groups the less the apparent justification for judicial revision of Congress' delegation of choice to the agency.[47]

Despite these court precedents and the admonitions of leading scholars, the Respondents have urged this Court to invoke the federal common law of public nuisance because, as they believe, EPA has yet to issue regulations covering the Petitioners' GHG emissions. Given the Court's admonition in *United States v. Standard Oil of California* with respect to judicial intrusion in areas properly within Congress' control, given the Court's conclusion in *Massachusetts v. EPA* that Congress provided a statutory text in the Clean Air Act conferring authority upon EPA on whether to regulate GHGs, and given the concerns raised by scholars such as Stewart about judicial expansion into policy areas that strain a court's competence, the Respondents' insistence on a solution ultimately to be imposed and administered by a single federal district judge is contrary to both reason and precedent.

In the present case, the Second Circuit has referred a number of times to *County of Oneida v. Oneida*

---

[47] Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1786–1787 (1975).

Indian Nation of N.Y. State[48] for the proposition that the Indian Nonintercourse Act of 1793 did not displace the federal common law.[49] Thus, the Second Circuit said that the Clean Air Act must not be taken to preclude the fashioning of both liability and remedy under federal common law. However, the analogy is inapposite, since the statute in *Oneida* was enacted over 200 years ago, was based on aboriginal title rights, did not provide a comprehensive plan for dealing with those rights,[50] and did not include any of the statutory text that this Court emphasized with respect to the Clean Air Act provisions on GHG emissions as air pollution in *Massachusetts v. EPA*.[51] Indeed, in *International Paper Co. v. Ouellette*, decided *after Oneida*, and which like *Oneida* was authored by Justice Powell, this Court stated that the *comprehensive* amendments to the Clean Water Act "now occupied the field, pre-empting all *federal* common law."[52]

The First Circuit reached the same conclusion, in *Conner v. Aerovox, Inc.*, with respect to public nuisance claims brought under federal maritime tort law and the admiralty jurisdiction.[53] Even though the Clean

---

[48] 470 U.S. 226 (1985).

[49] *Connecticut v. American Elec. Co.*, 582 F.3d 309, 386 (2d Cir. 2009).

[50] 470 U.S. at 237–238.

[51] 549 U.S. at 528–529.

[52] 479 U.S. 481, 489 (1987).

[53] 730 F.2d 835 (1st Cir. 1984).

Water Act did "not provide a compensatory remedy for losses of the type complained of here," the First Circuit stated that the "Supreme Court has emphasized, however, the comprehensiveness of the policy implemented in [the Clean Water Act] *rather than the adequacy of the implementation*."[54] It then concluded that there was no maritime tort remedy, based on federal common law in the area of water pollution that "is entirely preempted," and would "encompass all federal judge-made law of nuisance whether maritime or general federal law."[55]

The First Circuit next stated that it also rejected any common law of nuisance claims under admiralty law. In response to the plaintiffs' argument that the district court, sitting in admiralty, could "borrow from state law to fashion a theory of liability for the instant dispute," the court responded by saying that "the source of the borrowed law would be irrelevant" because a "damage claim based on common-law nuisance principles is precluded whether under maritime or other federal jurisdiction."[56]

The First Circuit cited its opinion in *Conner* in rejecting a public nuisance case under the federal Safe Drinking Water Act (SDWA). In *Mattoon v. City of Pittsfield*,[57] where the plaintiffs justified their claim on the grounds that there was no regulation issued by

---

[54] *Id.* at 840–841 (emphasis added).

[55] *Id.* at 842.

[56] *Id.*

[57] 980 F.2d 1 (1st Cir. 1992)

EPA under the SDWA for the contaminant of concern, the First Circuit noted that they "misapprehend[ed] the nature of the comprehensiveness inquiry required under *Milwaukee v. Illinois*, which turns on 'whether the field has been occupied, not whether it has been occupied in a particular manner.'"[58] As the court noted, "'once Congress has addressed a national concern, our fundamental commitment to the separation of powers precludes the courts from scrutinizing the sufficiency of the congressional solution.'"[59] As explained by the First Circuit:

> The comprehensiveness of the legislative grant is not diminished, nor is the congressional intent to occupy the field rendered unclear, merely by reason of the regulatory agency's discretionary decision to exercise less than the total spectrum of regulatory power with which it was invested.[60]

CONCLUSION

The adventure on which the Second Circuit would cause the federal courts to initiate a disastrous disregard of separation of powers principles, and would replace or unbalance not only the agency regulatory process but most palpably the international negotiations indispensable to any satisfactory solution.

---

[58] *Id.* at 5 (quoting *Conner*, 730 F.2d at 841 (quoting *Milwaukee*, 451 U.S. at 324)).

[59] *Id.* (quoting *People of State of Illinois v. Illinois Outboard Marine*, 680 F.2d 473, 478 (7th Cir.1982)).

[60] *Id.* at 5 (emphasis added).

An uncoordinated remedial injunction by a United States district court might simply lead—in a process similar to Fuller's spider's web—to an uncoordinated and piecemeal approach to GHG emissions that is, at best, ineffective at the national level and disruptive at the international level. Judge Wilkinson got it right when he said that upholding an injunction based on common law public nuisance principles "would encourage courts to use vague public nuisance standards to scuttle the nation's carefully created system for accommodating the need for energy production and the need for clean air. The result would be a balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike."[61]

Judicial intervention, under the rubric of the tort of public nuisance, in the highly complex issues surrounding greenhouse gas emissions would overrun tort law, swamp the courts, and undercut the proper organs of public policy in the United States and abroad. The words of Benjamin N. Cardozo are an apt reproof to the Second Circuit's dramatic intervention in this matter:

> The judge . . . is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy,

---

[61] *North Carolina*, 615 F.3d at 296.

disciplined by system, and subordinated to the "primordial necessity of order in the social life."[62]

This Court should overrule the Second Circuit's decision.

Respectfully submitted,

Charles Fried
Counsel of Record
1545 Massachusetts Avenue
Cambridge, Massachusetts 02138

Peter Sacripanti
McDermott Will & Emery LLP
40 Madison Avenue
New York, NY 10173-1922

Jeffrey Bates
Susan Cooke
McDermott Will & Emery LLP
28 State Street
Boston, MA 02109

Counsel for Amici Curiae

February 7, 2011

---

[62] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921).

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
MAR 18 201
OFFICE OF THE CLERK

No. 10-174

In The
Supreme Court of the United States

AMERICAN ELECTRIC
POWER COMPANY, INC., *et al.*,

Petitioners,

v.

STATE OF CONNECTICUT, *et al.*,

Respondents.

On *Writ Of Certiorari* To The United States Court Of Appeals For The Second Circuit

BRIEF OF JAMES G. ANDERSON, Ph.D., DAVID ARCHER, Ph.D., DAVID S. BATTISTI, Ph.D., MICHAEL L. BENDER, Ph.D., MARK A. CANE, Ph.D., PETER B. deMENOCAL, Ph.D., KERRY A. EMANUEL, Ph.D., INEZ Y. FUNG, Sc.D., PETER HUYBERS, Ph.D., RALPH F. KEELING, Ph.D., MARIO J. MOLINA, Ph.D., RAYMOND T. PIERREHUMBERT, Ph.D., DANIEL P. SCHRAG, Ph.D., AND STEVEN C. WOFSY, Ph.D., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

RICHARD WEBSTER
Counsel of Record
JAMES M. HECKER
MATTHEW W.H. WESSLER
PUBLIC JUSTICE, P.C.
1825 K St., NW, Suite 200
Washington, DC 20006
(202) 797-8600
rwebster@publicjustice.net

Attorneys for Amici Curiae

ARTHUR H. BRYANT
PUBLIC JUSTICE, P.C.
555 12th St., Suite 1620
Oakland, CA 94607
(510) 622-8205

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICI CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	9
ARGUMENT	12
I. PLAINTIFFS' ALLEGED INJURIES ARE OCCURRING AND WILL BECOME MORE SEVERE	12
A. Average Global Temperatures Have Increased and Will Continue to Increase	12
B. Sea Level Is Rising and Will Continue to Rise, Which Will Lead to Increased Flooding of Coastal Regions	14
C. Agricultural Production Will Decline Due to Increased Summer Temperatures	16
D. Natural Water Storage Has Decreased and Will Decrease Further	18
E. Ecosystems Are Changing	19
F. IPCC Estimates of Future Injuries Are Overly Conservative for Risk Assessment	20
G. Risks of Catastrophic Consequences Cannot be Neglected	22

TABLE OF CONTENTS – Continued

Page

II. IT IS A SCIENTIFIC CERTAINTY THAT ATMOSPHERIC CARBON DIOXIDE IS RISING, THAT THIS RISE IS CAUSED BY HUMAN ACTIVITIES TO WHICH PETITIONERS CONTRIBUTE, AND THAT THIS RISE IS CAUSING THE CLIMATE TO WARM 25

A. Combustion of Fossil Fuels Is Causing Atmospheric Carbon Dioxide to Increase to Levels Unprecedented for Millions of Years 25

B. Future Emissions Will Have a Greater Impact on Atmospheric Concentrations of Carbon Dioxide 26

C. Carbon Dioxide Remains in the Atmosphere for a Very Long Time 27

D. The Increasing Concentration of Carbon Dioxide in the Atmosphere Is Causing Global Warming 28

E. The Largest Uncertainties Relate to Impacts that Are Worse than Current Projections 30

F. Petitioners' Emissions Are Significant ... 32

III. REDUCING PETITIONERS' CARBON EMISSIONS WOULD SIGNIFICANTLY SLOW AND REDUCE GLOBAL WARMING 33

TABLE OF CONTENTS – Continued

Page

A. EPA Has Shown that the Reductions Achieved by the Domestic Transportation Rules Would be Significant 33

B. Emissions Reductions from this Case Could be Greater than from the EPA Rules Regarding Domestic Transportation 34

IV. THE CUMULATIVE EFFECTS OF CARBON EMISSIONS CREATE A PERILOUS FUTURE 36

CONCLUSION 36

TABLE OF AUTHORITIES

Page

CASES:

Massachusetts v. EPA, 549 U.S. 497 (2007).....*passim*

REGULATIONS:

74 Fed. Reg. 49,454 (September 28, 2009) 35

75 Fed. Reg. 25,324 (May 7, 2010).....34

OTHER AUTHORITIES:

Abbot, D.S. and Tziperman, E., *A High Latitude Convective Cloud Feedback and Equable Climates*, Quarterly Journal of the Royal Meteorological Society, 134, 165-185, 2008.....31

Adam, J.C., Hamlet, A.F. and Lettenmaier, D.P., *Implications of global climate change for snowmelt hydrology in the twenty-first century*, Hydrological Processes, 23, 962-972, 2009 18

Alley, R.B., Clark, P.U., Huybrechts, P. and Joughin, I., *Ice-sheet and Sea-level Changes*, Science, 310(5747):456, 2005.....24

Archer, D. and Brovkin, V., *The millennial atmospheric lifetime of anthropogenic CO2*, Climatic Change, 90, 283-297, 2008.....27, 28

Ashton, A.D., Donnelly, J.P. and Evans, R.L., *A discussion of the potential impacts of climate change on the shorelines of the Northeastern USA*, Mitigation and Adaptation Strategies for Global Change, 13, 2008.....16

TABLE OF AUTHORITIES

Page

Ballantyne, A.P., Lavine, M., Crowley, T.J., Liu, J. and Baker, P.B., *Metaanalysis of tropical surface temperatures during the Last Glacial Maximum*, Geophysical Research Letters, 32, L05712, 2005 13

Battisti, D.S. and Naylor, R.L., *Historical Warnings of Future Food Insecurity with Unprecedented Seasonal Heat*, Science, 323, 240-244, 2009 17

Cazenave, A., *et al.*, *Sea level budget over 2003-2008: A reevaluation from GRACE space gravimetry, satellite altimetry and Argo*, Global and Planetary Change, 65, 2009 22

Committee on Ecological Impacts of Climate Change, *Ecological Impacts of Climate Change*, National Research Council, 70, 2009 20

Cooper, M.J.P., Beevers, M.D. and Oppenheimer, M., *The potential impacts of sea level rise on the coastal region of New Jersey, USA*, Climatic Change, 90, 475-492, 2008 16

Cox, P.M., *et al.*, *Amazonian forest dieback under climate-carbon cycle projections for the 21st century*, Theoretical and Applied Climatology, 78, 137-156, 2004 32

de Bergh, C., *et al.*, *The composition of the atmosphere of Venus below 100 km altitude: An overview*, Planetary and Space Science, 54, 1389-1397, 2006 29

TABLE OF AUTHORITIES

Page

Denman, K.L., *et al.*, *Couplings between Changes in the Climate System and Biogeochemistry, In Climate Change: The Physical Basis of Climate Change*, Contribution of Working Group I to the Fourth Assessment Report of the IPCC, 500-587, Cambridge Univ. Press, 2007 27

FitzGerald, D.M., *et al.*, *Coastal impacts due to sea-level rise*, Annual Review of Earth and Planetary Sciences, 36, 601, 2008 16

Hamlet, A.F., Mote, P.W., Clark, M.P. and Lettenmaier, D.P., *Twentieth-Century Trends in Runoff, Evapotranspiration and Soil Moisture in the Western United States*, Journal of Climate, 20, 1468-1486, 2007 18

Hansen, J., Ruedy, R., Sato, M. and Lo, K., *2010: Global surface temperature change*, Reviews of Geophysics, 48, RG4004, 2010 12

Hartmann, D.L. and Michelsen, M.L., *No Evidence for Iris*, Bulletin of the American Meteorological Society 83, 249-254, 2002 31

IPCC, *Climate Change 2007: The Physical Science Basis*, Cambridge Univ. Press, 2007 15

Kirk-Davidoff, D.B., Schrag, D.P. and Anderson, J.G., *On the feedback of stratospheric clouds on polar climate*, Geophysical Research Letters, 10, 1029-1032, 2002 30

TABLE OF AUTHORITIES

Page

Knutti, R. and Hegerl, G.C., *The equilibrium sensitivity of the Earth's temperature to radiation changes*, Nature Geoscience, 1, 735-743, 2008 24

Le Quere, C., Raupach, M.R., Canadell, J.G., Marland, G., *et al.*, *Trends in the sources and sinks of carbon dioxide*, Nature Geosciences, 2, 831-836, 2009 27

Lee, S.Y., *et al.*, *Optimized flood control in the Columbia River Basin for a global warming scenario*, Journal of Water Resources Planning and Management, 135, 440-451, 2009 18

Lindzen, R.S., Chou, M.D. and Hou, A.Y., *Does the earth have an adaptive infrared iris?*, Bulletin of the America Meteorological Society, 82, 417-432, 2001 31

Lobell, D.B., *et al.*, *Impacts of future climate change on California perennial crop yields: Model projections with climate and crop uncertainties*, Agricultural and Forest Meteorology, 141, 208-218, 2006 17

Lüthi, D., *et al.*, *High-resolution carbon dioxide concentration record 650,000-800,000 years before present*, Nature, 453, 379-382, 2008 26

Manning, A.C. and Keeling, R.F., *Global oceanic and land biotic carbon sinks from the Scripps atmospheric oxygen flask sampling network*, Tellus Series B, 58, 95-116, 2006 26

TABLE OF AUTHORITIES

Page

McCabe, G. and Clark, M.P., *Trends and variability in snowmelt runoff in the western United States*, Journal of Hydrometeorology, 6, 476-482, 2005 18

Meehl, G.A., *et al.*, *The WCRP CMIP3 multimodel dataset – a new era in climate change research*, Bulletin of the American Meteorological Society, 88, 1383-1394, 2007 .... 13, 14

Millennium Ecosystem Assessment, *Ecosystems and Human Well-being: General Synthesis*, Washington, D.C., 2005 20

Mote, P.W., *Climate-Driven Variability and Trends in Mountain Snowpack in Western North America*, Journal of Climate, 19, 6209-6220, 2006 18

NASA Goddard Institute for Space Studies, Research News, *Despite Subtle Differences, Global Temperature Records in Close Agreement*, Jan. 13, 2011, *available at* http://www.giss.nasa.gov/research/news/20110113 12

Nicholls, R.J. and Cazenave, A., *Sea-level Rise and Its Impact on Coastal Zones*, Science, 328, 1517-1520, 2010 15

Otto-Bliesner, B.L., *et al.*, *A comparison of PMIP2 model simulations and the MARGO proxy reconstruction for tropical sea surface temperatures at last glacial maximum*, Climate Dynamics, 32, 799-815, 2009 13

TABLE OF AUTHORITIES

Page

Overpeck, J.T., *et al.*, *Paleoclimatic Evidence for Future Ice-sheet Instability and Rapid Sea-level Rise*, Science, 311(5768):1747, 2006 24

Pagani, M., *et al.*, *Marked Change in Atmospheric Carbon Dioxide Concentrations During the Oligocene*, Science, 309, 600-603, 2005 25

Pardeep, P., *et al.*, *Anthropogenic greenhouse gas contribution to flood risk in England and Wales in autumn 2000*, Nature, 470, 382-385, 2011 15

Parmesan, C., *Ecological and evolutionary responses to recent climate change*, Annual Review of Ecology, Evolution, and Systematics, 37, 627-669, 2006 19

Pfeffer, W.T., Harper, J.T. and O'Neel, S., *Kinematic Constraints on Glacier Contributions to 21st-Century Sea-level Rise*, Science, 321, 1340, 2008 15

Pierrehumbert, R.T., *Infrared radiation and planetary temperature*, Physics Today, January 2011 28

Prentice, I.C., Bartlein, P.J. and Webb III, T., *Vegetation and climate change in eastern North America since the last glacial maximum*, Ecology, 72, 2038-2056, 1991 13

Rahmstorf, S., *A semi-empirical approach to projecting future sea-level rise*, Science, 315, 368-370, 2007 .....15, 22

TABLE OF AUTHORITIES

Page

Regonda, S.K., *et al.*, *2005: Seasonal cycle shifts in hydroclimatology over the western United States*, Journal of Climate, 18, 372-384, 2005 18

Roe, G.H. and Baker, M.B., *Why is Climate Sensitivity so Unpredictable?*, Science, 318, 629, 2007 23

Schlenker, W. and Roberts, M.J., *Nonlinear temperature effects indicate severe damages to U.S. crop yields under climate change*, Proceedings of the National Academy of Sciences, 106, 15594, 2009 16

Schneider von Deimling, T., *et al.*, *How cold was the Last Glacial Maximum?*, Geophysical Research Letters, 33, L14709, 2006 13

Schrag, D.P. and Alley, R.B., *Ancient Lessons for our Future Climate*, Science, 306, 821-822, 2004 31

Siegenthaler, U., *et al.*, *Stable Carbon Cycle-Climate Relationship During the Late Pleistocene*, Science, 310, 1313-1317, 2005 25

Solomon, S., *et al.*, IPCC, *Climate Change 2007: The physical science basis*, Contribution of working group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, 2007 ..... 21, 22

TABLE OF AUTHORITIES

Page

Stainforth, D., *et al.*, *Uncertainty in predictions of the climate response to rising levels of greenhouse gases*, Nature, 433(7024):403-406, 2005 23

Tans, P.P. and Wallace, D.W.R., *Carbon cycle research after Kyoto*, Tellus B, 51, 562-571, 1999 26

Trenberth, K.E., *Conceptual framework for changes of extremes of the hydrological cycle with climate change*, Climatic Change, 42, 327-339, 1999 15

Velicogna, I., *Increasing rates of ice mass loss from the Greenland and Antarctic ice sheets revealed by GRACE*, Geophysical Research Letters, 36, L19503, 2009 22

Vicuna, S., *et al.*, *The sensitivity of California water resources to climate change scenarios*, Journal of the American Water Resources Association, 43, 482-498, 2007 19

Wegren, S.K., *Food security and Russia's 2010 drought*, Eurasian Geography and Economics, 52, 140-156, 2011 17

White, M.A., *et al.*, *Extreme heat reduces and shifts United States premium wine production in the 21st century*, Proceedings of the National Academy of Sciences, 103, 11217, 2006 17

TABLE OF AUTHORITIES

Page

Wing, S. and Greenwood, D.L., *Fossils and Fossils Climate: The Case for Equable Continental Interiors in the Eocene*, Royal Society of London Philosophical Transactions, 341, 243-252, 1993 31

Winton, M., Takahashi, K. and Held, I.M., *Importance of ocean heat uptake efficacy to transient climate change*, Journal of Climate, 23(9):2333-2344, 2010 24

Wu, S.Y., Najjar, R. and Siewert, J., *Potential impacts of sea-level rise on the Mid- and Upper-Atlantic Region of the United States*, Climatic Change, 95, 121-138, 2009.....15

Young, C.A., *et al.*, *Modeling the Hydrology of Climate Change in California's Sierra Nevada for Subwatershed Scale Adaptation*, Journal of the American Water Resources Association, 45, 1409-1423, 2009 19

Zhang, K.Q., Douglas, B.C. and Leatherman, S.P., *2000: Twentieth-century storm activity along the U.S. east coast*, Journal of Climate, 13, 1748-1761 15

Zhang, K.Q., Douglas, B.C. and Leatherman, S.P., *2004: Global warming and coastal erosion*, Climatic Change, 64, 41-58.....15

Zimov, S.A., Schuur, E.A.G. and Chapin, III, F.S., *Permafrost and the Global Carbon Budget*, Science, 312, 1612-1613, 2006 32

INTEREST OF *AMICI CURIAE*[1]

Amici Curiae Climate Scientists are James G. Anderson, David Archer, David S. Battisti, Michael L. Bender, Mark A. Cane, Peter B. deMenocal, Kerry A. Emanuel, Inez Y. Fung, Peter Huybers, Ralph F. Keeling, Mario J. Molina, Raymond T. Pierrehumbert, Daniel P. Schrag and Steven C. Wofsy (hereinafter "Climate Scientists").[2] The Climate Scientists are individual climate scientists who are actively involved in research on changes to the Earth's climate in the past, present, and future. They are filing this brief to ensure that the Court understands the key scientific facts relevant to the issue before the Court.

Amicus James G. Anderson is the Philip S. Weld Professor in the Departments of Chemistry and Chemical Biology, Earth and Planetary Sciences and the School of Engineering and Applied Sciences at Harvard University. His climate research focuses on establishing the primary mechanisms that couple

---

[1] All parties have consented to the filing of this brief. Pursuant to this Court's Rule 37.6, *Amici* state that no counsel for any party in this case authored this brief in whole or in part, and no person other than *Amici* and their counsel has made a monetary contribution to the preparation and submission of this brief.

[2] The Climate Scientists are appearing in their individual capacity and not as representatives of any institution with which any of them is affiliated. The assertions of science in this brief have been drafted, reviewed, and approved by the Climate Scientists, representing a distillation of the conclusions set forth in a multitude of scientific reports.

chemistry, dynamics, and radiation in the climate system, the establishment of a high-accuracy record of climate change using interferometry from low Earth orbit, and strategies for testing long-term climate forecasts using absolute spectrally resolved radiance in the infrared. He was elected to the National Academy of Sciences in 1992, the American Philosophical Society in 1998, and the American Academy of Arts and Sciences in 1985. He is also a Fellow of the American Association for the Advancement of Science and the American Geophysical Union. He has served on several National Research Councils, including the National Research Council Committee on Global Change Research.

Amicus David Archer is a Professor in the Department of the Geophysical Sciences at the University of Chicago and a Fellow of the American Geophysical Union. His work focuses on the Earth's carbon cycle and its interaction with global climate. He has written several books on climate change, including *Global Warming: Understanding the Forecast*, a text for non-science major undergraduates; *The Long Thaw: How Humans are Changing the Next 100,000 Years of Earth's Climate*; *The Climate Crisis*, a summary of the IPCC Scientific Assessment; *The Global Carbon Cycle*, a primer in climate science; and *The Warming Papers: The Scientific Foundation for the Climate Change Forecast*. He teaches classes on global warming, environmental chemistry, and global biogeochemical cycles, and is a regular contributor to the climate science blog site realclimate.org.

Amicus David S. Battisti is The Tamaki Endowed Chair and Professor of Atmospheric Sciences at the University of Washington. His research is focused on climate variability, including how the interactions between the ocean, atmosphere, land and sea ice lead to variability in climate on time scales from seasonal to decades. He has served on numerous international science panels, including Committees of the National Research Council. He served for five years as co-chair of the Science Steering Committee for the U.S. Program on Climate (US CLIVAR) and is co-author of several international science plans.

Amicus Michael L. Bender is a Professor in the Department of Geosciences, Princeton University. His research focuses on the modern ocean carbon cycle and the uptake of fossil fuel carbon dioxide by the oceans and forests, and also on past climates as recorded in ice cores. He has served on the Board on Atmospheric Science and Climate of the National Research Council. The author of over 100 scientific papers, he has been awarded the Patterson Medal of the Geochemical Society and the Roger Revelle Medal of the American Geophysical Union. He was elected to the National Academy of Sciences in 2002.

Amicus Mark A. Cane is the G. Unger Vetlesen Professor of Earth and Climate Sciences at Columbia University. He devised the first numerical model able to simulate El Niño. He continues to work on El Niño prediction, and has also worked extensively on the impact of El Niño on human activity, especially agriculture and health. He is the Chief Physical

Scientist for the International Research Institute for Climate and Society. He has received the Sverdrup Gold Medal of the American Meteorological Society (1992), the Cody Award in Ocean Sciences from the Scripps Institution of Oceanography (2003), and the Norbert Gerbier-MUMM International Award from the World Meteorological Organization (2009). He is a Fellow of the American Meteorological Society; the American Association for the Advancement of Science, the American Geophysical Union, and the American Academy of Arts and Sciences.

Amicus Peter B. deMenocal is a Professor and Vice Chair in the Department of Earth and Environmental Sciences at Columbia University. At Lamont-Doherty Earth Observatory of Columbia University he uses stable isotopic and other geochemical analyses of marine sediments to understand how and why past climates have changed, with a specific interest in placing contemporary climate change trends within the context of climate changes during the prehistoric past. He was awarded the Lenfest Columbia Distinguished Faculty award in 2008 and is Editor-in-Chief of the scientific journal *Earth and Planetary Science Letters*.

Amicus Kerry A. Emanuel is a Professor of atmospheric science at the Massachusetts Institute of Technology, where he has been on the faculty since 1981. His research focuses on tropical meteorology and climate, with a specialty in hurricane physics. His interests also include cumulus convection, and advanced methods of sampling the atmosphere in aid

of numerical weather prediction. He is the author or co-author of over 100 peer-reviewed scientific papers, and two books, including *Divine Wind: The History and Science of Hurricanes* and *What We Know about Climate Change*.

Amicus Inez Y. Fung is Director of the Berkeley Institute of the Environment and Professor of Atmospheric Science in the Department of Earth Planetary Science and Department of Environmental Science Policy and Management, at the University of California, Berkeley. Fung's research specializes on climate and biogeochemical cycles, geophysical fluid dynamics, large-scale numerical modeling, remote sensing of earth systems, and atmosphere-ocean interactions and atmosphere-biosphere interactions. She received her Sc.D. in Meteorology from the Massachusetts Institute of Technology. She was one of the authors of the National Academy of Sciences report on climate change science in 2001 that led to President Bush's Rose Garden speech that global warming is a serious problem. Fung is a member of the National Academy of Sciences and a Fellow of the American Geophysical Union and the American Meteorological Society. From 1997 to 2002 she was the Richard and Rhoda Goldman Distinguished Professor in the Physical Sciences at Berkeley, and in 2002 she was the Henry W. Kendall Memorial Lecturer in Global Change Science at MIT.

Amicus Peter Huybers is a Professor of Earth and Planetary Sciences at Harvard University. He focuses on understanding why and how Earth's

climate changes, particularly with respect to glaciation, ocean circulation, and surface temperature. He graduated from the United States Military Academy at West Point, subsequently serving in the U.S. Army before receiving a Ph.D. from the Massachusetts Institute of Technology. He is a recipient of the James B. Macelwane Medal from the American Geophysical Union and a MacArthur Foundation Fellowship.

Amicus Ralph F. Keeling is a Professor at Scripps Institute of Oceanography at the University of California, San Diego whose research interests include climate change, changes in atmospheric composition, ocean biogeochemistry, and carbon cycling. He was the first to demonstrate that the oxygen concentration of the global atmosphere is decreasing due to the burning of fossil-fuels and has directed a program to track this decrease since 1989. Since 2005 he has also directed the Scripps CO_2 program which sustains the iconic record of carbon dioxide at Mauna Loa and other sites, begun by his father, Charles D. Keeling. He is engaged in ongoing research to refine estimates of sources and sinks of carbon dioxide using atmospheric measurements. He has given keynote addresses to the American Geophysical Union in 2004, and to the G8 Legislators and Business Leaders Climate Change Forum in London in 2005. In 1997, he received the Rosenstiel Award for his work on atmospheric oxygen.

Amicus Mario J. Molina is a Professor of Chemistry and Biochemistry at the University of California, San Diego and the Center for Atmospheric

Sciences at the Scripps Institution of Oceanography, as well as Director of the Mario Molina Center for Energy and Environment in Mexico City. He received the Nobel Prize in Chemistry in 1995 for his role in elucidating the threat to the Earth's ozone layer of chlorofluorocarbon gases. The only Mexican-born Nobel laureate in science, he served on the President's Council of Advisors for Science and Technology (PCAST) for both Clinton terms and currently serves on PCAST for President Obama. He is a member of both the National Academy of Sciences and the Institute of Medicine.

Amicus Raymond T. Pierrehumbert is the Louis Block Professor in Geophysical Sciences at the University of Chicago. He received a Ph.D. from the Massachusetts Institute of Technology in the area of theoretical fluid mechanics. He is a Fellow of the American Geophysical Union and was named Chevalier de l'Ordre des Palmes Academiques by the Republic of France. He has published extensively on theory and modeling of Earth and planetary climate, including most recently the textbook *Principles of Planetary Climate*. He was also a Lead Author on the IPCC Third Assessment report, and a co-author of the National Research Council Report, Climate Stabilization Targets.

Amicus Daniel P. Schrag is the Sturgis Hooper Professor of Geology and Professor of Environmental Science and Engineering at Harvard University and the Director of the Harvard University Center for the Environment. He studies climate change over the

broadest range of Earth's history, including work on a broad set of questions about the early climate history of the Earth, and about how environmental conditions affected the evolution of life in the past. He is the author or co-author of over 100 journal articles, including research on new technological approaches to mitigating future climate change. He was the recipient of the James B. Macelwane Medal from the American Geophysical Union and was named a MacArthur Foundation Fellow in 2000. He currently serves on President Obama's Council of Advisors on Science and Technology.

Amicus Steven C. Wofsy is the Abbott Lawrence Rotch Professor of Atmospheric and Environmental Chemistry at Harvard University in the School of Engineering and Applied Science and the Department of Earth and Planetary Sciences. He studied chemistry at the University of Chicago and Harvard. His work has focused on changes in the composition of the atmosphere, using theory and modeling as well as field and laboratory studies. His current research emphasizes the effects of terrestrial ecosystems on the global carbon cycle, and the impacts of climate change and land use on ecosystems and atmospheric composition, including measurements of ecosystem carbon fluxes and forest responses to climate variations. He was the recipient of the James B. Macelwane Medal from the American Geophysical Union and NASA's Distinguished Public Service Medal.

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief reviews the key scientific facts and shows why, under established law, plaintiffs have standing to seek reductions in carbon dioxide emissions from the petitioners' power plants for their contribution to global warming. Tracking the traditional legal enquiry to determine standing, we discuss the current and future harm to plaintiffs associated with climate change; the traceability of that injury to carbon dioxide emissions, including those of petitioners; and the extent to which reducing petitioners' carbon dioxide emissions will reduce the magnitude and severity of the future harms.

As the scientific studies discussed below demonstrate, human activities are causing a rise in the carbon dioxide concentration in the atmosphere that is already causing injuries to the plaintiffs. These injuries will continue to accumulate over the next century and beyond because of the long lifetime of carbon dioxide in the ocean-atmosphere system, and because of inertia in the climate system that can delay some of the most serious impacts. If action is not taken to curtail greenhouse gas emissions, today's children will face a world that is dramatically different from the Earth as it exists today. Sea level will be much higher; agricultural productivity will be much lower; and many other impacts will occur because of higher average temperature.

It is therefore virtually certain that carbon dioxide emissions from many sources, including petitioners' power plants, are already causing harm to the plaintiffs, and will cause increasing harm in the future unless measures are taken soon. The only reasonable option to abate climate change is to lower the net inputs of greenhouse gases, chiefly carbon dioxide, into the atmosphere.

These issues are not new to the Court. Four years ago, in *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Court dealt with the harms caused by global warming in its inquiry into standing. The Court explained that the framework for establishing standing in the climate change context is no different than in any other: it requires only that a litigant "demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury." *Id.* at 517. Applying this framework, the Court concluded that the *Massachusetts* plaintiffs had demonstrated that they faced significant and real risks of harm from unchecked greenhouse gas emissions from new vehicles and that reducing such emissions would in turn reduce their risks of harm, even though new vehicle emissions constitute only a fraction of total global emissions. *Id.* at 526. The Court therefore found that the plaintiffs comfortably satisfied the familiar standing requirements. *Id.*

In reaching this conclusion, the Court had no difficulty finding that "[t]he harms associated with climate change are serious and well recognized." *Id.* at 521. As alleged, those harms included "retreat of mountain glaciers, reduction in snow-cover extent, the earlier spring melting of ice on rivers and lakes, and the accelerated rate of rise of sea levels." *Id.* As explained below, in the four years since this Court decided *Massachusetts*, the scientific data have grown stronger and confirmed that, absent intervention, these injuries will occur.

We show that if this Court applies the same legal standard as it applied in *Massachusetts*, it should reach the same result with regard to standing. This follows because: (1) the injuries alleged by plaintiffs here, which are similar to those alleged in *Massachusetts*, have already begun to occur and will become more severe over the next century; (2) emissions of greenhouse gases, mainly carbon dioxide emitted by petitioners and others, are directly responsible for these injuries; and (3) the reduction in total carbon emissions achieved by the specific relief sought here could result in more significant reductions in domestic carbon dioxide emissions than will be achieved by the transportation rule enabled by *Massachusetts*. In turn, those reductions will reduce the rate and severity of future injuries to the plaintiffs to a similar or greater extent than the transportation rule. Thus, if this Court applies the same standing requirements it applied in *Massachusetts*, it should reach the same

result and find that plaintiffs have standing to advance their claims.

ARGUMENT

I. PLAINTIFFS' ALLEGED INJURIES ARE OCCURRING AND WILL BECOME MORE SEVERE.

A. Average Global Temperatures Have Increased and Will Continue to Increase.

Global average temperature has been rising since the late 19th century, and most steeply since the mid 1970s. The temperature rise is not uniform; some areas have warmed more quickly than others, and a few locations such as Antarctica may have experienced slight cooling, but the vast majority of regions have experienced overall warming.[3] The calendar year 2010 was tied with 2005 for the warmest year on record.[4] The nine hottest years in the historical record for which there exist good instrumental measurements (going back to 1850) have all occurred since 1997.[5] A wide range of different climate models

---

[3] Hansen, J., Ruedy, R., Sato, M. and Lo, K., *2010: Global surface temperature change,* Reviews of Geophysics, 48, RG4004, 2010.

[4] NASA Goddard Institute for Space Studies, Research News, *Despite Subtle Differences, Global Temperature Records in Close Agreement*, Jan. 13, 2011, *available at* http://www.giss.nasa.gov/research/news/20110113/

[5] Hansen, *et al.*, 2010.

calibrated on the historical temperature record predict that global average temperatures will rise as much as 9°F by 2100 if no actions are taken to reduce carbon dioxide emissions.[6] As an indication that a temperature change on this scale can have enormous consequences, this increase is equivalent to the difference in the global average temperature between today and the last glacial maximum, 20,000 years ago, when half of North America was covered with ice.[7] Importantly, the transition from the glacial climate to the pre-industrial climate occurred over 10,000 years, allowing plants, animals and human societies to adapt.[8] The rate of change experienced in the last few decades is 100 times faster, making adaptation much more difficult. The rate of change projected for the next 100 years is faster still and

---

[6] Meehl, G.A., *et al.*, *The WCRP CMIP3 multimodel dataset – a new era in climate change research*, Bulletin of the American Meteorological Society, 88, 1383-1394, 2007; Stainforth, D., *et al.*, *Uncertainty in predictions of the climate response to rising levels of greenhouse gases*, Nature, 433, 403-406, 2005.

[7] Schneider von Deimling, T., *et al.*, *How cold was the Last Glacial Maximum?* Geophysical Research Letters, 33, L14709, 2006; Ballantyne, A.P., Lavine, M., Crowley, T.J., Liu, J. and Baker, P.B., *Metaanalysis of tropical surface temperatures during the Last Glacial Maximum*, Geophysical Research Letters, 32, L05712, 2005; Otto-Bliesner, B.L., *et al.*, *A comparison of PMIP2 model simulations and the MARGO proxy reconstruction for tropical sea surface temperatures at last glacial maximum*, Climate Dynamics, 32, 799-815, 2009.

[8] Prentice, I.C., Bartlein, P.J. and Webb, III, T., *Vegetation and climate change in eastern North America since the last glacial maximum*, Ecology, 72, 2038-2056, 1991.

beyond anything that human civilization has experienced.[9] The warmer temperatures that are observed now, as well as those predicted for the next century and beyond, will have a wide range of direct and indirect impacts on the citizens of the plaintiff States.

As the Court reviewed many of the impacts of climate change in the *Massachusetts* decision, we describe only a small number of examples of present and future injuries resulting from higher average temperatures, focusing also on new information developed since that case. We discuss the cause of those injuries in Section II.

B. Sea Level Is Rising and Will Continue to Rise, Which Will Lead to Increased Flooding of Coastal Regions.

Global warming causes sea level to rise because seawater expands as it warms, and because the melting of ice sheets on land, in particular on Greenland and Antarctica, adds to the volume of water in the oceans. Over the last two decades, global average sea level has been rising at a rate of 0.12 inches per year (3 mm per year), as measured by satellites and tide gauges.[10] Models predict this trend will continue

---

[9] Meehl, G.A., *et al.*, *The WCRP CMIP3 multimodel dataset – a new era in climate change research*, Bulletin of the American Meteorological Society, 88, 1383-1394, 2007.

[10] Nicholls, R.J. and Cazenave, A., *Sea-level Rise and Its Impact on Coastal Zones*, Science, 328, 1517-1520, 2010.

and produce at least 10 to 20 inches of additional sea level rise by 2100,[11] and perhaps much more,[12] as discussed below. Higher sea level increases the damages due to flooding during large storms.[13] The increase in flooding is also exacerbated by the tendency for warmer temperatures to increase the rainfall intensity of storms.[14] Connecticut, New York, Rhode Island, and California, four of the plaintiffs, are already experiencing the erosion of coastal land and expensive coastal management challenges due to storm damage made worse by rising sea level. As sea level continues to rise, these damages will get worse

---

[11] IPCC, *Climate Change 2007: The Physical Science Basis*, Cambridge Univ. Press, 2007.

[12] Pfeffer, W.T., Harper, J.T. and O'Neel, S., *Kinematic Constraints on Glacier Contributions to 21st-century Sea-level Rise*, Science, 321, 1340, 2008; Rahmstorf, S., *A semi-empirical approach to projecting future sea-level rise*, Science, 315, 368-370, 2007.

[13] Zhang, K.Q., Douglas, B.C. and Leatherman, S.P., *2000: Twentieth-century storm activity along the U.S. east coast*, Journal of Climate, 13, 1748-1761; Zhang, K.Q., Douglas, B.C. and Leatherman, S.P., *2004: Global warming and coastal erosion*, Climatic Change, 64, 41-58; Wu, S.Y., Najjar, R. and Siewert, J., *Potential impacts of sea-level rise on the Mid-and Upper-Atlantic Region of the United States*, Climactic Change, 95, 121-138, 2009.

[14] Trenberth, K.E., *Conceptual framework for changes of extremes of the hydrological cycle with climate change*, Climatic Change, 42, 327-339, 1999; Pardeep, P., *et al.*, *Anthropogenic greenhouse gas contribution to flood risk in England and Wales in autumn 2000*, Nature, 470, 382-385, 2011.

and worse as flooding affects a larger fraction of the United States coastline.[15]

C. Agricultural Production Will Decline Due to Increased Summer Temperatures.

Warmer summer temperatures cause grain harvests to decline. For example, corn yields increase slightly up to daily temperatures of 85°F, but above this threshold, hotter conditions sharply reduce yields. A single day at 95°F diminishes the entire year's corn harvest by 3% on average.[16] Such heat-driven declines in harvests during summer heat waves around the world have already occurred. In 2003, a summer heat wave in Western Europe with temperatures 6°F above average caused a 30%

---

[15] Ashton, A.D., Donnelly, J.P. and Evans, R.L., *A discussion of the potential impacts of climate change on the shorelines of the Northeastern USA*, Mitigation and Adaptation Strategies for Global Change, 13, 719-743, 2008; Cooper, M.J.P., Beevers, M.D. and Oppenheimer, M., *The potential impacts of sea level rise on the coastal region of New Jersey, USA*, Climatic Change, 90, 475-492, 2008; FitzGerald, D.M., *et al.*, *Coastal impacts due to sea-level rise,* Annual Review of Earth and Planetary Sciences, 36, 601, 2008.

[16] Schlenker, W. and Roberts, M.J., *Nonlinear temperature effects indicate severe damages to U.S. crop yields under climate change*, Proceedings of the National Academy of Sciences, 106, 15594, 2009.

reduction in grain yield.[17] This extreme weather is likely to be the average summer climate of Western Europe by the end of the century.[18] Similarly, the heat wave around Moscow in 2010 reduced the Russian wheat harvest last year by 40% and prompted Russia to ban grain exports.[19] A comparable heat wave located in the Midwest would cause a serious reduction in corn harvests, including in Iowa, a plaintiff here. The effect of warmer temperatures is not limited to basic agricultural commodities, but extends also to all manner of economically important crops. For example, future warming is likely to degrade the quality of wine production in nearly all premium wine regions, including the Napa and Sonoma valleys of plaintiff California.[20]

---

[17] Battisti, D.S. and Naylor, R.L., *Historical Warnings of Future Food Insecurity with Unprecedented Seasonal Heat*, Science, 323, 240-244, 2009.

[18] *Id.*

[19] Wegren, S.K., *Food security and Russia's 2010 drought*, Eurasian Geography and Economics, 52, 140-156, 2011.

[20] White, M.A., *et al.*, *Extreme heat reduces and shifts United States premium wine production in the 21st century*, Proceedings of the National Academy of Sciences, 103, 11217, 2006; Lobell, D.B., *et al.*, *Impacts of future climate change on California perennial crop yields: Model projections with climate and crop uncertainties*, Agricultural and Forest Meteorology, 141, 208-218, 2006.

D. Natural Water Storage Has Decreased and Will Decrease Further.

Warmer temperatures are already causing seasonal and spatial shifts in water resources with enormous economic implications. Most western states, including California, rely on the accumulation of snow in their mountain regions to serve as a natural reservoir, holding and releasing water for use in the dry summer months. Warmer temperatures are already causing a higher fraction of wintertime precipitation in the mountains to fall as rain instead of snow, and causing mountain snow packs to melt earlier in the year.[21] This causes more intense spring runoff, leading to springtime flooding in locations such as the Columbia River basin and Sacramento delta, and to water shortages in late summer.[22] As

---

[21] Mote, P.W., *Climate-Driven Variability and Trends in Mountain Snowpack in Western North America*, Journal of Climate, 19, 6209-6220, 2006; Hamlet, A.F., Mote, P.W., Clark, M.P. and Lettenmaier, D.P., *Twentieth-Century Trends in Runoff, Evapotranspiration, and Soil Moisture in the Western United States*, Journal of Climate, 20, 1468-1486, 2007; Adam, J.C., Hamlet, A.F. and Lettenmaier, D.P., *Implications of global climate change for snowmelt hydrology in the twenty-first century*, Hydrological Processes, 23, 962-972, 2009; Regonda, S.K., *et al.*, *2005: Seasonal cycle shifts in hydroclimatology over the western United States*, Journal of Climate, 18, 372-384, 2005; McCabe, G. and Clark, M.P., *Trends and variability in snowmelt runoff in the western United States*, Journal of Hydrometeorology, 6, 476-482, 2005.

[22] Lee, S.Y., *et al.*, *Optimized flood control in the Columbia River Basin for a global warming scenario*, Journal of Water Resources Planning and Management, 135, 440-451, 2009.

this trend continues, mountain snowmelt will be a less and less reliable source of water for late summer agriculture, imposing large economic costs on agricultural regions of the Western United States, including the Central Valley of California.[23] The natural reservoir currently provided by mountain snow is far too large to be replaced by building artificial reservoirs. Scarcer water resources will affect not only agriculture but also industry, for example, hampering operations of power generation facilities that rely on river water for steam turbines and for cooling purposes.

E. Ecosystems Are Changing.

Warmer temperatures are causing injuries to the natural ecosystems across the United States, transforming them at extraordinary rates and scales. Critical ecosystems services provided to the plaintiff States are at risk.[24] A recent National Research Council (NRC) report[25] reviewed the multitude of

---

[23] Vicuna, S., *et al.*, *The sensitivity of California water resources to climate change scenarios*, Journal of the American Water Resources Association, 43, 482-498, 2007; Young, C.A., *et al.*, *Modeling the Hydrology of Climate Change in California's Sierra Nevada for Subwatershed Scale Adaptation*, Journal of the American Water Resources Association, 45, 1409-1423, 2009.

[24] Parmesan, C., *Ecological and evolutionary responses to recent climate change*, Annual Review of Ecology, Evolution, and Systematics, 37, 627-669, 2006.

[25] Committee on Ecological Impacts of Climate Change, *Ecological Impacts of Climate Change*, National Research Council, 70, 2009.

ecological impacts of climate change in the United States, including shifts in species' geographic ranges as they attempt to migrate to colder regions, and seasonal shifts such as changes in when many plants bloom or in when birds, butterflies, and other animals migrate. As individual species adapt differently to local environmental changes, there will be a range of indirect impacts caused by disruptions in the interactions between them. For example, a change in when plants bloom may deprive animals of critical food supplies. Conversely, a change in the timing of insect or bird migrations may deprive blooming plants of critical pollinators. These changes can affect population dynamics, and even drive extinctions.[26] As warming proceeds over the next few decades, additional extinctions are expected to occur as plants and animals are unable to adapt to such rapid climate changes.[27]

F. IPCC Estimates of Future Injuries Are Overly Conservative for Risk Assessment.

The injuries described above have already begun to occur and are likely to worsen over the course of the next century. The Intergovernmental Panel on Climate Change (IPCC) is the leading international

---

[26] *Id.*

[27] Millennium Ecosystem Assessment, *Ecosystems and Human Well-being: General Synthesis*, Washington, D.C., 2005.

scientific body for the assessment of climate change. It was established by the United Nations Environment Programme and the World Meteorological Organization to provide the world with a scientific view on the current state of knowledge in climate change and its potential environmental and socio-economic impacts.[28] In its report of 2007,[29] the IPCC reviewed many additional climate change impacts in great detail.[30] The IPCC assessment of climate change impacts, used by the Court in *Massachusetts,* is scientifically accurate. However, where there is a range of potential outcomes, the IPCC report often errs on the conservative side, tending to underestimate potential damages. In part, this is because the IPCC works by consensus, which means that controversial subjects are often avoided.

A good example of how the IPCC provides a conservative assessment of future climate risks is the 2007 IPCC report's projection of sea level rise for 2100. The authors of the chapter on future sea level rise chose to exclude from their projections the possibility that melting of ice from glaciers on Greenland or Antarctica might accelerate as the Arctic warmed because evidence was not considered certain enough

---

[28] Solomon, S., *et al.*, IPCC, *Climate Change 2007: The physical science basis*, Contribution of working group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, 2007.

[29] *Id.*

[30] *Id.*

to provide an accurate estimate.[31] By assuming that the current rate of ice loss, measured from satellite monitoring of the Earth's gravitational field,[32] would remain constant even as global average temperature rises, the authors provided only a lower bound on how much sea level will rise.[33] More recent, peer-reviewed scientific publications explore a more reasonable assumption that the ice sheets will melt more quickly as temperature warms and will track the observed historical relationship between global average temperature and sea level.[34] Such an assumption yields an estimate of sea level rise of 39 to 70 inches (1 to 1.8 meters) by 2100, more than *three times higher* than the range reported by the IPCC.[35]

G. Risks of Catastrophic Consequences Cannot be Neglected.

In addition to the injuries described above, there is a possibility that climate change could result in

---

[31] *Id.*

[32] Cazenave, A., *et al.*, *Sea level budget over 2003-2008: A reevaluation from GRACE space gravimetry, satellite altimetry and Argo*, Global and Planetary Change, 65, 83-88, 2009; Velicogna, I., *Increasing rates of ice mass loss from the Greenland and Antarctic ice sheets revealed by GRACE*, Geophysical Research Letters, 36, L19503, 2009.

[33] Solomon, *et al.*, 2007.

[34] Rahmstorf, S., *A semi-empirical approach to projecting future sea-level rise*, Science, 315, 368, 2007.

[35] *Id.*

even more catastrophic impacts. These impacts are inherently uncertain because they have never been observed, so they are often ignored in scientific assessments when the process requires higher confidence, even though they do pose substantial risks to human society at a global scale. For example, scientists measure the Earth's climate sensitivity – how much the Earth warms for a given increase in greenhouse gas concentration – by historical observations of global temperature and carbon dioxide concentrations over the past century. The exact number for climate sensitivity remains uncertain; models used to predict future warming yield a range of values from 2.7°F to 8.1°F per doubling of carbon dioxide levels. However, it is possible that the sensitivity is as much as 20°F per doubling of carbon dioxide.[36] If this were true, the injuries discussed above could be far more extreme and occur much more rapidly.

Another effect that is hard to predict with precision is the probability of the collapse of ice sheets in Antarctica. For example, the Ross Ice Shelf is an enormous piece of ice roughly 3000 feet thick that currently floats over the Ross Sea, restraining some of the glaciers on West and East Antarctica from

---

[36] Roe, G.H. and Baker, M.B., *Why is Climate Sensitivity so Unpredictable?*, Science, 318, 629, 2007; Stainforth, D., *et al.*, *Uncertainty in predictions of the climate response to rising levels of greenhouse gases*, Nature, 433(7024):403-406, 2005; Knutti, R. and Hegerl, G.C., *The equilibrium sensitivity of the Earth's temperature to radiation changes*, Nature Geoscience, 1, 735-743, 2008.

flowing directly into the ocean.[37] If the Ross Ice Shelf were to collapse, the seaward movement of these glaciers would accelerate, greatly increasing the rate of sea level rise beyond what is already predicted,[38] causing serious coastal damage. This is often treated as a low probability event, when actually its probability is highly uncertain. It is possible that the Ross Ice Shelf is already disintegrating – there is currently insufficient knowledge to make an accurate determination.

In addition, oceans and ice sheets have not yet adjusted to the current greenhouse gas concentrations discussed below. Even if global greenhouse gas emissions were stopped completely, the Earth would continue to warm for several decades, particularly over the oceans.[39] Ice sheets would continue to melt; sea level would continue to rise. Thus, the plaintiffs have not yet experienced the full impact of the past actions of the petitioners. More injuries are inevitable, but their severity and timing will be affected by the ongoing emissions of greenhouse gases.

---

[37] Alley, R.B., Clark, P.U., Huybrechts, P. and Joughin, I., *Ice-sheet and Sea-level Changes*, Science, 310(5747):456, 2005.

[38] Overpeck, J.T., *et al.*, *Paleoclimatic Evidence for Future Ice-sheet Instability and Rapid Sea-level Rise*, Science, 311(5768):1747, 2006.

[39] Winton, M., Takahashi, K. and Held, I.M., *Importance of ocean heat uptake efficacy to transient climate change*, Journal of Climate, 23(9):2333-2344, 2010.

II. IT IS A SCIENTIFIC CERTAINTY THAT ATMOSPHERIC CARBON DIOXIDE IS RISING, THAT THIS RISE IS CAUSED BY HUMAN ACTIVITIES TO WHICH PETITIONERS CONTRIBUTE, AND THAT THIS RISE IS CAUSING THE CLIMATE TO WARM.

A. Combustion of Fossil Fuels Is Causing Atmospheric Carbon Dioxide to Increase to Levels Unprecedented for Millions of Years.

The concentration of atmospheric carbon dioxide is rising, and it is certain that the rise is caused by human activities. The concentration at the end of 2010 (390 parts per million or ppm) is higher than it has been for at least 800,000 years, based on direct observations of carbon dioxide in air bubbles trapped in ice cores.[40] There are no direct observations older than 800,000 years, but indirect methods of reconstructing ancient carbon dioxide concentrations indicate that the levels reached by mid-century if society does not take action to reduce carbon dioxide emissions (roughly 500 ppm) are higher than have existed for tens of millions of years.[41]

---

[40] Siegenthaler, U., *et al.*, *Stable Carbon Cycle-Climate Relationship During the Late Pleistocene*, Science, 310, 1313-1317, 2005; Lüthi, D., *et al.*, *High-resolution carbon dioxide concentration record 650,000-800,000 years before present*, Nature, 453, 379-382, 2008.

[41] Pagani, M., *et al.*, *Marked Change in Atmospheric Carbon Dioxide Concentrations During the Oligocene*, Science, 309, 600-603. 2005.

Before the industrial revolution, the carbon cycle had been essentially in balance for thousands of years, with atmospheric carbon dioxide remaining constant between 260 and 280 ppm. As human society accelerated its use of fossil fuels and cut down forests for agricultural activities, the carbon dioxide concentration started to rise, implicating human activities as the cause. We are certain that combustion of fossil fuels is responsible for most of this rise, as the isotopes of carbon (both carbon-13 and carbon-14) in carbon dioxide in the atmosphere provide a clear fingerprint of fossil fuel as the source.[42]

B. Future Emissions Will Have a Greater Impact on Atmospheric Concentrations of Carbon Dioxide.

We are not yet experiencing the full impact of past and current carbon dioxide emissions. To date, the oceans and the terrestrial biosphere have provided a buffer by absorbing roughly 55% of the carbon dioxide released each year.[43] This buffer has slowed the increase in atmospheric concentrations of carbon dioxide, but this buffering effect may not persist in

---

[42] Tans, P.P. and Wallace, D.W.R., *Carbon cycle research after Kyoto*, Tellus B, 51, 562-571, 1999.

[43] Manning, A.C. and Keeling, R.F., *Global oceanic and land biotic carbon sinks from the Scripps atmospheric oxygen flask sampling network*, Tellus Series B, 58, 95-116, 2006; Le Quere, C., Raupach, M.R., Canadell, J.G., Marland, G., *et al.*, *Trends in the sources and sinks of carbon dioxide*, Nature Geosciences, 2, 831-836, 2009.

the future. As carbon dioxide emissions continue, studies suggest that a smaller fraction of carbon dioxide will be taken up by the ocean and terrestrial biosphere.[44] This means that the continued emissions of the petitioners will have a larger impact on concentrations of atmospheric carbon dioxide in the future.

C. Carbon Dioxide Remains in the Atmosphere for a Very Long Time.

The carbon dioxide from human emissions that remains in the atmosphere will endure for a very long time. Even if human society stopped carbon dioxide emissions altogether by the end of this century, more than 20% of cumulative carbon dioxide emissions will still be in the atmosphere 1,000 years from now.[45] In 10,000 years, at least 10% of cumulative emissions will remain and maybe as much as 25%.[46] The last remnants of anthropogenic carbon dioxide emissions will stay in the atmosphere for more than 100,000 years, slowly drawn down by silicate weathering that converts the carbon dioxide to calcium carbonate, as

---

[44] Denman, K.L., *et al.*, *Couplings between Changes in the Climate System and Biogeochemistry, In Climate Change: The Physical Basis of Climate Change*, Contribution of Working Group I to the Fourth Assessment Report of the IPCC, 500-587, Cambridge Univ. Press, 2007.

[45] Archer, D. and Brovkin, V., *The millennial atmospheric lifetime of anthropogenic CO2*, Climatic Change, 90, 283-297, 2008.

[46] *Id.*

well as slow burial of organic carbon on the ocean floor.[47] Thus, the continued actions of the petitioners will affect the atmosphere for many thousands of years into the future.

D. The Increasing Concentration of Carbon Dioxide in the Atmosphere Is Causing Global Warming.

There is no scientific dispute that adding carbon dioxide to the atmosphere causes global warming. Carbon dioxide is a greenhouse gas, which means that it absorbs outgoing infrared radiation (i.e., heat) in the atmosphere but allows the Sun's visible light to penetrate, causing a rise in Earth's surface temperature. The basic physics of the greenhouse effect and the relationship between carbon dioxide and climate was worked out by Arrhenius in the late 19th century, drawing on previous work by Fourier and others.[48] Atmospheric research over the 20th century has served to confirm Arrhenius's basic conclusions.[49] Our neighboring planet, Venus, which has a surface temperature of 860°F, is hotter than the Earth not because it is closer to the sun (it has highly reflective clouds that reflect most incoming sunlight) but

---

[47] *Id.*

[48] Pierrehumbert, R.T., *Infrared radiation and planetary temperature*, Physics Today, January 2011.

[49] *Id.*

because of its thick atmosphere composed almost entirely of carbon dioxide (96.5%).[50]

This Court's decision in *Massachusetts* correctly concluded that carbon dioxide emissions cause climate change. 549 U.S. at 523. The Court stated that "[b]y any standard," this country's motor-vehicle emissions "make a meaningful contribution to greenhouse gas concentrations and hence, . . . to global warming." 549 U.S. at 525.

The clear causal connection between carbon dioxide and surface temperature contradicts the central claim of the *amici* Southeastern Legal Foundation, which incorrectly claims that "the extent to which anthropogenic greenhouse gases cause global warming is substantially uncertain."[51] There is no scientific dispute that anthropogenic greenhouse gases cause global warming. What is uncertain is 1) exactly how much warming will occur in response to a particular amount of carbon dioxide released by human activities and 2) precisely how that will impact other aspects of the Earth's climate system. These uncertainties exist because it is difficult to predict some feedbacks in the climate system, such as cloud physics or water vapor effects that can amplify the direct effects of higher greenhouse gas concentrations, as

---

[50] de Bergh, C., *et al.*, *The composition of the atmosphere of Venus below 100 km altitude: An overview*, Planetary and Space Science, 54, 1389-1397, 2006.

[51] Br. of Southeastern Legal Foundation at 20-37.

well as feedbacks in the carbon cycle that can add additional greenhouse gases to the atmosphere.

The argument from the *amici* that uncertainty weakens the claims of the plaintiffs is incorrect. In fact, the scientific uncertainty about climate change primarily concerns the risks of the most extreme impacts. We know the probabilities of these impacts are not zero and the consequences would be devastating. The danger is that these impacts could start to occur before global carbon dioxide emissions are sufficiently reduced. Therefore, the scientific uncertainty that exists regarding extreme impacts only strengthens the arguments for reducing emissions.

E. The Largest Uncertainties Relate to Impacts that Are Worse than Current Projections.

Because the concentration of carbon dioxide is already higher today than it has been at any other time in human history and is increasing, the situation is particularly difficult to model. There is some evidence that most climate models underestimate climate sensitivity in part because they do not take into consideration certain feedbacks that operate only during higher levels of atmospheric carbon dioxide. One example is the hypothesis that cloud feedbacks, either in the stratosphere[52] or in the polar

---

[52] Kirk-Davidoff, D.B., Schrag, D.P. and Anderson, J.G., *On the feedback of stratospheric clouds on polar climate*, Geophysical Research Letters, 10, 1029-1032, 2002.

troposphere,[53] amplify greenhouse warming at the poles and over continental interiors when greenhouse gas concentrations are high. These feedbacks are not included in climate models simply because they have not yet been observed. Yet geological evidence from warm climates in Earth history suggests that such feedbacks must exist.[54] In contrast, climate feedbacks that mute the impact of carbon dioxide on temperature have been proposed,[55] but have been refuted by theory and observations[56] and are not supported by the geologic record. Indeed, the geologic history of climate change provides compelling evidence that climate models underestimate the effects of carbon dioxide emissions,[57] making the claims of the plaintiffs here even more urgent.

---

[53] Abbot, D.S. and Tziperman, E., *A High Latitude Convective Cloud Feedback and Equable Climates*, Quarterly Journal of the Royal Meteorological Society, 134, 165-185, 2008.

[54] Observations of amplified warming, particularly in continental interiors support the existence of some additional amplification beyond what exists in current climate models. *E.g.*, Wing, S. and Greenwood, D.L., *Fossils and Fossils Climate: The Case for Equable Continental Interiors in the Eocene*, Royal Society of London Philosophical Transactions, 341, 243-252, 1993.

[55] Lindzen, R.S., Chou, M.D. and Hou, A.Y., *Does the earth have an adaptive infrared iris?*, Bulletin of the American Meteorological Society, 82, 417-432, 2001.

[56] Hartmann, D.L. and Michelsen, M.L., *No Evidence for Iris*, Bulletin of the American Meteorological Society, 83, 249-254, 2002.

[57] Schrag, D.P. and Alley, R.B., *Ancient Lessons for our Future Climate*, Science, 306, 821-822, 2004.

There are other feedbacks that affect the climate system by causing the release of additional greenhouse gases to the atmosphere, amplifying the impact of carbon dioxide originally released by human activities. One example is warming of the Arctic that allows organic carbon stored in arctic soils to be released as either carbon dioxide or methane (an even more potent greenhouse gas).[58] Another example is the possible drying of tropical rainforests, which would release the carbon stored in these massive ecosystems to the atmosphere.[59] In both cases, the amount and timing of additional carbon releases are uncertain, and so these feedbacks are generally not included in predictions of future warming in the IPCC. If these feedbacks do occur, the injuries to the plaintiffs will be substantially more serious than those described above.

F. Petitioners' Emissions Are Significant.

Petitioners currently emit approximately 2.5% of global carbon dioxide. In *Massachusetts*, this Court found that, on an annualized basis, the transportation sector in the United States emits approximately 6% of global carbon dioxide. 549 U.S. at 524. Neither of these emitters are *de minimis*, like individual

---

[58] Zimov, S.A., Schuur, E.A.G. and Chapin, III, F.S., *Permafrost and the Global Carbon Budget*, Science, 312, 1612-1613, 2006.

[59] Cox, P.M., *et al.*, *Amazonian forest dieback under climate-carbon cycle projections for the 21st century*, Theoretical and Applied Climatology, 78, 137-156, 2004.

houses.[60] Instead, both classes of emitters – the vehicles at issue in *Massachusetts* and the petitioners' power plants here – are responsible for substantial aggregations of greenhouse gas emissions. As explained below, reducing petitioners' annual carbon dioxide emissions by as little as 1.5% annually would reduce emissions by an amount equivalent to that produced by the transportation rule enabled by *Massachusetts*. There is, therefore, no principled distinction between the levels of contribution and reduction in this case and those in *Massachusetts*. Applying the same standing requirements to this case that this Court found the *Massachusetts* plaintiffs met should yield the same result.

III. REDUCING PETITIONERS' CARBON EMISSIONS WOULD SIGNIFICANTLY SLOW AND REDUCE GLOBAL WARMING.

A. EPA Has Shown that the Reductions Achieved by the Domestic Transportation Rules Would be Significant.

The Environmental Protection Agency (EPA), following *Massachusetts*, has concluded that the rules

---

[60] *Amici* Southeastern Legal Foundation argue that owners or operators of individual buildings could be sued under the legal theory advanced by plaintiffs. This fails to recognize that most carbon dioxide emissions from buildings (aside from the relatively low emissions from natural gas or oil heating systems) actually come from the power plants that generate the electricity used in the buildings, including those power plants operated by the petitioners, and not the buildings themselves.

proposed for domestic transportation will reduce atmospheric carbon dioxide concentration, global mean surface temperatures, and sea level rise.[61] In reaching this conclusion, EPA rejected arguments that uncertainties in climate models meant that projected results were not meaningful. Instead, EPA found that "the reductions . . . are quantifiable . . . across a range of climate sensitivities."[62]

As discussed above, these conclusions represent only a lower bound of the benefits of emissions reductions because they do not take account of the full range of possible climate impacts based on several feedbacks that amplify the climate's sensitivity to increased carbon dioxide levels. *See* Sections I.F, I.G & II.E *supra*.

B. Emissions Reductions from This Case Could be Greater than from the EPA Rules Regarding Domestic Transportation.

Petitioners' total emissions are approximately 650 million short tons of carbon dioxide per year or 590 million metric tons. This accounted for approximately 10% of all United States carbon dioxide

---

[61] *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule*, 75 Fed. Reg. 25,324, 25,495 (May 7, 2010).

[62] *Id.*

emissions in 2004.[63] Plaintiffs seek to reduce the defendants' power plant emissions "by a specified percentage each year for at least a decade."[64]

The EPA transportation rules enabled by *Massachusetts* abate carbon dioxide emissions relatively slowly, because it takes time for the vehicle fleet to turn over and the standards only apply to new vehicles.[65] The net reduction in carbon dioxide that will be achieved by the EPA transportation rules amounts to 950 million metric tons over the lifetime of the vehicles sold.[66]

Achieving comparable emissions reductions from the petitioners' power plants would require an annual emissions reduction of only 1.5% per year for 15 years (roughly the average lifetime of cars and trucks in the United States), resulting in a cumulative reduction in emissions of 991 million metric tons. Thus, this case could provide comparable cumulative reductions in emissions and avoidance of climate change impacts relative to the transportation rule enabled by *Massachusetts*.

---

[63] Compl. at ¶ 98.

[64] Compl. at ¶ 49.

[65] The *Massachusetts* court was fully aware of this limitation. Indeed, it was one of the issues cited by one of the dissenters. 549 U.S. at 544.

[66] *Proposed Rulemaking To Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Proposed Rule*, 74 Fed. Reg. 49,454, 49,512 (September 28, 2009).

IV. THE CUMULATIVE EFFECTS OF CARBON EMISSIONS CREATE A PERILOUS FUTURE.

Finally, it is important that this Court understand the unique challenge of addressing climate change that comes from the scale of the problem, as well as the long response time of the Earth's climate system. We can think of our situation as sitting at the helm of a huge supertanker. Because of the long lifetime of carbon dioxide, the long response times of oceans and ice sheets, as well as the long time required to change energy infrastructure, our vessel has enormous momentum; it takes a long time to slow down or adjust course. The science of climate change shows that the planet is headed for a shipwreck. There is no uncertainty in the cause of that wreck, but we don't know whether the damage will merely cause a severe oil spill, or destroy our ship entirely. The plaintiffs are demanding that the petitioners start to reduce the throttle to minimize their injuries. We support this demand, because we believe that evasive action is essential.

CONCLUSION

For the foregoing reasons, this Court should hold that plaintiffs have standing to allege that petitioners

should reduce their carbon dioxide emissions to abate the effects of climate change.

Respectfully submitted,

RICHARD WEBSTER
Counsel of Record
JAMES J. HECKER
MATTHEW W.H. WESSLER
PUBLIC JUSTICE, P.C.
1825 K St., NW, Suite 200
Washington, DC 20006
(202) 797-8600
rwebster@publicjustice.net

ARTHUR H. BRYANT
PUBLIC JUSTICE, P.C.
555 12th St., Suite 1620
Oakland, CA 94607
(510) 622-8205

Attorneys for Amici Curiae

AMICUS CURIAE BRIEF

FILED
FEB 7 - 2011
OFFICE OF THE CLERK

No. 10-174

IN THE

Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY, INC., ET AL.,
Petitioners,

v.

STATE OF CONNECTICUT, ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF OF THE ASSOCIATION OF GLOBAL AUTOMAKERS, THE ALLIANCE OF AUTOMOBILE MANUFACTURERS AND THE NATIONAL AUTOMOBILE DEALERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

RAYMOND B. LUDWISZEWSKI
Counsel of Record
CHARLES H. HAAKE
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
rludwiszewski@gibsondunn.com

Counsel for Amici Curiae

138a
37

QUESTIONS ADDRESSED BY *AMICI CURIAE*

Whether a state and private parties may bring a cause of action under the federal common law of nuisance to limit greenhouse gas emissions from certain sources where the Clean Air Act establishes a comprehensive federal program for regulating these emissions.

Whether a nuisance claim seeking to address global climate change, which would require a court to determine whether Defendants' greenhouse gas producing activities were reasonable under the circumstances relative to untold millions of other sources of greenhouse gas emissions throughout the world, is nonjusticiable under the political question doctrine on the grounds that there is a "lack of judicially discoverable and manageable standards for resolving" the dispute, and that the action presents the "impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. ADDRESSING GREENHOUSE GAS EMISSIONS REQUIRES A COORDINATED NATIONAL APPROACH THAT IS THE ANTITHESIS OF AD HOC COMMON LAW NUISANCE CLAIMS. 6

II. *MASSACHUSETTS V. EPA* INSTRUCTS THAT THE CLEAN AIR ACT AUTHORIZES AND PROVIDES FOR A COMPREHENSIVE FEDERAL PROGRAM TO CONTROL GREENHOUSE GAS EMISSIONS THAT DISPLACES FEDERAL COMMON LAW. 13

III. THE POLITICAL QUESTION DOCTRINE DICTATES THAT THE COORDINATED NATIONAL APPROACH TO ADDRESS GREENHOUSE GAS EMISSIONS MUST COME FROM THE ELECTED BRANCHES OF GOVERNMENT. 24

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

CASES

Baker v. Carr,
369 U.S. 186 (1962) 25

California v. Gen. Motors Corp.,
No. C06-05755 MJJ, 2007 WL 2726871
(N.D. Cal. Sept. 17, 2007) ..... passim

City of Milwaukee v. Illinois,
451 U.S. 304 (1981) 5, 14, 23, 27

Diamond v. Chakrabarty,
447 U.S. 303 (1980) 24

Georgia v. Tenn. Copper Co.,
206 U.S. 230 (1907) 25

Illinois v. City of Milwaukee,
406 U.S. 91 (1972) 4, 25

Illinois v. Outboard Marine Corp.,
680 F.2d 473 (7th Cir. 1982) 15

International Paper Co. v. Ouellette,
479 U.S. 481 (1987) 13

Massachusetts v. EPA,
549 U.S. 497 (2007) ..... passim

Mattoon v. City of Pittsfield,
980 F.2d 1 (1st Cir. 1992) 15

Missouri v. Illinois,
180 U.S. 208 (1901) 25

Motor Vehicle Mfrs. Ass'n of the United States, Inc., v. N.Y. Dept. of Env. Conservation,
17 F.3d 521 (2d Cir. 1994) 15

Nat'l Audubon Soc'y v. Dept. of Water & Power of Los Angeles,
869 F.2d 1196 (9th Cir. 1988) 15

Native Vill. of Kivalina v. ExxonMobil Corp.,
663 F. Supp. 2d 863 (N.D. Cal. 2009) 26, 27, 28

North Carolina v. TVA,
615 F.3d 301 (4th Cir. 2010) 13, 24

Owen Equip. & Erection Co. v. Kroger,
437 U.S. 365 (1978) 26

Tex. Indus., Inc. v. Radcliff Materials, Inc.,
451 U.S. 630 (1981) 24

Vieth v. Jubelirer,
541 U.S. 267 (2004) 26

Weiler v. Chatham Forest Prod., Inc.,
392 F.3d 532 (2d Cir. 2004) 15

STATUTES

42 U.S.C. § 7411(a)(3) 16

42 U.S.C. § 7411(b)(1)(A) 16

42 U.S.C. § 7470 22

42 U.S.C. § 7475 16

42 U.S.C. § 7479 16

42 U.S.C. § 7521(a)(1) 16, 17

42 U.S.C. § 7547(a)(1) 16

42 U.S.C. § 7571(a)(2)(A) 16

42 U.S.C. § 7602(z) 16

42 U.S.C. § 7661 22

49 U.S.C. § 32902 10

OTHER AUTHORITIES

Cal. Envtl. Prot. Agency, Air Res. Bd., *Regulations to Control Greenhouse Gas Emissions from Motor Vehicles, Final Statement of Reasons* 229 (2005) 9

California's Memorandum of Law in Opposition to Defendant's Motion to Dismiss, *California v. General Motors*, 2007 WL 2726871 (N.D. Cal. Feb. 1, 2007) 19

California's Request for Continuance of Oral Argument at 3, *California v. General Motors*, No. 07-16908 (9th Cir. Jan. 21, 2009) 21

EPA, Natural Sources and Sinks of Carbon Dioxide http://www.epa.gov/climatechange/emissions/co2_natural.html (last visited Feb. 1, 2011) 7

Intergovernmental Panel on Climate Change, *Climate Change 2001: Synthesis Report; Summary for Policymakers* 2 (2001), *available at* http://www.ipcc.ch/pdf/climate-changes-2001/synthesis-spm/synthesis-spm-en.pdf 11

Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. Envtl. L.J. 130 (2005) 10

Office of the Attorney General, News Release: Attorney General Lockyer Files Lawsuit Against "Big Six" Automakers for Global Warming Damages in California (September 20, 2006), http://ag.ca.gov/newsalerts/print_release.php?id=1338 18

Office of the Press Secretary, President Obama Announces National Fuel Efficiency Policy (May 19, 2009), http://www.whitehouse.gov/the_press_office/President-Obama-Announces-National-Fuel-Efficiency-Policy/ 22

Restatement (Second) of Torts (1979) 12, 26, 27

RULES

Rule 37.3(a) 1

Rule 37.6 1

REGULATIONS

40 C.F.R. § 600.113-93(e) 9

40 C.F.R. § 86.144-90 9

Average Fuel Economy Standards for Light Trucks, 71 Fed. Reg. 17,566 (Apr. 6, 2006) 9, 10, 17

Cal. Code Regs. tit. 13, § 1961.1 ..... 8, 22

Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922 (Sept. 8, 2003) 6, 19

Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule, 74 Fed. Reg. 66,496 (Dec. 15, 2009) 20

Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010) ..... passim

Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) 23

Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010) 23

BRIEF OF THE ASSOCIATION OF GLOBAL AUTOMAKERS, THE ALLIANCE OF AUTOMOBILE MANUFACTURERS AND THE NATIONAL AUTOMOBILE DEALERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Amici curiae the Association of Global Automakers (Global Automakers), the Alliance of Automobile Manufacturers (the Alliance) and the National Automobile Dealers Association (NADA) respectfully submit that the decision of the court of appeals should be reversed.[1]

INTEREST OF *AMICI CURIAE*

The question presented in this case is whether the federal common law recognizes a cause of action for public and private nuisance seeking to address greenhouse gas emissions, where the Clean Air Act already establishes a comprehensive federal program for regulating such emissions. *Amici*, which collectively represent almost the entire automobile industry in the United States, have a significant interest in the correct resolution of this question. The automobile industry is subject to a comprehensive set of motor vehicle fuel economy and greenhouse gas emission regulations jointly adopted by the United States Environmental Protection Agency (EPA) and the National Highway Traffic

[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amici* or their counsel made a monetary contribution for the preparation or submission of this brief.

Safety Administration (NHTSA). The industry has also, however, been the target of a climate-related nuisance lawsuit brought by the State of California seeking the recovery of billions of dollars in damages claimed to have been caused by lawful greenhouse gas emissions from motor vehicles. *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) (*General Motors*). Although that action was correctly dismissed on political question grounds, the action before this Court raises the prospect that, like defendants in the instant case, the automobile industry may again be the target of climate-related nuisance actions asking courts to determine whether the fuel economy and resulting greenhouse gas emissions from their motor vehicles are reasonable under the circumstances.

The Alliance is a trade association of car and light truck manufacturers, whose members include BMW Group, Chrysler Group LLC, Ford Motor Company, General Motors Company, Jaguar, Land Rover, Mazda North America, Mercedes-Benz USA, Mitsubishi Motors, Porsche Cars North America, Toyota Motor North America, Inc., Volkswagen Group of America, and Volvo Cars North America, LLC. Global Automakers'[2] members include 15 foreign-based automobile manufacturers, such as American Honda Motor Company, Inc., Hyundai Motor America, Isuzu Motors America, LLC, Kia Motors America, Inc., Mitsubishi Motors North America, Inc., Nissan North America, Inc., Subaru of America, Inc., and Toyota Motor North America, Inc. NADA is a trade association that represents

---

[2] Global Automakers formerly operated under the name the Association of International Automobile Manufacturers (AIAM).

franchised automobile and truck dealers who sell new and used motor vehicles and engage in service, repair, and parts sales. These trade associations represent their members' interests in matters impacting the automobile industry, such as motor vehicle safety, emissions, and fuel economy, and they regularly represent their interests in litigation.

Amici seek to participate in this matter because of the detrimental impact the Second Circuit's holding would have on the automobile industry. If climate-related nuisance actions such as the one presented here are allowed to proceed, the automobile industry would be faced with conflicting standards—some established by the expert agencies within the elected branch of government, and others established ad hoc by non-elected judges and juries—concerning the appropriate amount of greenhouse gases that may be emitted from their vehicles. Given that greenhouse gas emissions are already subject to the comprehensive regulatory program established by the Clean Air Act (and, in the case of motor vehicles, a separate regulatory program established by the Energy Policy and Conservation Act) Article III courts have no role to play in determining how and to what degree greenhouse gas emissions should be reduced or which sector of the economy should bear this reduction burden.

SUMMARY OF ARGUMENT

The decision below included three holdings concerning the viability of Plaintiffs' climate-related nuisance actions: first, that the political question doctrine does not bar their claims; second, that the federal common law recognizes a nuisance cause of action seeking to abate otherwise lawful emissions of greenhouse gases; and third, that the Clean Air Act

has not displaced this federal common law cause of action. These three holdings cannot be reconciled among themselves, let alone with this Court's long-standing precedents, and the circuit court's decision should therefore be overturned.

In finding that Plaintiffs have stated a valid claim under the federal common law of nuisance and that their claim is justiciable despite the political question doctrine, the circuit court's opinion suffers from an incurable internal inconsistency. The court initially determined that the political question doctrine does not bar this action because it concluded that a "decision by a single federal court concerning a common law of nuisance cause of action, brought by domestic plaintiffs against domestic companies for domestic conduct, does not establish a national or international emissions policy" concerning greenhouse gas emissions. Pet. App. at 26a. Subsequently, however, the court held that the federal common law is an appropriate tool for private parties to address climate change because of an "overriding federal interest in the need for a uniform rule of decision" in matters concerning global climate change and greenhouse gas emissions. Pet. App. 110a-112a (citing *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972) ("*Milwaukee I*")). Laying these two holdings side-by-side demonstrates that they cannot be reconciled with each other. If it is true, as the circuit court held, that Plaintiffs' complaint properly pleads a claim under the federal common law of nuisance because of the need for a uniform rule of decision concerning industrial greenhouse gas emissions, then adjudicating such a claim would necessarily require a court to determine national policy concerning the appropriate level and allocation of greenhouse gas emissions from the

various sectors of our economy. And once federal courts wade into such an economic, social and political thicket, the political question doctrine is necessarily implicated.

A more discerning examination of the questions presented here shows that the circuit court was only partially correct. Determining whether certain industries should be required to reduce their greenhouse gas emissions and what the appropriate level of these emissions ought to be under the circumstances does require a coordinated approach established at the national level. The court erred, however, in failing to recognize that federal courts are structurally incapable of formulating that coordinated national approach through common law tort suits. To the contrary, because of the inherently "vague and indeterminate" standard that is applied in nuisance actions, *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) ("*Milwaukee II*"), allowing climate-related nuisance actions to go forward would likely result in courts making ad hoc determinations concerning the reasonableness of greenhouse gas emissions that conflict with each other and that are inconsistent with standards established by the relevant expert agencies.

The political question doctrine requires that questions raising such broad policy concerns that touch on every aspect of the American economy be directed to the political branches. For that reason, the district court presiding over the nuisance action against the automobile industry correctly dismissed that lawsuit, concluding that its adjudication "would require the Court to balance the competing interests of reducing global warming emissions and the interests of advancing and preserving economic and industrial development," a task that "is the type of initial policy

determination to be made by the political branches, and not this Court." *General Motors*, 2007 WL 2726871, at *8. Because the political question doctrine renders this case non-justiciable, that should end the inquiry. However, even if it did not, Plaintiffs' claims must still fail because this Court has held that the elected branches have already spoken on the question of greenhouse gas emissions by enacting the comprehensive regulatory program found in the Clean Air Act. *Massachusetts v. EPA*, 549 U.S. 497 (2007). Since Article III courts may not second-guess the policy judgments made by the elected branches of government, that Congressional action resulted in the displacement of Plaintiffs' claims.

ARGUMENT

I. ADDRESSING GREENHOUSE GAS EMISSIONS REQUIRES A COORDINATED NATIONAL APPROACH THAT IS THE ANTITHESIS OF AD HOC COMMON LAW NUISANCE CLAIMS.

Because of the inextricable link between the engines that run our nation's economy and the emission of greenhouse gases "[i]t is hard to imagine any issue in the environmental area having greater 'economic and political significance' than regulation of activities that might lead to global climate change." Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,928 (Sept. 8, 2003). Regulating these activities requires a coordinated national approach that fully accounts for all of the costs and benefits of standards limiting greenhouse gas emissions.

1. The emission of carbon dioxide is the natural byproduct of energy production, as it is released to the atmosphere whenever a carbon-containing fuel—such as oil, natural gas, or coal—is burned. These fossil fuels are the primary energy source for every

sector of the nation's economy; they fuel our motor vehicles, aircraft engines and diesel locomotives; they provide the energy source for approximately 70% of all electricity generated in the United States; and they are a significant source of heat for our homes and industrial facilities. The release of carbon dioxide is therefore inherent in life and business in the United States, and every state in the nation has innumerable sources of emissions.

The environmental impacts of the emission of greenhouse gases such as carbon dioxide likewise cut across state, and indeed national, lines. Once it is released, carbon dioxide disperses evenly throughout the atmosphere and mixes indistinguishably with carbon dioxide from other sources throughout the world. Moreover, carbon dioxide retains its chemical form for long time periods because it is inert and extremely stable. It does not readily reduce to another chemical state or react with other constituents in the atmosphere. Carbon dioxide will therefore remain in the atmosphere until it is removed through a natural process such as plant respiration or oceanic absorption. *See* EPA, Natural Sources and Sinks of Carbon Dioxide http://www.epa.gov/climatechange/emissions/co2_natural.html (last visited Feb. 1, 2011). Because of these unique properties of carbon dioxide, any environmental impacts felt in a particular state can be attributed to sources throughout the world, and not merely those within its own borders.

Consequently, addressing any impact that greenhouse gas emissions may have on the worldwide climate presents unusual challenges that do not arise in traditional environmental contexts where local actions can have a direct impact on local conditions. For example, traditional pollutants like

hydrocarbons and oxides of nitrogen react in the atmosphere in the presence of sunlight to form ozone, which is the major component of localized smog. State action reducing such emissions from sources within their own borders has tangible and measurable impacts on this local air pollution. It may therefore be sound policy to allow states and localities to direct how these pollutants should be controlled because both the costs and the benefits of such regulations are internalized by these jurisdictions, and the responsible policymakers can assess whether the benefits of regulation are worth the costs to its citizens.

This is not the case for carbon dioxide and other greenhouse gases. Local emissions of these substances do not have impacts that are themselves localized. Consequently, state and local jurisdictions cannot by themselves redress the localized environmental impacts of greenhouse gas emissions by regulating sources within their own borders. Rather, to the extent that a state such as Connecticut or California wishes to address the impact greenhouse gas emissions may have on their climates, they must seek a reduction of these emissions throughout the entire world.[3]

---

[3] For example, when the State of California adopted its own set of motor vehicle greenhouse gas emissions standards in 2004, *see* Cal. Code Regs. tit. 13, § 1961.1, (which were subsequently adopted by other petitioners states), the State recognized that:

> It is true that the contribution to a reduction in global warming from the actions of California alone will be small. This is true of any individual contribution. The point here is that human-induced climate change is a

2. For this reason, addressing greenhouse gas emissions requires coordinated national (indeed, international) action. Because the sources of greenhouse gas emissions are ubiquitous and because their impacts are present throughout the country, the national government is best equipped to balance all of the costs and benefits of regulating these emissions within the United States.

This is especially true in the automobile industry. Today's cars and trucks are fueled primarily by carbon-containing fuels like gasoline or diesel. Reducing carbon dioxide emissions from these vehicles is solely a matter of improving fuel economy because carbon dioxide emissions are a direct function of the amount of the carbon-containing fuel consumed by a vehicle. In fact, "fuel economy has become virtually synonymous with CO2 emission rates," because fuel economy is actually calculated by measuring a vehicle's carbon dioxide emissions and then converting those emissions into miles-per-gallon fuel economy using a simple formula. *See* Average Fuel Economy Standards for Light Trucks, 71 Fed. Reg. 17,566, 17,660-61 (Apr. 6, 2006); 40 C.F.R. § 86.144-90; *id.* § 600.113-93(e). Improving fuel economy implicates a number of competing policy concerns such as maintaining consumer choice for vehicles, protecting the economic health of the U.S.

[Footnote continued from previous page]

> truly global problem—one that will eventually require actions by all countries.

See Cal. Envtl. Prot. Agency, Air Res. Bd., *Regulations to Control Greenhouse Gas Emissions from Motor Vehicles, Final Statement of Reasons* 229, 231–34 (2005), *available at* http://www.arb.ca.gov/regact/grnhsgas/fsor.pdf.

automobile industry, and ensuring vehicle safety. *See* Average Fuel Economy Standards for Light Trucks, 71 Fed. Reg. at 17,668. These are issues of wide national concern where Congress, in the Energy Policy & Conservation Act of 1975 ("EPCA"), has instructed NHTSA, the elected branch's expert agency, to determine the "maximum feasible average fuel economy level" for a given model year. 49 U.S.C. § 32902.

Furthermore, because automobile manufacturers operate in a single, integrated economy, a uniform federal standard concerning fuel economy and greenhouse gas emissions is more efficient than multiple, potentially inconsistent, standards. "Where a given product is bought and sold in national markets, and will travel throughout interstate commerce, it is less costly to design and produce the product to conform with a single national standard that applies nationwide." Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. Envtl. L.J. 130, 148 (2005). This is especially true for carbon dioxide control because unlike other commonly regulated automotive emissions, there is no "bolt on" aftertreatment device that can capture or chemically alter carbon dioxide emissions. Rather, improving motor vehicle fuel economy (and therefore reducing greenhouse gas emissions) goes to the foundation of vehicle design and manufacture. Higher fuel economy vehicles often incorporate advanced technology such as hybrid-electric engines, continuously variable transmissions, specialty lightweight yet high-strength materials, and/or engine down-sizing and turbocharging. *See* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324,

25,373-75 (May 7, 2010) (the "Vehicle Rule"). Integrating these technologies across product lines entails a significant investment of capital, time, resources and engineering planning. *Id.* at 25,445.

Allowing multiple jurisdictions to establish different standards for greenhouse gas emissions—whether through state regulation or through various Article III courts' selective application of nuisance law—would lead to perverse outcomes. "Consumer states," such as California and New York that have brought climate-related nuisance actions (*see, e.g.*, *General Motors*, 2007 WL 2726871) would ask courts to determine the reasonableness of the fuel economy level of the industry's products, and either impose limits on these emissions or require compensation for past climate-related damages. These costs would then be imposed on businesses in "producer states," such as Michigan and Tennessee.

Regulating greenhouse gas emissions is therefore a task best suited to the national government. Deciding the appropriate level of regulation entails a complex analysis of multiple, often competing, considerations. As the Intergovernmental Panel on Climate Change has stated:

> Natural, technical, and social sciences can provide essential information and evidence needed for decisions on what constitutes 'dangerous anthropogenic interference with the climate system.' At the same time, such decisions are value judgments determined through socio-political processes, taking into account considerations such as development, equity, and sustainability, as well as uncertainties and risk.

Intergovernmental Panel on Climate Change, *Climate Change 2001: Synthesis Report; Summary*

for Policymakers 2 (2001), *available at* http://www.ipcc.ch/pdf/climate-changes-2001/synthesis-spm/synthesis-spm-en.pdf. Standards for greenhouse gas emissions must be set at the level where the benefits of additional stringency are outweighed by the additional costs to society. Only the national government can properly consider and balance all of the relevant considerations—such as the anticipated environmental benefits, the costs borne by consumers, and the regulatory burdens imposed on industry—and set appropriate standards accordingly.

3. The series of ad hoc judicially-fabricated federal common law tort judgments inherent in the Second Circuit panel's decision is fundamentally inconsistent with the uniform national approach required to address greenhouse gas emissions. And applying federal common law will not provide any greater certainty or uniformity because of the inherently vague and forum-specific standards found in nuisance law. The Restatement defines a public nuisance as "an unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B(1) (1979). Whether a particular interference is unreasonable under the circumstances turns on weighing "the gravity of the harm against the utility of the conduct." *Id.* § 821B cmt. e. "[I]n determining whether the gravity of the interference with the public right outweighs the utility of the actor's conduct, it is necessary to consider the social value that the law attaches to the primary purpose of the conduct, the suitability of the conduct to the character of the locality and the impracticability of preventing or avoiding the invasion." *Id.* § 828 cmt. a.

There is no objectively-discernable answer to these questions that could be applied consistently in all federal courts throughout the country. For instance, "the social value that the law attaches to" the burning of fossil fuels to generate electricity or power motor vehicles may be different in Connecticut than it is in Ohio. Similarly, because greenhouse gases mix evenly in the atmosphere and the location of a source therefore has no impact on the concentration of greenhouse gases at any particular location "the suitability" of the greenhouse gas emitting conduct "to the character of the locality" may be different in Vermont than it is in Michigan. There is nothing inherent in the federal common law of nuisance requiring that a federal court in one jurisdiction answer these questions the same way a court in a different jurisdiction would. Consequently, subjecting industry to "the uncertain twists and turns of litigation will leave whole states and industries at sea and potentially expose them to a welter of conflicting court orders across the country." *North Carolina v. TVA*, 615 F.3d 301 (4th Cir. 2010) (*citing International Paper Co. v. Ouellette*, 479 U.S. 481, 496-97 (1987) (allowing "a number of different states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states.")).

II. *MASSACHUSETTS V. EPA* INSTRUCTS THAT THE CLEAN AIR ACT AUTHORIZES AND PROVIDES FOR A COMPREHENSIVE FEDERAL PROGRAM TO CONTROL GREENHOUSE GAS EMISSIONS THAT DISPLACES FEDERAL COMMON LAW.

Congress is the political branch that is empowered by the Constitution to direct national policy through the enactment of statutes, and where Congress speaks to an issue in that manner, federal

common law is displaced. In light of this Court's holding in *Massachusetts v. EPA*, there can no longer be any doubt as to whether Congress has displaced Plaintiffs' common law cause of action through the Clean Air Act. It has. Yet despite this federal authority, the circuit court concluded that there is no displacement here because at the time of its decision "EPA [did not] regulate carbon dioxide under the CAA—at least not in the sense that EPA require[d] control of such emissions at [that] time." Pet. App. 135a. While that premise of the court's decision is no longer true, even if it were, the circuit court committed a fundamental error of law in concluding that displacement depends on the activities of a federal agency, instead of properly focusing on whether Congress intended a federal statute to occupy the field.

1. The circuit court erred by applying an unduly rigorous displacement standard that focused on whether EPA has provided the precise remedy sought by Plaintiffs. That standard cannot be reconciled with this Court's precedents holding that the displacement turns on the scope of the statute enacted by Congress. Once Congress has "occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency," there is simply no role left for the courts for "the formulation of appropriate federal standards . . . through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence . . . ." *Milwaukee II*, 451 U.S. at 317. "[W]hen Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." *Id.* at 314.

Displacement, therefore, does not depend on whether or how the expert agency has exercised the authority granted by Congress, as the circuit court erroneously held, but rather on the regulatory framework established by the statute. "The comprehensiveness of the legislative grant is not diminished, nor is the congressional intent to occupy the field rendered unclear, merely by reason of the regulatory agency's discretionary decision to exercise less than the total spectrum of regulatory power with which it was invested." *Mattoon v. City of Pittsfield*, 980 F.2d 1, 5 (1st Cir. 1992); *see also Illinois v. Outboard Marine Corp.*, 680 F.2d 473, 477-78 (7th Cir. 1982) (federal common law is displaced if Congress has "considered the problem . . . and enacted some solution" even if "it has not done so by means of remedies against the polluters themselves").

2. The Clean Air Act displaces this common law nuisance claim because it is a "comprehensive . . . scheme to control air pollution in the United States.")*Nat'l Audubon Soc'y v. Dept. of Water & Power of Los Angeles*, 869 F.2d 1196, 1201 (9th Cir. 1988; *see also Weiler v. Chatham Forest Prod., Inc.*, 392 F.3d 532, 534 (2d Cir. 2004) ("[t]he Clean Air Act created a complex and comprehensive legislative scheme to protect and improve the nation's air quality"). Indeed, the Act has been described as "one of the most comprehensive pieces of legislation in our nation's history." *Motor Vehicle Mfrs. Ass'n of the United States, Inc., v. N.Y. Dept. of Env. Conservation*, 17 F.3d 521, 524 (2d Cir. 1994). And the question concerning whether that statute applies to greenhouse gases was answered in the affirmative by this Court in *Massachusetts v. EPA*.

The Clean Air Act regulates all "pollutants" that EPA determines cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare. Title I of the Act pertains to stationary sources of emissions, which broadly include "any building, structure, facility, or installation which emits or may emit any air pollutant." 42 U.S.C. §§ 7411(a)(3); 7602(z). For instance, Title I requires EPA to establish "new source performance standards" for "categories of stationary sources" that "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A). Similarly, the prevention of significant deterioration program (PSD) subjects any new or modified "major emitting facility" to permitting requirements with respect to any "pollutant subject to regulation under [the Act]." 42 U.S.C. §§ 7475, 7479.

Title II of the Clean Air Act applies to mobile sources of emissions. Section 202(a) requires the EPA Administrator to establish standards "applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). Similar provisions of Title II require EPA to set emission standards for nonroad engines and vehicles, to the extent that those sources "cause[], or contribute[] to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. §§ 7547(a)(1), 7571(a)(2)(A).

3. In *Massachusetts v. EPA*, this Court held that carbon dioxide is a "pollutant" subject to the comprehensive regulatory program found in Title II

of the Clean Air Act, that EPA must exercise its discretion to consider whether such emissions from motor vehicles endanger public health or welfare consistent with the statute, and that EPA must establish standards under Section 202(a), 42 U.S.C. § 7521(a)(1), controlling carbon dioxide emissions from new motor vehicles if the Agency makes an endangerment finding.[4] *See* 549 U.S. at 528-33. That determination by itself leads inexorably to the conclusion that a federal nuisance claim directed at the same emissions has been displaced by Congress's enactment of the Clean Air Act.[5] Whatever action EPA was to eventually take concerning greenhouse gases—whether finding endangerment and consequently enacting standards, or finding lack of endangerment and enacting no standards—flows from the discretionary authority under the statute.

The circuit court's holding would erroneously require a specific form of agency action before finding displacement. That is the position taken also by Plaintiffs, which enlisted Article III courts to force

---

[4] The question of whether greenhouse gas emissions are also subject to regulation under other titles of the Clean Air Act was not before the Court.

[5] As discussed above, EPCA establishes a separate comprehensive national program for regulating motor vehicle fuel economy. And because "[f]uel consumption and CO2 emissions from a vehicle are two 'indissociable' parameters" such that "fuel economy is directly related to emissions of greenhouse gases such as CO2," Average Fuel Economy Standards for Light Trucks, 71 Fed. Reg. at 17,659, EPCA also effectively establishes a national program governing motor vehicle carbon dioxide emissions. Consequently, EPCA provides an independent basis for displacement with respect to motor vehicle greenhouse gas emissions.

greenhouse gas emission reductions because they believed that EPA was shirking its obligation to regulate under the Clean Air Act. This is demonstrated by the history of *Massachusetts v. EPA*, and California's then concurrent nuisance lawsuit against the automobile industry.

The petitioners in *Massachusetts v. EPA* included many of the same state plaintiffs that filed this nuisance action.[6] The original petition requested EPA to promulgate greenhouse gas emissions limits for motor vehicles—the very remedy Plaintiffs seek here from the federal judiciary with regard to stationary sources—based on the argument that the Clean Air provided that authority. As a backstop to that petition, the State of California separately sued the six largest automobile manufacturers in federal court claiming that the emissions of greenhouse gases from their vehicles constituted a nuisance under the federal common law. This lawsuit was avowedly intended to fill what was perceived by California to be a void caused by federal inaction in controlling greenhouse gas emissions. As explained in the press release from the California Attorney General's office, the action was brought because "the Bush Administration's inaction on global warming has forced California and other states to take action on their own." *See* Office of the Attorney General, News Release: Attorney General Lockyer Files Lawsuit Against "Big Six" Automakers for Global Warming Damages in California (September 20, 2006), http://ag.ca.gov/newsalerts/print_release.php?id=1338. Accordingly, California argued that its

---

6 Plaintiffs, the states of Connecticut, New York, California, New Jersey, Rhode Island, and Vermont were also petitioners in *Massachusetts v. EPA*.

federal common law nuisance claims were not displaced by the Clean Air Act in part because EPA had concluded "'that the Clean Air Act does not authorize U.S. EPA to regulate for global climate change purposes, and accordingly that carbon dioxide and other GHGs cannot be considered 'air pollutants' subject to the Clean Air Act's regulatory provisions for any contribution they may make to global climate change.'" *See* Memorandum of Law in Opposition to Defendant's Motion to Dismiss at 11-12 in *California v. General Motors*, No. 3:06-cv-05755 (Feb. 1, 2001) (quoting Control of Emissions From New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,925 (Sept. 8, 2003)). California argued that "U.S. EPA's interpretation precludes a finding of displacement." *Id.* at 12.

Massachusetts v. EPA resolved the question of whether carbon dioxide is subject to regulation under the Clean Air Act in favor of the petitioners. Reading the Clean Air Act's definition of "air pollutant" broadly, the Court found that carbon dioxide and the other greenhouse gases fall within the purview of the Act's regulatory provisions. *Id.* at 528-29. Consequently, the Court held, the Clean Air Act requires EPA to determine whether emissions of carbon dioxide from motor vehicles cause or contribute to air pollution that is reasonably anticipated to endanger public health or welfare, and, if so, prescribe motor vehicle emissions standards under Section 202(a) of the Act. *Massachusetts*, 549 U.S. at 533.

EPA has since acted on that mandate. On December 15, 2009, EPA published its "Endangerment Finding," wherein it determined that atmospheric concentrations of greenhouse gases may be "reasonably be anticipated both to endanger public

health and to endanger public welfare," and that emissions of greenhouse gases from motor vehicles "contribute to the air pollution" for which the endangerment finding was made. *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule, 74 Fed. Reg. 66,496, 66,497, 66,537-45 (Dec. 15, 2009). Because the Clean Air Act requires EPA to prescribe emissions standards for motor vehicles once it makes an endangerment finding, EPA promulgated regulations for cars and light trucks for model years 2012 through 2016. *See* Vehicle Rule, 75 Fed. Reg. 25,324. Those rules went into effect on January 2, 2011.

During the period of time that *Massachusetts v. EPA* was pending and EPA was subsequently fulfilling its mandate, the State of California pursued its separate nuisance action against the automobile industry. In 2007, the district court dismissed the State's complaint on the ground that the issue presented a nonjusticiable political question, finding that "[t]he adjudication of Plaintiff's claim would require the Court to balance the competing interests of reducing global warming emissions and the interests of advancing and preserving economic and industrial development," a task which entails "the type of initial policy determination to be made by the political branches, and not this Court." *General Motors*, 2007 WL 2726871, at *8. California initially appealed this ruling to the Ninth Circuit, and while the appeal was pending, EPA finalized the motor vehicle rulemaking described above. Having achieved the remedy it sought from the political branch, the State of California dismissed its appeal of the nuisance action. In doing so, the State "acknowledge[d] that the federal common law may be

displaced by federal statute where a comprehensive regulatory or statutory scheme speaks directly to the particular issue and provides an adequate remedy,"[7] and cited EPA's action in regulating greenhouse gas emissions as a basis for staying and ultimately dismissing its appeal. *See* State of California, Request for Continuance of Oral Argument at 3, *California v. General Motors*, No. 07-16908 (9th Cir. Jan. 21, 2009).

4. That federal rulemaking established a single national program governing both motor vehicle greenhouse gas emissions and fuel economy. "[B]ecause the relationship between improving fuel economy and reducing CO2 tailpipe emissions is a very direct and close one," EPA's greenhouse gas standards were adopted jointly with fuel economy regulations promulgated by the National Highway Traffic Safety Administration (NHTSA). Vehicle Rule, 75 Fed. Reg. at 25,327.[8] The joint rulemaking also paved the way for California to amend its separate greenhouse gas emissions regulations (that were also adopted by twelve other states) to allow manufacturers to use compliance with the federal program to achieve compliance with its program. *See*

---

[7] As discussed above, however, that remedy need not be the precise remedy sought by a tort plaintiff in order for the plaintiff's common law claim to be displaced.

[8] In *Massachusetts v. EPA*, this Court recognized that EPA's regulation of greenhouse gas emissions might "overlap" with NHTSA's administration of the federal fuel economy program, but because NHTSA and EPA are sister agencies within the same Executive Branch, it concluded that "both [Agencies can] administer their obligations and yet avoid inconsistency." *Massachusetts*, 549 U.S. at 532.

Cal. Code Regs. tit. 13, § 1961.1(a)(1)(A)(ii). As EPA explained in the preamble to the final rule:

> The National Program also represents regulatory convergence by making it possible for the standards of two different Federal agencies and the standards of California and other states to act in a unified fashion in providing these benefits. The National Program will allow automakers to produce and sell a single fleet nationally, mitigating the additional costs that manufacturers would otherwise face in having to comply with multiple sets of Federal and State standards.

Vehicle Rule, 75 Fed. Reg. at 25,326.[9]

The Environmental Protection Agency is also in the process of implementing greenhouse gas rules concerning stationary sources. On April 2, 2010, EPA determined that once the motor vehicle greenhouse gas regulations became effective on January 2, 2011, then greenhouse gases are made subject to the comprehensive Clean Air Act's Prevention of Significant Deterioration and Title V programs. 42 U.S.C. §§ 7470, *et seq.*; *id.* § 7661. *See*

---

[9] Similarly, Carol M. Browner, Assistant to the President for Energy and Climate Change, stated in a press release announcing the development of this program that "[a] clear and uniform national policy is not only good news for consumers who will save money at the pump, but this policy is also good news for the auto industry which will no longer be subject to a costly patchwork of differing rules and regulations." *See* Office of the Press Secretary, President Obama Announces National Fuel Efficiency Policy (May 19, 2009), available at http://www.whitehouse.gov/the_press_office/President-Obama-Announces-National-Fuel-Efficiency-Policy/.

Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010). Subsequently, EPA adopted a rule to regulate greenhouse gas emissions from stationary sources that emit at least 75,000 tons of carbon dioxide equivalent per year and would otherwise require a preconstruction permit for a non-greenhouse gas pollutant. *See* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (the "Tailoring Rule").

These actions by the expert agencies seek to balance competing policy concerns, such as which sectors of the economy should be required to reduce their greenhouse gas emissions, how quickly these reductions will occur, and at what cost to the economy. For example, EPA has initially limited the applicability of the PSD and Title V programs to very large sources because it determined that applying these provisions to all sizes of stationary sources of greenhouse gas emissions would entail unacceptable costs and burdens on both the smaller sources as well as the permitting authorities. *See* Tailoring Rule, 75 Fed. Reg. at 31,533-41 (June 3, 2010).

Because the Clean Air Act authorizes and provides for a comprehensive program to control air pollution in the nation, and because greenhouse gas emissions are subject to that program, Plaintiffs' federal common law nuisance claim has been displaced. "The establishment of such a self-consciously comprehensive program by Congress . . . strongly suggests that there is no room for courts to attempt to improve on that program with federal common law." *Milwaukee II*, 451 U.S. at 319 (citation and footnote omitted). "If courts across the

nation were to use the vagaries of public nuisance doctrine to overturn the carefully enacted rules governing airborne emissions, it would be increasingly difficult for anyone to determine what standards govern." *North Carolina*, 615 F.3d at 298.

III. THE POLITICAL QUESTION DOCTRINE DICTATES THAT THE COORDINATED NATIONAL APPROACH TO ADDRESS GREENHOUSE GAS EMISSIONS MUST COME FROM THE ELECTED BRANCHES OF GOVERNMENT.

Even if the Clean Air Act did not establish a comprehensive federal program regulating greenhouse gas emissions, the circuit court still erred in finding that Plaintiffs have stated a justiciable cause of action asserting that Defendants' greenhouse gas emissions constitute a public nuisance. In contrast to the relevant expert agencies, federal courts have "neither the expertise nor the authority to evaluate the[] policy judgments" that inform the manner in which greenhouse gases should be controlled. *Massachusetts*, 549 U.S. at 533. Rather, policy choices of this magnitude must be resolved "within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 647 (1981) (quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980)). Here, the political question doctrine renders Plaintiffs' lawsuit nonjusticiable because the remedy sought would require a federal court to decide which among the countless emitters of greenhouse gases should be held responsible for the impacts of those emissions, and what greenhouse gas producing activities are unreasonable under the circumstances. The court below did not articulate any "judicially discoverable

and manageable standards" for drawing these lines and failed to recognize that their placement presents the "impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

1. First, the line between the parties that must compensate others for their greenhouse gas emissions and the parties that escape financial responsibility is not governed by any judicially discernable standard and entails a policy decision not suited to the courts. Because carbon dioxide emissions are the unavoidable result of burning carbon-based fuel, every participant in the world economy is partially responsible for the concentration of greenhouse gases in the atmosphere. Nuisance actions directed at greenhouse gas emissions are therefore distinguishable from cases involving transborder pollution that this Court has previously recognized. *See Illinois v. City of Milwaukee*, 406 U.S. 91 (1972); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 236 (1907); *Missouri v. Illinois*, 180 U.S. 208 (1901). Those cases involved a limited number of actors causing a traceable and identifiable harm to discrete victims. Enjoining the Tennessee Copper facility's emissions of noxious gas, or declaring that the discharge of sewage into Lake Michigan constitutes a public nuisance, did not require any court to engage in quasi-legislative policymaking in drawing the line between liable parties and non-liable parties.

In an attempt to downplay the influence a court's decision in this action would have, the circuit court claimed that "[t]he possibility that mandatory emissions reductions may be imposed upon these defendants is quite different from mandatory emissions reduction requirements on American industry." Pet. App. 26a n.4 (quotations omitted). To the contrary: as a practical matter, any decision by a

federal court adjudicating a greenhouse gas-related nuisance claim would have a sweeping impact on industry. Because responsibility for greenhouse gas emissions is shared across the entire economy, those defendants unfortunate enough to be singled out by plaintiffs in a lawsuit like this would likely implead other responsible parties. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 n.17 (1978) ("a defendant in a tort suit such as this one would surely try to limit his liability by impleading any joint tortfeasors for indemnity or contribution").[10] Once that happens, the court would be required to consider the entire spectrum of greenhouse gas emitters—ranging from the largest operator of coal-fired power plants down to the individual motorist commuting 50 miles to and from work each day in a gasoline-powered car—and draw a line between those parties who are liable and those who are not. The circuit court did not articulate any standard that is "principled, rational, and based upon reasoned distinctions" for determining where that seemingly arbitrary line should be drawn. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004). As every district court to have considered the matter has concluded, "the allocation of fault—and cost—of global warming is a matter appropriately left for determination by the executive or legislative branch in the first instance." *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 877 (N.D. Cal. 2009); *see also General Motors*, 2007 WL 2726871, at *15 ("[t]he Court is left without guidance . . . in determining who should bear the costs associated with the global

---

10 Even where a nuisance action seeks injunctive relief, a defendant may implead other joint-tortfeasors and seek an order requiring them to bear a share of the emission reductions required to abate the nuisance. Restatement (Second) of Torts § 840E.

climate change that admittedly result from multiple sources around the globe.").

2. This action presents a nonjusticiable political question also because it would require a court to make a policy determination concerning which greenhouse gas-emitting activities pose an "unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B(1) (1979). Aside from invoking the inherently "vague and indeterminate nuisance concepts," *Milwaukee II*, 451 U.S. at 317, the circuit court did not articulate any standard for making that determination. As one district court succinctly stated:

> Applying the above-discussed [nuisance] principles here, the factfinder will have to weigh, inter alia, the energy producing alternatives that were available in the past and consider their respective impact on far ranging issues such as their reliability as an energy source, safety considerations and the impact of the different alternatives on consumers and business at every level. . . . The factfinder would then have to weigh the benefits derived from those choices against the risk that increasing greenhouse gases would in turn increase the risk of [climate-related damages].

Kivalina, 663 F. Supp. 2d at 874-75.

Moreover, drawing the line between those greenhouse gas-emitting activities that result in an "unreasonable interference with a right common to the general public" and those that do not, requires the type of quasi-legislative balancing that properly belongs with the elected branches of government. For example, resolution of a greenhouse gas nuisance claim necessarily "entails a determination of what would have been an acceptable limit on the level of

greenhouse gases emitted by Defendants." *Kivalina*, 663 F. Supp. 2d at 876. Plaintiffs, after all, do not claim that that Defendants should not be emitting any greenhouse gases at all in generating the electricity that powers our economy. Rather, they claim that at some as yet undefined level, those emissions become unreasonable and therefore constitute a nuisance. However, as discussed above, deciding the optimum level of carbon dioxide emissions from a particular activity entails a policy decision concerning the proper balance between economic growth and development on the one hand, and environmental stewardship on the other. As the Central District of California correctly found in dismissing California's lawsuit against the automobile industry,

> [t]he adjudication of Plaintiff's claim would require the Court to balance the competing interests of reducing global warming emissions and the interests of advancing and preserving economic and industrial development. The balancing of those competing interests is the type of initial policy determination to be made by the political branches, and not this Court.

General Motors, 2007 WL 2726871, at *8.

This is precisely the type of broad policymaking that belongs in the elected branches of government. As discussed above, directing the nation's energy policy and regulating the resulting greenhouse gas emissions—whether from motor vehicles or stationary sources—entails a number of social and economic trade-offs which Congress has directed the relevant expert agencies to weigh. *See, e.g.*, Vehicle Rule, 75 Fed. Reg. at 25,404, 25,555 (describing the statutory factors weighed by EPA and NHTSA). A climate-related tort action would invariably chart a

different and conflicting course. An action against the automobile industry, for instance, would ask an Article III court to determine what constitutes a "reasonable" level of motor vehicle greenhouse gas emissions even though EPA and NHTSA have already addressed this question in their recent joint rulemaking. These policy questions rest exclusively with the elected branches in our system of government.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

RAYMOND B. LUDWISZEWSKI
Counsel of Record
CHARLES H. HAAKE
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Amici Curiae

February 7, 2011

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
FEB 4 - 2011
OFFICE OF THE CLERK

No. 10-174

In The
Supreme Court of the United States

AMERICAN ELECTRIC POWER CO. INC., *et al.*,
Petitioners,

v.

STATE OF CONNECTICUT, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF BUSINESS ROUNDTABLE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

MARIA GHAZAL
Director, Public Policy and Counsel
BUSINESS ROUNDTABLE
901 New York Avenue, NW
West Tower, 3rd Floor
Washington, D.C. 20001
(202) 496-3268

ROBERT P. CHARROW*
LAURA METCOFF KLAUS
GREENBERG TRAURIG LLP
2101 L Street, NW
Washington, D.C. 20037
Charrowr@gtlaw.com
(202) 533-2396

DAVID G. MANDELBAUM
GREENBERG TRAURIG LLP
2700 Two Commerce Square
2001 Market Street
Philadelphia, PA 19103
(215) 988-7800

Counsel for Amicus Business Roundtable

**Counsel of Record*

February 4, 2011

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

41537f (33)

TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. Piecemeal Adjudication of Worldwide Climate Issues Would Breed Legal Uncertainty Undermining Capital Investment and Impeding Employment 3

A. The Common Law of Tort Is Ill-Suited for Regulating Complex Problems in a Predictable and Rational Manner 3

B. The Particular Vagueness of Public Nuisance Leads to Significant Uncertainty 6

C. U.S. Tort Law Is Particularly Inefficient and Ineffective at Fashioning an International Scientific and Economic Global Climate Change Policy 11

1. The Parties Necessary to Fashion Rational Standards Are Not and Can Never Be Before the Court 11

2. Tort Law Does Not Take into Account Economic Considerations Necessary for Rational National or Global Policy-Making 18

TABLE OF CONTENTS – Continued

Page

D. The Only Thing That Is Certain From This Litigation Is Economic Uncertainty 19

II. Legal Uncertainty Is Amplified When Federal Courts Inappropriately Interfere with Decisionmaking Committed to Federal and State Regulatory Agencies 22

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES:

Baker v. Carr, 369 U.S. 186 (1962) 22

City of Milwaukee v. Illinois, 451 U.S. 304 (1981) 17

Connecticut v. Am. Elec. Power Co., 582 F.3d 309 (2d Cir. 2009) 11

Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994) 10

Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) 17

Gorman v. Abbott Labs., 599 A.2d 1364 (R.I. 1991) 10

Illinois v. Milwaukee, 406 U.S. 91 (1972) 17

In Re Comiskey, No. 06-1286 (Fed. Cir. Jan. 13, 2009) 2

Massachusetts v. Environmental Protection Agency, 549 U.S. 497 (2007) 12, 13

Mulcahy v. Eli Lilly and Co., 386 N.W.2d 67 (Iowa 1986) 10

People v. Lim, 18 Cal.2d 872, 118 P.2d 422 (1941) 8, 9

Safft v. Eli Lilly and Co., 676 S.W.2d 241 (Mon. 1984) 10

Sindell v. Abbott Labs., 26 Cal.3d 588, 607 P.2d 924, *cert. denied*, 449 U.S. 912 (1980) 10

TABLE OF AUTHORITIES – Continued

Page

Smith v. Eli Lilly and Co., 560 N.E.2d 324 (Ill. 1990) 10

Summers v. Tice, 33 Cal.2d 80, 199 P.2d 1 (1948) 9, 10

The Schoolmaster's Case, 11 Hen. 4, f. 47, pl. 10 (Y.B. Hilary 1410) 4

The Thorns Case, 6 Ed. 4, f. 7, pl. 18 (Y.B. Mich. 1466) 4

Thrifty Oil Co. v. Bank of Am. Nat'l Trust & Savings Ass'n, 322 F.3d 1039 (9th Cir. 2002) 2

STATUTES AND REGULATIONS:

Rules of the Supreme Court of the United States

Rule 37.3(a) 1

Rule 37.6 1

Copyright Act 1709, 8 Anne c.19 6

Mandatory Greenhouse Gas Reporting Rule,

40 C.F.R. pt. 98, subpt. H 14

40 C.F.R. § 98.1(a) 14

74 Fed. Reg. 66,495 (Dec. 15, 2009) 12

74 Fed. Reg. 66,517 (Dec. 15, 2009) 12

TREATIES:

United Nations Framework Convention on Climate Change, *adopted* May 9, 1992, 1771 U.N.T.S. 107, S. Treaty Doc. No. 102-38 24

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS:

RESTATEMENT (SECOND) OF TORTS (1979) 7, 18

Sir William Blackstone, 3 COMMENTARIES ON THE LAWS OF ENGLAND (Oxford: Clarendon Press 1765-1769) 5

Herbert L.A. Hart, THE CONCEPT OF LAW (Oxford: Oxford Univ. Press 1961) 5

W. Page Keeton *et al.*, PROSSER & KEETON ON TORTS (5th ed. 1984).....4, 7

David Lieberman, THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH CENTURY BRITAIN (New York: Cambridge Univ. Press 1989) 5, 6

BABYLONIAN TALMUD, SEDER NEZIKIN, BABA M'TZIA (Salis Daiches & H. Freedman Translators and Editors 1959) 4, 7

John W. Wade, Victor E. Schwartz *et al.*, PROSSER, WADE AND SCHWARTZ'S TORTS (9th ed. 1994) 9

Morris Arnold, *Accident, Mistake, and the Rules of Liability in the 14th Century Law of Torts*, 128 U. PENN. L. REV. 361 (1979) 4

Benjamin Bernanke, *Irreversibility, Uncertainty and Cyclical Investment,* 98 QUARTERLY J. OF ECONOMICS 85 (1983).....20

Nicholas Bloom, *The Impact of Uncertainty Shocks*, 77 ECONOMETRICA 623 (2009).....20

TABLE OF AUTHORITIES – Continued

Page

Robert Lensink, Hong Bo & Elmer Sterken, *Does uncertainty affect economic growth? An empirical analysis*, 135 REVIEW OF WORLD ECONOMICS 379 (1999) 2

Victor E. Schwartz and Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541 (2006) 7

David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720 (1972) 20

Marilyn Brown, Frank Southworth & Andrea Surzynski, *Shrinking the Carbon Footprint of America* (Brookings, May 2008) 15

Helmut Wagner, *Macroeconomic Analysis of the Cost of Judicial Barriers in the Single Market, Part III* in: COST OF JUDICIAL BARRIERS FOR CONSUMERS IN THE SINGLE MARKET, A REPORT FOR THE EUROPEAN COMMISSION (H. von Freyhold, V. Gessner, E.L. Vial and H. Wagner, eds. (Brussels 2005) 19

Stephen Schwartzman, Lecture at Hong Kong University (Oct. 18, 2010), as reported at http://www.efinancialnews.com/story/2010-10-19/schwarzman-regulators-hamper-growth 2

INTEREST OF AMICUS CURIAE[1]

Business Roundtable is an association of chief executive officers of leading U.S. companies with nearly $6 trillion in annual revenues and more than 13 million employees. Member companies comprise nearly a third of the total value of the U.S. stock markets and more than 60 percent of all corporate income taxes paid to the federal government. As the senior leaders of many of the country's largest and most responsible corporate citizens, Business Roundtable members have a strong interest in ensuring that national and global policies affecting global climate change are developed in a rational and coherent manner through existing regulatory mechanisms. Business Roundtable members are deeply concerned whenever a court, federal or state, takes it upon itself to shape global economic and scientific policy. Judicial intervention through an ancient common law tort into matters of national policy is particularly ill-advised here, where the litigation would necessarily undermine the Executive Branch's ability to negotiate multilateral treaties, and where the tort itself is so amorphous that predictable standards are absent. This form of litigation will generate significant legal

---

[1] Pursuant to Rule 37.6, counsel for amicus states that no counsel for a party authored this brief in whole or in part and no person, other than amicus, its members, or its counsel made a monetary contribution to the preparation of this brief. Pursuant to Supreme Court Rule 37.3(a), amicus certifies that counsel of record for both parties have consented to its filing in letters on file with the Clerk's office submitted herewith.

uncertainty nationally and globally – of the very type that will adversely affect capital markets, unnecessarily increase transactional costs, and will generally place a drag on capital investment and employment.

SUMMARY OF ARGUMENT

It has been said that legal uncertainty is the enemy of economic growth. *See, e.g., In Re Comiskey*, No. 06-1286, slip op. at 11 (Fed. Cir. Jan. 13, 2009) ("Uncertainty is the enemy of commercial investment."); *Thrifty Oil Co. v. Bank of Am. Nat'l Trust & Savings Ass'n*, 322 F.3d 1039, 1050-51 (9th Cir. 2002); Stephen Schwartzman, Lecture at Hong Kong University (Oct. 18, 2010), as reported at http://www.efinancialnews.com/story/2010-10-19/schwarzman-regulators-hamper-growth. Capitalism works best when businesses can balance risk against uncertainty. Excessive uncertainty, however, hinders the ability even to calculate with any degree of accuracy the odds of potential outcomes. *See* Robert Lensink, Hong Bo & Elmer Sterken, *Does uncertainty affect economic growth? An empirical analysis*, 135 REVIEW OF WORLD ECONOMICS 379 (1999) (showing empirically that uncertainty hinders economic growth).

Accordingly, business leaders tend to support rational rules that reduce uncertainty; they tend to oppose regulation that not only constrains innovation and trade, but also increases uncertainty. This latter

type of regulation melds the worst of both worlds – stifling creativity while promoting unpredictability – and is exemplified by the attempt to regulate global climate change judicially using the ancient tort of public nuisance. Judicial regulation of complex systems where the science is not well understood is ill-advised both scientifically and economically. That sort of judicial regulation would inject precisely the type of uncertainty that hinders economic growth.

ARGUMENT

I. Piecemeal Adjudication of Worldwide Climate Issues Would Breed Legal Uncertainty, Undermining Capital Investment and Impeding Employment

A. The Common Law of Tort Is Ill-Suited for Regulating Complex Problems in a Predictable and Rational Manner

This case highlights the limitations of the common law of public nuisance as a rational means of regulating global climate change.[2] The law of nuisance, with its feet firmly rooted in the 17th and 18th Centuries and which has "meant all things to all people," will likely prove as effective at abating global

[2] The Second Circuit championed the federal common law of public nuisance. Business Roundtable doubts that there is such a federal common law of public nuisance. This issue is thoughtfully and thoroughly discussed in petitioners' merits briefs.

warming as blood-letting was at curing George Washington. W. Page Keeton *et al.*, PROSSER & KEETON ON TORTS 616 (5th ed. 1984). Common law principles, especially those of public nuisance, are ill-suited for resolving complex societal problems in a scientifically and economically rational manner.

Tort law[3] was conceived and evolved in simpler times to address simpler problems. As such, common law principles, as developed in England, tended to be verbally concise and therefore, necessarily broad in scope and variable in application. Prior to the 18th century, the trade-off between simplicity and predictability favored the former at the expense of the latter. The helter-skelter way in which the common law evolved, case-by-case, minimized the speed and coherence with which refined principles emerged. Nonetheless, the common law alone – especially in tort – was well suited for largely agrarian societies where the purpose of the law was modest: to resolve concrete disagreements, usually between neighbors, that were

---

[3] It was not until the 19th century that "torts" was recognized as a separate body of law. However, the notion of a civil wrong outside of contract traces its origin to the Babylonian Talmud and was recognized in England as early as the 14th century. *See* BABYLONIAN TALMUD, SEDER NEZIKIN, BABA M'TZIA, folio 118b at 672 *et seq.* (Ch. IX) (Salis Daiches & H. Freedman Translators and Editors 1959); Morris Arnold, *Accident, Mistake, and the Rules of Liability in the 14th Century Law of Torts*, 128 U. PENN. L. REV. 361 (1979); *The Schoolmaster's Case*, 11 Hen. 4, f. 47, pl. 10 (Y.B. Hilary 1410) (unfair competition); *The Thorns Case*, 6 Ed. 4, f. 7, pl. 18 (Y.B. Mich. 1466) (trespass).

relatively straightforward and where cause and effect were not difficult to pinpoint.

The inherent limitations of the common law were recognized by early English jurists, parliamentarians, and philosophers, including William Blackstone and Jeremy Bentham, two men who rarely saw eye-to-eye. *See* Sir William Blackstone, 3 COMMENTARIES ON THE LAWS OF ENGLAND, Book III, ch. 22 (Oxford: Clarendon Press 1765-1769).[4] Bentham, for example, viewed the "Common Law as a course of punishing without command." David Lieberman, THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH CENTURY BRITAIN 238 *et seq.* (New York: Cambridge Univ. Press 1989) ("Lieberman"). The "Dark chaos of the Common law," as Bentham noted, was imprecise and unknowable and fit only for beasts:

> To be governed by Statute Law belongs only to men. It is by Common Law that even beasts are governed. A mode of government that is fit only for Beasts, and for them fully, because of them incapable of a better.

Id.

The common law, even in 18th century Britain, was ill-suited for regulating complex systems in a predictable manner. As industrialization began to take hold, the Crown's reliance on the common law began

---

[4] *See also* Herbert L.A. Hart, THE CONCEPT OF LAW 119-130 (Oxford: Oxford Univ. Press 1961).

to wane. When confronted with a systemic legal issue with broad technological or economic implications, the Crown turned to the Parliament for a statutory solution and not to the King's Bench for a common law decree. Thus, starting at the early 18th Century and coinciding with the industrial revolution, the output of public statutes began to increase dramatically. *See* Lieberman at 13. For example, even though the English courts recognized and enforced an author's property right in his writings, provided the author had been granted the right to have works published, the uncertainties associated with allowing copyright law to develop *ad hoc*, as had been the case, was rejected in favor of a more coherent legislative approach leading to Statute of Anne, also known as the Copyright Act 1709, 8 Anne c.19. The Crown was concerned that a book-by-book, case-by-case approach would lead to regional variations that would undermine both the trade in books and the establishment of more commercial printing facilities.

B. The Particular Vagueness of Public Nuisance Leads to Significant Uncertainty

The characteristics of the common law – broad principles, case-by-case development, and absence of a coherent legislative mandate – that limit its ability to grapple predictably with complicated problems are especially evident in the tort of public nuisance. Notwithstanding the superb efforts of the American Law Institute ("ALI") to bring a modicum of structure

and stability to the law of public nuisance, the tort remains, much as it has throughout its twenty-century history, a "vague[], uncertain[], and confus[ing]" term that can encompass anything that is distasteful. PROSSER AND KEETON at 617.[5] The ALI defines a "public nuisance" as "an unreasonable interference with a right common to the general public." RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979). It would be difficult to conjure up a more amorphous tort. In this setting, even the most basic terms are denuded of meaning. To determine whether the alleged interference is "unreasonable," the "common right" and the "general public" must be defined. Neither is self-evident in this setting. First, a "right" presupposes either a duty or some reasonable expectation. Determining whether a duty exists is an unbounded exercise in judicial discretion. Second, no one can have a reasonable expectation about world climate variation; it has varied dramatically during the past millennium swinging from mini-ice ages to a more temperate climate before industrialization. Third, the "right" has to be a "common right." When

---

[5] The earliest known discussion of the law of public nuisance appears in the BABYLONIAN TALMUD, SEDER NEZIKIN, BABA M'TZIA, *supra* n.2, Portions of the Talmud discussing public nuisance were compiled about 2000 years ago; the term "public nuisance" first appeared in a portion of the Talmud compiled about 1600 years ago. For an outstanding history of public nuisance, *see* Victor E. Schwartz and Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541 (2006) (tracing the tort's development to shortly after the Norman Conquest).

dealing with global climate, who is included in the word "common?" Do we include those living in Asia? There is no guidance. Nor is there a rational method for determining who should be included within the term "general public." The eleven-word, one sentence definition is little more than a dense package of linguistic uncertainty.

Seventy years ago, California's supreme court recognized this inherent uncertainty and declined to permit the tort to be used as a method of shaping public policy. *See People v. Lim*, 18 Cal.2d 872, 118 P.2d 472 (1941). In *Lim*, the court, enjoined the operation of a gambling house under a public nuisance-like statute, but declined to do so under the common law of public nuisance. The court observed that

> the tendency to utilize the equity injunction as a means of enforcing public policy is a relatively recent development in the law. . . . Courts have held that public and social interests, as well as the rights of property, are entitled to the protection of equity. . . . This development has resulted in a continuous expansion of the field of public nuisances in which equitable relief is available at the request of the state. . . . The courts of this state, however, have refused to sanction the granting of injunctions on behalf of the state merely by a judicial extension of the definition of "public nuisance." . . . [C]ompelling reasons of policy require that the responsibility for establishing those standards of public morality, the violations of which are to

> constitute public nuisances within equity's jurisdiction, should be left with the legislature. . . . In a field where the meaning of *terms is so vague and uncertain* it is a proper function of the legislature to define those breaches of public policy which are to be considered public nuisances within the control of equity.

People v. Lim, 18 Cal.2d at 878, 879-80 (citations omitted) (emphasis supplied).

The limitations of the common law approach become apparent when issues take on even the slightest patina of complexity. *Summers v. Tice*, 33 Cal.2d 80, 199 P.2d 1 (1948), a case studied by virtually every law student in first year torts class, aptly illustrates these limitations. *See* John W. Wade, Victor E. Schwartz *et al.*, PROSSER, WADE AND SCHWARTZ'S TORTS 276 (9th ed. 1994). In *Summers*, a member of a hunting party was struck in the eye by a single pellet after two other members of the party simultaneously fired in the plaintiff's direction. Inasmuch as each defendant was equally likely to have fired the pellet that struck the plaintiff, the plaintiff would have been unable to prove by a preponderance of the evidence that either of two was responsible had the normal burdens of proof and producing evidence pertained. To accommodate a three-party, two-possible-cause suit, the court altered the normal burdens by introducing a fudge factor: shifting the burden of producing evidence onto the defendants. The court justified this approach as preferable to allowing the

defendants, both whom acted unreasonably, to escape liability. Since *Summers*, courts have debated whether to embrace methods to artificially allocate loss among a finite set of arguably culpable actors where causation cannot be determined. There is still no consensus among the states. *See, e.g., Sindell v. Abbott Labs.*, 26 Cal.3d 588, 607 P.2d 924, *cert. denied*, 449 U.S. 912 (1980) (adopting a market share approach); *but see, Safft v. Eli Lilly and Co.*, 676 S.W.2d 241, 247 (Mon. 1984); *Mulcahy v. Eli Lilly and Co.*, 386 N.W.2d 67 (Iowa 1986); *Smith v. Eli Lilly and Co.*, 560 N.E.2d 324 (Ill. 1990); and *Gorman v. Abbott Labs.*, 599 A.2d 1364 (R.I. 1991) (all opting to retain traditional requirement that plaintiff prove identity of tortfeasor). In the federal courts, applying federal law, it appears unlikely that there would be any modification in the burdens to accommodate these somewhat more complicated cases. *See, e.g., Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 277-78 (1994) (holding that, unless a statute indicates to the contrary, normal burdens of persuasion and production pertain in litigation under the Administrative Procedure Act).

A system that cannot readily address cases with a finite and identifiable set of points (*i.e.*, parties) with known etiologies cannot hope to address a case such as this where the points are uncountable and unknowable, where there is no scientific consensus about complex mechanisms of general and specific causation, and where every plaintiff is also a potential defendant and vice-versa: Among the States,

California and New York are two of the largest emitters of greenhouse gases, with California motor vehicles alone accounting for about four percent nationally of all emissions from all sources. *See* http://www.epa.gov/climatechange/emissions/state_energyco2inv.html

The Second Circuit brushed aside these widely recognized inadequacies of the nuisance tort, concluding that "Defendants' argument is undermined by the fact that federal courts have successfully adjudicated complex common law public nuisance cases for over a century." *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 326 (2d Cir. 2009). The court's conclusion ignored the obvious and begged the question. It is obvious that a case-by-case common law approach to regulating global climate necessarily engenders significant uncertainties – legal, scientific, economic and policy. Given that these uncertainties exist, the question then becomes how great is each type of uncertainty and what costs are associated with each. These questions were never addressed by the court.

C. U.S. Tort Law Is Particularly Inefficient and Ineffective at Fashioning an International Scientific and Economic Global Climate Change Policy

1. The Parties Necessary to Fashion Rational Standards Are Not and Can Never Be Before the Court

Tort law is particularly ill-suited when it comes to crafting a solution to plaintiffs' complaint of greenhouse

gas emissions from certain fossil-fuel-fired electric power plants. In order to adjudicate liability or to craft a remedy, the district court would have to consider most activities in the world economy. No district court could have all the parties responsible for those activities before it, nor could the court ever receive enough evidence to make the necessary findings. This is just not a case that a court can get right.

According to the complaint, emissions of carbon dioxide into the atmosphere cause global warming which will injure plaintiffs. App. 56-57, ¶ 1 & App. 86-102, ¶¶ 103-46. The *location* of the emissions does not matter. *See, e.g.*, App. 56-57, ¶¶ 1, 2 & App. 102, ¶ 147. Any ton of carbon dioxide emitted anywhere on the planet will mix in the atmosphere and will cause climate change everywhere to the same extent as any other ton of carbon dioxide. *See, e.g.*, *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, 523-25 (2007). All carbon dioxide emissions everywhere on the planet are fungible from plaintiffs' perspective. The Environmental Protection Agency's Endangerment Finding in response to *Massachusetts v. EPA* describes this global feature at length, finding that "it would not be meaningful to define the air pollution as the greenhouse concentrations over the United States as somehow being distinct from the greenhouse gas concentrations over other regions of the world." 74 Fed. Reg. 66,495, 66,517 (Dec. 15, 2009).

Moreover, plaintiffs complain specifically of carbon dioxide emissions from electricity generation. In order for electricity service to be reliable, the amount

of electric power generated at any given instant must equal the amount demanded. *Cf.* App. 68-70, ¶¶ 41-43. Plaintiffs acknowledge that "demand-side management" would reduce emissions; a power company's emissions of carbon dioxide will decline if the amount of electricity demanded goes down. That is why activities like lighting and heating that require electric power are said to have a "carbon footprint," even though a light bulb or a heater does not itself emit carbon dioxide; the power plant that supplies electricity to power them emits the carbon dioxide. Persons other than the electric power generator are typically responsible for that electricity demand.

For these reasons, every activity in the world that causes greenhouse gas emissions not only contributes to the alleged nuisance of which plaintiffs complain, but also would form a critical part of any remedy, assuming any remedy were required. *Cf. Massachusetts v. EPA*, 549 U.S. at 525. Even though plaintiffs allege that defendants emit as much as ten percent of the carbon dioxide emissions from human activities in the United States – and therefore percents or tenths of percents of the total emissions in the world – and even if that amount were material to the total, one cannot determine whether controlling those emissions is or is not equitable or sensible without understanding all other emissions and determining that emissions from defendants' particular generation fleets are the appropriate activities to curtail or to change.

Other emissions might be more equitable or sensible to curtail. Burning gasoline in automobiles generates carbon dioxide emissions much in the same way as burning coal in a power plant will. *See, e.g.*, *Mandatory Greenhouse Gas Reporting Rule*, 40 C.F.R. § 98.1(a). Assuming plaintiffs were to establish that carbon dioxide emissions in fact caused them injury, a court in fashioning an injunction such as plaintiffs seek would need to determine whether good policy and good sense require carbon dioxide emission reductions by replacement of gasoline-powered automobiles with electric cars. Electric cars would increase demand for electricity and therefore emissions from defendants' facilities. However, the injunction plaintiffs seek would discourage replacement of conventional automobiles by requiring defendants to take costly steps that increase the cost of electricity relative to the cost of gasoline.

Similarly, manufacturing of concrete causes very substantial emissions of carbon dioxide. *See, e.g.*, 40 C.F.R. pt. 98, subpt. H (mandatory greenhouse reporting for cement manufacturing). A court cannot appropriately enjoin defendants to construct different facilities without determining that the additional demand for concrete occasioned by the required construction will not have more of an effect on greenhouse gas emissions than the emissions avoided from defendants' facilities.

The economy and public health depend on reliable delivery of electric power. At any given moment, electricity demand contains a mix of critical uses, like

hospital equipment, and arguably less critical ones, like hair dryers or on-line poker machines. Defendants have no ability to direct what they generate to specific users at any given moment. A court fashioning injunctive relief like that demanded here, however, could enjoin only defendants – the power companies – and not their customers.

Moreover, many broad public policy decisions would affect both carbon dioxide emissions and emissions from defendants' facilities, and not necessarily in the same direction. The carbon dioxide emissions associated with living or doing business in different parts of the United States vary markedly. By way of example only, one study published in 2008, estimated the *per capita* carbon footprint in the 100 largest metropolitan areas in the United States from transportation and residential energy use in 2005, and showed a range of more than a factor of two. In this example, the estimated *per capita* carbon footprint in the Washington, D.C. area (3.12 metric tons/person/year) was more than double the footprint of people living in the New York City area (1.5 metric tons/person/year) or Los Angeles (1.41 metric tons/person/year). Marilyn Brown, Frank Southworth & Andrea Surzynski, *Shrinking the Carbon Footprint of America* (Brookings, May 2008).[6] The location of new development

[6] We cite this only by way of example. The estimates exclude non-residential energy use. They are, by now, somewhat dated. The study report does not provide information on variation *within* metropolitan areas nor does it analyze anything other than these 100 large metropolitan areas. The observation we make is just the obvious: location matters.

and the nature of land use have material implications for the rate of carbon dioxide emission. A trial court considering the injunction requested by plaintiffs would have to determine whether equitable and sensible policy to achieve total domestic carbon dioxide emission reductions (assuming for the sake of argument that those emissions reductions were equitable and sensible at all) might require incentives for people and businesses to move *into* an area served by one of the defendants – resulting in increased carbon dioxide emissions by that defendant. That is, if the service area of one of the defendants had housing and transportation infrastructure that made living there particularly greenhouse-gas-friendly, a global policy might want to encourage growth in that area, increasing the demand for that defendant's electricity and therefore its carbon dioxide emissions.

Almost every activity in every economy in the world – from manufacturing to power production to home cooking fires – has an effect on the total emissions of carbon dioxide on the planet. A court's determination to enjoin or not to enjoin these defendants implicitly depends upon a judgment about the relative value of all of these other activities. The persons responsible for all those other activities can never be joined in a tort case; they are everyone in the world. The persons responsible even in the United States cannot be joined.

Even if those parties were not considered indispensible, the facts concerning every activity in the

worldwide economy would have to be considered by the district court were this Court not to reverse. A trial court in a tort case is uniquely ill-suited to make judgments about the total sweep of human activity in the United States, let alone the world.

The court of appeals below analogized this case to other public nuisance cases considered by the federal courts. This claim, however, differs markedly from copper smelter emissions, *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), or sewage discharges, *Illinois v. Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee I*"); *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) ("*Milwaukee II*"). In each of these cases, a single pollution source affected the plaintiff state. If the defendant carried on its activity somewhere else, it would not have caused the alleged public nuisance to the plaintiff. Here, there is no question of location. There is no issue of local concentration of pollutants. Any ton of carbon dioxide anywhere in the world allegedly harms plaintiffs equally. Indeed, if Petitioners closed the facilities at issue and they (or another company) opened new identical facilities in a different state, or nation, the result to plaintiffs would allegedly be the same. This itself reveals the inherent non-justifiability of the claims. A trial court in a common law tort case cannot possibly choose among those emissions, and their causes, in fashioning an injunction. The list of necessary parties – or at least necessary facts – would be unmanageably large.

2. Tort Law Does Not Take into Account Economic Considerations Necessary for Rational National or Global Policy-Making

Conventionally, a court will not find a public nuisance unless the defendant's activity unreasonably interferes with a public right. RESTATEMENT (SECOND) OF TORTS, § 821B(1). Reasonableness connotes some evaluation of the defendant's activity and the public right with which it interferes, assuming the "public" can be identified. Certainly a court will not enjoin a public nuisance unless it find that the activity to be enjoined has a lower value than the interest upon which the enjoined activity encroaches. A trial court cannot possibly make that determination here.

A trial court cannot determine that defendants' carbon dioxide emissions should be enjoined rather than the emissions from a concrete plant in China. The court of appeals below hypothesized a "fair share" of carbon dioxide emission reductions that ought to be allocated to the United States as a whole, and a fair share of those reductions that could be allocated to defendants. However, a district court has no way of making the determination of the United States' fair share of reductions as against the European Union or India. The court has no way to decide which domestic emissions are less valuable than foreign ones and at what level. Moreover, a district court has no way of deciding which activities in the domestic economy have what shares of that hypothetical United States total reduction.

The decision to enjoin certain emitting activities and to permit others – to define the "aliquot" to be assigned to these defendants – would have economy-wide ramifications. Electricity would be more or less costly or more or less reliable. Some steps would be taken and others not. Trial judges in individual tort cases cannot possibly have before them the parties or the evidence necessary to make those decisions.

Moreover, the relative values of activities change over time. One form of electric power generation may make sense today, but not tomorrow. Even if plaintiffs were able to demonstrate that they experienced injury from greenhouse gas emissions, and even if they could somehow demonstrate that defendants should be enjoined in some way, within short order that injunction might well require modification to reflect changes in the economy. That sort of real-time adjustment could not possibly occur through tort litigation.

D. The Only Thing That Is Certain From This Litigation Is Economic Uncertainty

Legal philosophers and economists have long recognized that legal uncertainty has an adverse impact on the economy at all levels. It increases investment risks and transaction costs, discourages consumers from purchasing and stifles investment by entrepreneurs. *See, e.g.,* Helmut Wagner, *Macroeconomic Analysis of the Cost of Judicial Barriers in the Single Market, Part III* in: COST OF JUDICIAL

BARRIERS FOR CONSUMERS IN THE SINGLE MARKET, A REPORT FOR THE EUROPEAN COMMISSION, edited by H. von Freyhold, V. Gessner, E.L. Vial and H. Wagner (Brussels 2005); David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720 (1972).

On the investment side, uncertainty is empirically correlated with stock-market volatility and hence the risk of investment. *See, e.g.*, Benjamin Bernanke, *Irreversibility, Uncertainty and Cyclical Investment*, 98 QUARTERLY J. OF ECONOMICS 85 (1983). As uncertainty increases, risk increases as does the volatility of the markets. This is consistent with theoretical predictions and empirical findings that the absence of information (*i.e.*, lack of predictability) hinders rational investment: those willing to invest are discouraged from doing so. Correspondingly, as the uncertainty abates, investment rebounds. *See* Nicholas Bloom, *The Impact of Uncertainty Shocks*, 77 ECONOMETRICA 623 (2009). Late last year, Congress interjected significant short-term uncertainty into the economy when it was unable to reach accord on whether the Bush tax cuts would continue or be permitted to sunset. Businesses had no way of knowing what their tax burdens would be the following years and therefore, lacked the information necessary to make strategic plans. This in turn fueled market volatility that not only undermined investment, but also growth and the willingness of businesses to expand their workforces. In short, added legal uncertainty in the midst of significant economic recession

should not be embraced. Yet, that is precisely what the Second Circuit has done.

Business Roundtable is particularly concerned that suits of this nature, which subject all businesses to potential lawsuits and ask courts to fashion national and international policy, may increase uncertainty in precisely those areas of the economy that the executive branch has targeted to receive incentives. Specifically, the government has implemented legislation that provides significant economic incentives for companies that develop, manufacture and distribute electric cars and corresponding tax credits for those who purchase those cars (*e.g.*, Chevrolet Volt). As noted, electric cars increase the demand for electric generation while the current lawsuit is aimed at forcing generators to decrease their output. If the electric output is decreased, then infrastructure necessary to support an electric fleet (*e.g.*, adequate number of charging stations) may not develop as planned and the absence of that infrastructure may discourage consumers from purchasing these new, greenhouse gas friendly automobiles. Suits, such as this, which engender uncertainty, may well obviate the benefits of government programs by increasing the risks to both consumers and manufacturers.

Business Roundtable is also concerned that legal uncertainty, unlike other forms of uncertainty (*e.g.*, catastrophic event uncertainty), translates immediately into higher operating costs (*e.g.*, higher insurance premiums, added attorneys fees), further amplifying its adverse impact on the economy. These

transaction costs do little to improve productivity or increase employment. Indeed, they have precisely the opposite effect.

II. Legal Uncertainty Is Amplified When Federal Courts Inappropriately Interfere with Decisionmaking Committed to Federal and State Regulatory Agencies

In *Baker v. Carr*, 369 U.S. 186 (1962), this Court described six attributes of political questions that federal courts cannot or should not decide. The Court included in that enumeration questions with "a lack of judicially discoverable and manageable standards for resolving it" and questions with "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion[.]" 369 U.S. at 210 (factors two and three).

For the reasons explained above, even if plaintiffs could establish that they have suffered or will suffer injury as the result of carbon dioxide emissions, the remedy for that injury cannot be decided by a federal court. That remedy presents a political question under the second and third *Baker* factors. Every ton of carbon dioxide emitted anywhere in the world is fungible. Plaintiffs do not claim to suffer more injury from nearby emissions of carbon dioxide than from emissions in Asia or Europe. Every activity in the domestic and world economies affects carbon dioxide emissions. Moreover, defendants supply electricity. The amount supplied at any time must equal

the amount demanded, or the electricity supply "grid" will cease to be reliable.

Plaintiffs seek to have the district court enjoin defendants to reduce their carbon dioxide immediately and over time. Plaintiffs hypothesize a "fair share" for each defendant of the emissions reduction required globally to mitigate climate change. However, the district court has no discoverable or manageable standards to determine what that "fair share" might be.

No judicial principles establish the "fair share" of defendants' electric power plants as against electric power plants in China or automobiles in India or forest destruction in Brazil or land use decisions in Europe. The court of appeals below suggested that some "aliquot" of reduction might be assigned to defendants much in the way multiple polluters of a single stream might have to reduce their pollution proportionately. But there is no reason why *pro rata* reduction in carbon dioxide emissions is either fair or good policy. Some activities that emit carbon dioxide are more important to the economy or to national defense or to human well-being than others. Moreover, no judicial standard determines the "fair share" of the United States in any required global reduction. No standard would allow a court to decide that the United States should reduce its emissions at a higher or lower rate than France or Japan or Myanmar. Plaintiffs are not suing to enforce international treaties or domestic implementation of those

treaties.[7] They have brought a tort claim. Tort law simply does not address the questions that this case presents.

Moreover, a district court cannot decide whether or how to reduce emissions of carbon dioxide from the domestic economy without nonjudicial policy decisions. Other departments of government must decide whether the United States ought to have any obligation to reduce greenhouse gas emissions from its economy. Other departments are charged with determining whether foreign economies ought to bear larger or smaller burdens than does ours.

In addition, other departments must decide *how* the domestic economy should reduce emissions, if at all, and on what schedule. The decision to cap emissions from one sector or another cannot be made by a court in any principled fashion. A court cannot tell whether manufacturing ought to be encouraged over agriculture, or reliable electricity service is more valuable than inexpensive gasoline. A court cannot decide whether emission limits ought to be technology-based and fixed (for example, that all electricity generation fleets should average no more than so many tons of carbon dioxide/megawatt-hour) or tradable.

---

[7] Notably, the United States has ratified the United Nations Framework Convention on Climate Change. However, it has not ratified any protocol under that Convention that establishes a specific emission ceiling or reduction. *See* United Nations Framework Convention on Climate Change, *adopted* May 9, 1992, 1771 U.N.T.S. 107, S. Treaty Doc. No. 102-38.

These policy decisions are value judgments about which there is no right or wrong answer, and are for the Executive Branch and Congress. Courts are ill-equipped to make such foreign and/or economic policy.

The court of appeals below was far too facile with its reasoning. It analogized this case to a water pollution or localized air pollution case. If one or a few sources of pollution cause a high concentration of pollution that adversely affects a plaintiff, a court can decide whether one or more of those sources should change operations or relocate. There is no moving away here, according to the complaint. Plaintiffs claim that every activity in the world economy affects them. A court simply cannot choose among those activities. That is a political decision for other branches of government.

CONCLUSION

For all of these reasons, as well as those set forth in the briefs for the petitioners, amicus respectfully urges the Court to reverse the decision below.

Respectfully submitted,

MARIA GHAZAL
Director, Public Policy
and Counsel
BUSINESS ROUNDTABLE
901 New York Avenue, NW
West Tower, 3rd Floor
Washington, D.C. 20001
(202) 496-3268

ROBERT P. CHARROW*
LAURA METCOFF KLAUS
GREENBERG TRAURIG LLP
2101 L Street, NW
Washington, D.C. 20037
Charrowr@gtlaw.com
(202) 533-2396

DAVID G. MANDELBAUM
GREENBERG TRAURIG LLP
2700 Two Commerce Square
2001 Market Street
Philadelphia, PA 19103
(215) 988-7800

Counsel for Amicus
Business Roundtable

**Counsel of Record*

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
FEB 7 2011
OFFICE OF THE CLERK

No. 10-174

IN THE

Supreme Court of the United States

AMERICAN ELECTRIC POWER CO., ET AL.,

Petitioners,

v.

CONNECTICUT, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF CATO INSTITUTE IN SUPPORT OF PETITIONERS

ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Ave, NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

MEGAN L. BROWN
Counsel of Record
BRENDAN T. CARR
J. MICHAEL CONNOLLY
ARI MELTZER
WILEY REIN LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000
mbrown@wileyrein.com

February 7, 2011

234551

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

41696e
47

QUESTION PRESENTED

Whether Article III permits any entity claiming injury from climate change to seek judicial relief for such claims against any person or entity that it alleges "contributes to" global warming.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	7
I. THIS CASE DOES NOT PRESENT A "CASE OR CONTROVERSY" WITHIN THE MEANING OF ARTICLE III.	7
A. The Separation of Powers Depends on Fidelity to the Constitution's "Case or Controversy" Requirement.	7
B. The Traceability Element Is Critical to Standing, and the Second Circuit's Analysis Eviscerates Its Demands.	11
II. THIS LAWSUIT WOULD FORCE A FEDERAL COURT TO MAKE POLICIES PROPERLY ADOPTED ONLY BY THE POLITICAL BRANCHES.	20

Table of Contents

Page

A. This Case Presents Nonjusticiable Political Questions. 20

B. Global Warming Nuisance Suits Will Encourage the Politically Accountable Branches to Abdicate Their Duties. 25

C. These Cases Will Burden Federal Courts and Ossify Regulatory Responses to Global Warming. 29

CONCLUSION 34

TABLE OF CITED AUTHORITIES

Page

CASES

Allen v. Wright,
468 U.S. 737 (1984) ..... *passim*

America Trucking Associations, Inc. v. Atchison, Topeka & Santa Fe Railway,
387 U.S. 397 (1967) 32

Baker v. Carr,
369 U.S. 186 (1962) 5, 20

Buckley v. Valeo,
424 U.S. 1 (1976) 7

California v. General Motors Corp.,
No. C06-05755, 2007 WL 2726871
(N.D. Cal. Sept 17, 2007) 3

Cannon v. University of Chicago,
441 U.S. 677 (1979) 7, 26

Chevron, U.S.A., Inc. v. N.R.D.C.,
467 U.S. 837 (1984) 32

Chiles v. United States,
69 F.3d 1094 (11th Cir. 1995) 24

Clinton v. City of New York,
524 U.S. 417 (1998) 10

Cited Authorities

Page

Comer v. Murphy Oil USA, Inc.,
No. 05-436, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007), rev'd, 585 F.3d 855 (5th Cir. 2009), vacated on grant of reh'g en banc, 598 F.3d 208 (5th Cir. 2010), appeal dismissed, No. 07-60756, 2010 WL 2136658 (5th Cir. May 28, 2010), petition for writ of mandamus denied, No. 10-294 (U.S. Jan. 10, 2011) 2, 3

Comer v. Murphy Oil USA, Inc.,
No. 1:05-cv-00436 (S.D. Miss. Apr. 19, 2006).... 6

Conn v. City of Reno,
591 F.3d 1081 (9th Cir. 2010) 16

Connecticut v. American Electric Power Co.,
582 F.3d 309 (2d Cir. 2009)..... 17, 23

Duke Power Co. v. Carolina Environmental Study Group, Inc.,
438 U.S. 59 (1978) 13

Flast v. Cohen,
392 U.S. 83 (1968) 11

Gonzaga University v. Doe,
536 U.S. 273 (2002) 32

Gordon v. Texas,
153 F.3d 190 (5th Cir. 1998) 24

Cited Authorities

Page

Habecker v. Town of Estes Park, Colo.,
518 F.3d 1217 (10th Cir. 2008) 13

Haitian Refugee Center v. Gracey,
809 F.2d 794 (D.C. Cir. 1987) 12

Hancock v. Commissioner of Education,
443 Mass. 428 (2005) 26

Japan Whaling Association v. American Cetacean Society,
478 U.S. 221 (1986) 25

Lewis v. Casey,
518 U.S. 343 (1996) 10

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 4-5, 11, 12, 13

Marble Co. v. Ripley,
77 U.S. (1 Wall) 339 (1870) 24

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 9, 20

Massachusetts v. EPA,
549 U.S. 497 (2007) ..... *passim*

Mistretta v. United States,
488 U.S. 361 (1989) 4

Cited Authorities

	Page
Muskrat v. United States, 219 U.S. 346 (1911)	4
Native Village of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009)	3
Nixon v. United States, 506 U.S. 224 (1993)	5
Nova Health Systems v. Gandy, 416 F.3d 1149 (10th Cir. 2005)	13
Public Citizen v. U.S. Department of Justice, 491 U.S. 440 (1989)	8
Raines v. Byrd, 521 U.S. 811 (1997)	10
San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973)	33
Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974)	11
Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976)	8, 13 14
Sosa v. Alvarez-Machain, 542 U.S. 692 (2004)	23

Cited Authorities

Page

Summers v. Earth Island Institute,
129 S. Ct. 1142 (2009) 11

United States v. Richardson,
418 U.S. 166 (1974) 10, 28

United States v. SCRAP,
412 U.S. 669 (1973) 17

Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.,
454 U.S. 464 (1982) 4

Vermont Agency of Natural Resources v. United States ex rel. Stevens,
529 U.S. 765 (2000) 10

Vieth v. Juberlirer,
541 U.S. 267 (2004) 23

Warth v. Seldin,
422 U.S. 490 (1975) 9, 14, 17, 29

Williams v. North Carolina,
317 U.S. 287 (1942) 29

Williamson v. Lee Optical of Oklahoma, Inc.,
348 U.S. 483 (1955) 32

Cited Authorities

Page

CONSTITUTION AND STATUTES

U.S. Const. art III ..... *passim*

Air Pollution Control Act of 1955;
Pub. L. No. 84-159, 69 Stat. 322 (1955) 29

RULES AND REGULATION

68 Fed. Reg. 52,922 (Sept. 8, 2003) 24

74 Fed. Reg. 18,886 (Apr. 24, 2009) 30

74 Fed. Reg. 66,496 (Dec. 15, 2009) 30-31

MISCELLANEOUS

Darren Samuelsohn & Robin Bravender, *Democrats' Day of Reckoning Comes for Climate Vote*, Politico.com, Nov. 3, 2010 27

David A. Fahrenthold & Juilet Eilperin, *White House Takes a More Modest Plan B to Cancun Climate Talks*, Wash. Post., Nov. 20, 2010 27

Editorial, *The New Climate Litigation: How About If We Sue You for Breathing?*, The Wall Street Journal, Dec. 28, 2009 6

Cited Authorities

Page

EPA, *Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act*, http://www.epa.gov/climatechange/endangerment.html#comments.. 31

James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, The Injury-In-Fact Rule, And The Framer's Plan For Federal Courts Of Limited Jurisdiction*, 54 Rutgers L. Rev. 1 (2001)..... 9

Jean Edward Smith, *John Marshall: Definer of a Nation* (1996)..... 9

John Carey & Lorraine Woellert, *Global Warming: Here Come the Lawyers*, BusinessWeek Online (Oct. 30, 2006)..... 21

John M. Broder, *Clashes Loom with E.P.A. Set to Limit Gases*, N.Y. Times, Dec. 31, 2010..... 27

John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219 (1993)..... 9

John G. Roberts, *2010 Year-End Report on the Federal Judiciary* (2010)..... 31

Juliet Eilperin, *Effort to Block EPA from Regulating Greenhouse Gases Fails in Senate*, Wash. Post., June 10, 2010..... 26

Cited Authorities

Page

Kirsten H. Engel, *Harmonizing Regulatory and Litigation Approaches to Climate Change Mitigation: Incorporating Tradable Emissions Offsets into Common Law Remedies*, 155 U. Penn L. Rev. 1563 (2007) 28

Martin H. Redish, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 Duke L.J. 449 (1991) 8

Mary Christina Wood, Atmospheric Trust Litigation, *Adjudicating Climate Change: Sub-National, National and Supra-National Approaches* (Willam C. G. Burns & Hari M. Osofsky, eds. 2009) 21

Randall S. Abate, *Automobile Emissions and Climate Change Impacts: Employing Public Nuisance Doctrine as Part of a "Global Warming Solution" in California*, 40 Conn. L. Rev. 591 (2008) 21

Richard J. Lazarus, *The Making of Environmental Law* (2004) 29

Senate Minority Staff Report, *More than 700 International Scientists Dissent Over Man-Made Global Warming Claims* (2009)..... 22

The Federalist No. 47 (J. Madison)..... 8

Cited Authorities

	Page
The Federalist No. 48 (J. Madison)	8
U.S. Global Change Research Program, *Our Changing Planet* (2010)	30
W. Lee Rawls, *In Praise of Deadlock: How Partisan Struggle Makes Better Laws* (Woodrow Wilson Center Press 2009)	28

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files amicus briefs.

This case presents an opportunity to clarify the important but limited role federal courts play in our system of government. Cato believes that assigning courts the role of resolving policy disputes—instead of legal ones—would dramatically expand the judicial role, thereby relieving the legislative and executive branches of political accountability for sweeping changes to national economic and social policy.

SUMMARY OF THE ARGUMENT

Respondents seek a federal court injunction ordering five energy companies with operations across the nation to "abate" their "contribution[s]" to global warming "by requiring [them] to cap [their] carbon dioxide emissions

---

1. Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief and letters of consent have been lodged with the Clerk.

and then reduce them by a specified percentage each year for at least a decade." Complaint filed by State Plaintiffs at 49, ¶ 6, *Connecticut v. Am. Elec. Power Co.*, No. 04-05669 (S.D.N.Y. July 21, 2004) (hereinafter "Compl."). Respondents do not seek this remarkable judicial action to compel compliance with any binding standard for Petitioners' carbon dioxide emissions—no such rules exist. Instead, they invoke the jurisdiction of the federal courts by pleading common law nuisance claims, and they do so *because* no specific emissions limit has been provided by the Congress or the EPA. Those branches have been vigorously debating and considering caps on carbon dioxide emissions, which are the most controversial aspect of the many possible policy responses to concerns about global warming, and have thus far not taken what Respondents deem satisfactory action.

Though Respondents lack standing and present sweeping policy questions suitable only for the political branches, a panel of the Second Circuit deemed this case cognizable. In permitting this case to go forward, the Court of Appeals' decision subverts important structural and prudential limitations on federal courts' authority. As every district court to confront this sort of "global warming" nuisance litigation has concluded, federal courts simply do not have the policy-making authority, the technical expertise, or the constitutional responsibility to address the fundamental policy questions necessarily implicated by this case.[2] Simply put, the factual and

2. There have been four major "global warming" nuisance suits, including this lawsuit. In *Comer v. Murphy Oil*, Mississippi residents sued dozens of oil and gas companies for damages from Hurricane Katrina, which allegedly was intensified by global warming. The Southern District of Mississippi dismissed the case

causation issues presented do not come close to the sort of case or controversy that is properly decided by an Article III judge.

This Court should reverse the Second Circuit and make clear that this case and other global warming nuisance suits are nonjusticiable. A decision to the contrary would encourage the democratically accountable branches to abdicate their responsibility for national policies, require unmanageable judicial guesswork with sweeping impact on national (and international) affairs, and ossify federal responses to the controversial and fluid economics and science of climate change.

* * *

Our government's power is divided among three co-equal branches. This structure protects each branch

---

based on the political question doctrine and a lack of standing. *See Comer v. Murphy Oil USA, Inc.*, No. 05-436, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007), rev'd, 585 F.3d 855 (5th Cir. 2009), vacated on grant of reh'g en banc, 598 F.3d 208 (5th Cir. 2010), appeal dismissed, No. 07-60756, 2010 WL 2136658 (5th Cir. May 28, 2010), petition for writ of mandamus denied, No. 10-294 (U.S. Jan. 10, 2011). In *Kivalina*, an Alaskan village sued two dozen oil, energy and utility companies for $400 million for Alaskan coastal erosion allegedly caused by global warming. The Northern District of California dismissed the claims under the political question doctrine and for lack of standing. *See Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009). A fourth case, a 2007 nuisance suit against automakers, was dismissed under the political question doctrine. *See California v. Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept 17, 2007). The appeal was voluntarily dismissed. These novel suits test the bounds of federal court's authority and represent a conscious effort to draw federal courts into the climate change debate.

from encroachment by the others and assigns essential functions of government to the organ best suited to the task. Public policy disputes are appropriately resolved by a representative and democratically accountable legislature; law enforcement and national defense demand swift action by a unitary executive; and the interpretation of law requires the dispassion of judges removed from the vagaries of politics. The mission of the federal courts, then, is not to resolve policy disputes but to interpret the laws that arise from the political branches' resolution of those disputes.

To ensure fidelity to this separation, the Framers confined judicial review to "cases" and "controversies." U.S. Const. art. III, § 2. This limitation "preclud[es] debilitating entanglements between the Judiciary and the two political Branches" by limiting the judicial power to "those disputes traditionally thought to be capable of resolution through the judicial process." *Mistretta v. United States*, 488 U.S. 361, 385 (1989) (citations and quotations omitted). Courts thus "carefully abstain from exercising any power that is not strictly judicial in its character, and which is not clearly confided to it by the Constitution." *Muskrat v. United States*, 219 U.S. 346, 355 (1911) (citations and quotations omitted).

The discipline imposed by Article III's standing requirements ensures that "the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian Coll. v. Ams. United For Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982); *accord Lujan v. Defenders of Wildlife*, 504

U.S. 555 (1992). Similarly, the political question doctrine "is 'essentially a function of the separation of powers,' existing to restrain courts 'from inappropriate interference in the business of the other branches of Government,'" *Nixon v. United States*, 506 U.S. 224, 252-53 (1993) (Souter, J., concurring in the judgment) (citations omitted).

The standing and political question doctrines thus complement and reinforce each other: they require a plaintiff to "claim infringement of an interest particular and personal to himself, as distinguished from a cause of dissatisfaction with the general frame and functioning of government—a complaint that the political institutions are awry." *Baker v. Carr*, 369 U.S. 186, 287 (1962) (Frankfurter, J., dissenting).

Respondents' claims are nonjusticiable. First, their theory of causation cannot satisfy Article III. Due to the undifferentiated nature of carbon dioxide emissions by billions of businesses, activities, and individuals around the globe—the alleged harms are untraceable to particular actions of these defendants. The notion that traceability can be established simply by asserting that a defendant "contributes to" global warming, thereby playing some part in sea level changes and other ecological effects present the world over, misreads and improperly extends this Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), and cannot be squared with this Court's settled jurisprudence. This case fails to satisfy Article III's standing requirement.

This case is further nonjusticiable under the political question doctrine. The political branches have not provided any judicially manageable standards of conduct to govern

adjudication of the lawfulness of Petitioners' activities. The remarkable relief here requested—a judicial abatement order imposing at least a decade of specific emissions caps on national energy companies—starkly demonstrates that this dispute is suitable only for the political branches. Global warming litigants have made plain their claims' political nature: "the political process has failed" to adequately respond to climate change because "state and Federal Governments . . . [have] refused to regulate greenhouse gas emissions." Third Amended Complaint, *Comer v. Murphy Oil Co.*, No. 1:05-cv-00436, ¶¶ 20, 39 (S.D. Miss. Apr. 19, 2006). Here, the litigants were, in the words of one state Attorney General, "'trying to compel measures that will stem global warming regardless of what happens in the legislature.'"[3] But dissatisfaction with the political process does not create a judicially-cognizable grievance.

For these reasons, district courts across the country have correctly and uniformly determined that these types of claims are nonjusticiable. In disagreeing, the Second Circuit has dramatically expanded the judicial role, and foisted upon trial courts the tasks of, among other things: (1) evaluating the existence, degree, and causes of global climate change, (2) judging the impact and utility of Petitioners' activities vis-à-vis all others around the globe allegedly contributing to climate change, and (3) divining and imposing a regulatory remedy that will dramatically reshape how energy is produced and sold in this country.

---

3. Editorial, *The New Climate Litigation: How About If We Sue You for Breathing?*, The Wall Street Journal, Dec. 28, 2009, at A16 (quoting Connecticut Attorney General Richard Blumenthal, now a U.S. Senator, speaking to trade publication Carbon Control News).

This "regulation by litigation" will remove fundamental policy disputes from the democratic process and encourage the politically accountable branches to abdicate their responsibilities to craft policy solutions that have democratic legitimacy. When the judiciary "assume[s] policymaking authority . . . [r]ather than confronting the hard political choices involved, Congress is encouraged to shirk its constitutional obligation and leave the issue to the courts to decide. When this happens, the legislative process with its public scrutiny and participation has been bypassed, with attendant prejudice to everyone concerned." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 743 (1979) (Powell, J., dissenting).

This Court should reject the Second Circuit's decision and protect the federal judiciary from being conscripted into federal policymaking for which it is institutionally and constitutionally ill-suited.

ARGUMENT

I. THIS CASE DOES NOT PRESENT A "CASE OR CONTROVERSY" WITHIN THE MEANING OF ARTICLE III.

A. The Separation of Powers Depends on Fidelity to the Constitution's "Case or Controversy" Requirement.

"The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787." *Buckley v. Valeo*, 424 U.S. 1, 124 (1976). This guiding principle "long

predate[d] the American Constitution," and the Framers' concept of separation of powers was "a conglomeration of the ideas of many scholars and the experiences of many governments." Martin H. Redish, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 Duke L.J. 449 (1991). Indeed, "[n]o political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty" than that "the legislative, executive and judiciary departments ought to be separate and distinct." The Federalist No. 47 (Madison).

Thus was the power of government divided between the legislature, executive, and judiciary. The Constitution gave each branch certain enumerated powers that would allow them, in turn, to check the other branches' powers. *See Pub. Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 468 (1989) ("The Framers . . . knew that the most precious of liberties could remain secure only if they created a structure of Government based on a permanent separation of powers."). Of these three branches, the Framers found the judiciary least likely to overstep its authority. While the legislature's powers are "more extensive, and less susceptible of precise limits," the judicial branch has clear "landmarks" that precisely define its power. The Federalist No. 48 (Madison).

These landmarks are found in Article III's "Cases and Controversies" requirement. *See* U.S. Const. art III, § 2. Indeed, "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976).

This Court has long recognized that Article III prevents courts from exercising legislative or executive powers by straying beyond a "case" or "controversy." The judiciary solely "decide[s] on the rights of individuals," and those "[q]uestions, in their nature political . . . can never be made in this court." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803); *see also* James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, The Injury-In-Fact Rule, And The Framer's Plan For Federal Courts Of Limited Jurisdiction*, 54 Rutgers L. Rev. 1, 66 (2001) (documenting early Supreme Court decisions that "reaffirmed the Framers' decision to utilize judicial review to restrain the political branches but only within the confines of actual controversies between parties"). John Marshall warned: "If the judicial power extended to every question under the Constitution [and] every question under the laws and treaties of the United States[,] . . . [t]he division of power [among the branches of government] could exist no longer, and the other departments would be swallowed up by the judiciary." *See* Jean Edward Smith, *John Marshall: Definer of a Nation* 260-61 (1996); *see also* John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1229 (1993) ("By properly contenting itself with the decision of actual cases or controversies . . . , the judiciary leaves for the political branches the generalized grievances that are their responsibility under the Constitution.").

Modern Article III standing doctrine "is built on a single basic idea—the idea of separation of powers." *Allen v. Wright*, 468 U.S. 737, 752 (1984). Time and again the Court has reaffirmed this fundamental principle. *See Warth v. Seldin*, 422 U.S. 490, 498 (1975) ("[Standing] is founded in concern about the proper—and properly

limited—role of the courts in a democratic society."); *Lewis v. Casey*, 518 U.S. 343, 349 (1996) ("[T]he doctrine of standing [is] a constitutional principle that prevents courts of law from undertaking tasks assigned to the political braches."); *Vermont Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 771 (2000) ("[Standing is] a key factor in dividing the power of government between the courts and the two political branches.").

The standing doctrine requires judicial humility: courts must "put aside" what may be a "natural urge to proceed directly to the merits" and, instead, "carefully inquire as to whether [the plaintiffs] have met their burden" of establishing standing. *Raines v. Byrd*, 521 U.S. 811, 820 (1997). While a court may be tempted to stray into the legislative and/or executive sphere, "[t]he Constitution's structure requires a stability which transcends the convenience of the moment." *Clinton v. City of New York*, 524 U.S. 417, 449 (1998) (Kennedy, J., concurring).

By adhering to Article III's requirements, courts ensure that core questions about how society will be ordered are decided in the *political* branches, where the Constitution assigns them. No matter how "[s]low, cumbersome, and unresponsive . . . the traditional electoral process may be thought at times," *United States v. Richardson*, 418 U.S. 166, 179 (1974), the legitimacy of representative government depends on this process. Indeed, "[a]ny other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts." *Id.*;

see Schlesinger vs. Reservists Comm. to Stop the War, 418 U.S. 208, 222 (1974) (warning against "government by injunction"); *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009) (explaining that where standing "does not exist, allowing courts to oversee legislative or executive action would significantly alter the allocation of power . . . away from a democratic form of government").

When the judiciary properly limits its actions to "cases" and "controversies," it "recogni[zes] the strengths as well as the hazards that go with our kind of representative government," and ensures that "[t]he powers of the federal judiciary will be adequate for the great burdens placed upon them." *Schlesinger*, 418 U.S. at 222 (quoting *Flast v. Cohen*, 392 U.S. 83, 131 (1968) (Harlan, J., dissenting)).

B. The Traceability Element Is Critical to Standing, and the Second Circuit's Analysis Eviscerates Its Demands.

This Court has distilled the foundational separation of power principles into a single, modern test. This test establishes "the irreducible constitutional minimum of standing [and it] contains three elements." *Lujan*, 504 U.S. at 560. *First*, "a plaintiff must show that he is under threat of suffering 'injury in fact'"—which this Court has further defined as an invasion of a legally protected interest that is (a) "concrete and particularized," and (b) "actual and imminent, not conjectural or hypothetical." *Summers*, 129 S. Ct. at 1149; *see also Lujan*, 504 U.S. at 560. *Second*, there must be a "causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant,

and not . . . th[e] result [of] the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (internal quotation marks and citations omitted). *Third*, it must be "likely," not merely "speculative," that the injury can be "redressed by a favorable decision." *Id.* at 561. This three-pronged inquiry "requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen*, 468 U.S. at 752 (internal quotation marks and citations omitted). Because these elements "are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Lujan*, 504 U.S. at 561.

Although the first element, injury-in-fact, has garnered more judicial attention, the "causation aspect" of standing, which includes both the traceability and redressability prongs, is equally vital. This "causation aspect" is "properly understood as designed to confine federal courts to their 'properly limited' function." *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 805 (D.C. Cir. 1987). It helps "prevent the virtually limitless spread of judicial authority." *Id.* Thus, "'causation' in this context is something of a term of art, taking into account not merely an estimate of effects but also considerations related to the constitutional separation of powers as that concept defines the proper role of courts in the American governmental structure." *Id.* at 801. This "Court's decisions about causation rest upon something more than mere estimates of probabilities," *id.* at 803—they are "at least as much a matter of constitutional principle," *id.* at 806.

Cognizant of the important separation of powers concerns underlying the traceability requirement, this Court requires a plaintiff to make at least two related showings to satisfy this prong of the standing inquiry. These requirements demonstrate that some fact patterns, while theoretically possible, can be simply too attenuated to satisfy Article III. The Second Circuit's "contributes to" standard does not account for the Constitution's limits on highly-attenuated theories of causation.

First, a plaintiff must show there is a "substantial likelihood" that the defendant's conduct caused his injury. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 75 (1978). "If the line of causation between the illegal conduct and the injury is too attenuated," the traceability requirement will not be met. *Allen*, 468 U.S. at 752; *see also Habecker v. Town of Estes Park, Colo.*, 518 F.3d 1217, 1225 (10th Cir. 2008) ("Although the 'traceability' of a plaintiff's harm to the defendant's actions need not rise to the level of proximate causation, Article III does 'require proof of a substantial likelihood that the defendant's conduct caused plaintiff's injury in fact.'" (quoting *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1159, 1161 (10th Cir. 2005))). If it is "purely speculative" that an individual plaintiff's injury can be traced to a particular defendant's action, there is no standing. *Simon*, 426 U.S. at 42-43.

Second, traceability requires that the plaintiff's asserted injury must not "result[] from the independent action of some third party not before the court." *Id.* at 41-42; *see also Lujan*, 504 U.S. at 561. In sum, Respondents "must allege facts from which it reasonably could be inferred that, absent the [challenged conduct] . . . there

is a *substantial probability* that they would" not have suffered their alleged injury-in-fact. *Warth*, 422 U.S. at 504 (emphasis added).

This Court has applied the traceability requirement in three major cases—*Warth*, *Simon*, and *Allen*. *Warth* involved a challenge to the lawfulness of a town's zoning regulations on the grounds that the regulations harmed persons of low and moderate income by preventing them from being able to afford to live in the town. The Court dismissed the action for lack of standing because "the facts alleged fail to support an actionable causal relationship." *Id.* at 507. While the zoning regulations may have contributed "substantially" to the cost of housing, Article III traceability was nonetheless missing because the lack of affordable housing was also attributable to the actions of a third party—the builders' unwillingness to construct low-cost housing. *Id.* at 506-07.

Similarly, in *Simon*—an action brought by indigents to challenge a decision of the Treasury Department that conferred favorable tax treatment on hospitals—this Court held that the plaintiffs lacked standing because, even assuming that the challenged decision encouraged hospitals to refrain from providing certain services to the poor, "[i]t is purely speculative whether the denials of service specified in the complaint fairly can be traced to petitioners' 'encouragement' or instead result from decisions made by" third parties not before the court. *Simon*, 426 U.S. at 42-43.

Allen is to the same effect. There, parents alleged that the IRS had failed to fulfill its obligation to deny tax-exempt status to racially discriminatory private

schools. However, the plaintiffs lacked standing because their injury was not "fairly traceable" to the defendant's challenged conduct. *Allen*, 468 U.S. at 756-66. The Court stated that "[t]he diminished ability of respondents' children to receive a desegregated education would be fairly traceable to unlawful IRS grants of tax exemptions only if there were enough racially discriminatory private schools receiving tax exemptions in respondents' communities for withdrawal of those exemptions to make an appreciable difference in public school integration." *Id.* at 758 (emphasis added). However, the Court concluded that the plaintiffs lacked standing because "[t]he chain of causation . . . involves numerous third parties [and their] . . . independent decisions." *Id.* at 759. In other words, "[t]he links in the chain of causation between the challenged Government conduct and the asserted injury [we]re far too weak for the chain as a whole to sustain respondents' standing." *Id.*

Respondents' chain of causation fails both aspects of this Court's core teachings: they are too attenuated and they rest inextricably on the activities of third parties not before the Court.

Respondents' alleged chain of "causation" is too attenuated because it involves at least the following links: (1) carbon dioxide has existed in the Earth's atmosphere for 20 million years, and the levels have been rising since at least the 18th century, Compl. ¶ 88; (2) Petitioners allegedly emit 10% of "anthropogenic carbon dioxide emissions in the United States," *id.* ¶ 98; (3) in the Earth's atmosphere, Petitioners' carbon dioxide emissions mix with the other 90% of U.S. carbon dioxide emissions, the emissions of the rest of the world, carbon dioxide that has

been in the atmosphere for "several centuries," *id.* ¶ 87, and other global greenhouse gases, *id.* ¶ 85; (4) increased gases raise atmospheric temperatures which, among other things, allegedly makes oceans "less efficient at removing carbon dioxide from the atmosphere, thus causing even more carbon dioxide to accumulate" in turn accelerating the concentration of gases and atmospheric warming, *id.* ¶ 90; (5) the gases thus accumulated are predicted to warm the Earth's atmosphere by some unspecified temperature at some unspecified time, *id.* ¶ 91; (6) the resulting warmer atmosphere may cause various ecological effects, including sea level rise, *id.* ¶ 113, on the one hand, and at the same time may "lower the water levels of the Great Lakes" *id.* ¶ 122; and (7) these effects may (in the case of sea level rise) cause flooding, which may erode beaches and harm tourism, *id.* ¶ 117, or may (in the case of lake levels falling) adversely affect boat docks, requiring the extension of municipal water intakes, damaging wetlands, *id.* ¶ 125.

Such a chain of causation is inadequate for purposes of Article III and calls to mind the "butterfly effect" which, in a case like this, "becomes an engine for judicial intervention." *Conn v. City of Reno*, 591 F.3d 1081, 1090 (9th Cir. 2010) (Kozinksi, C.J., dissenting from denial of rehearing en banc). "[I]f judges can draw attenuated causal connections of the sort at issue in this case, they can expand their authority to encompass a much larger sphere of activity." *Id.*

Respondents' chain of causation is also too dependent on natural phenomena and third parties to satisfy the "substantial likelihood" standard. Because carbon dioxide mixes in an undifferentiated manner in the atmosphere with other gases, is emitted by virtually every individual, animal, method of transportation, and business worldwide,

and has been accumulating for at least centuries, there is not a "substantial likelihood" that these defendants have caused or will cause Respondents' asserted injuries. By Respondents' own allegations, Petitioners' emissions constitute approximately ten percent of all anthropogenic carbon dioxide emissions in the United States, Compl. ¶ 2, which represents an even smaller fraction of global greenhouse gas emissions and a vanishingly small percentage of the gases accumulating in the atmosphere for millenia. Respondents simply cannot say that, absent these particular emissions, there is a "substantial probability" that they would be spared their alleged global warming-created injuries. *Warth*, 422 U.S. at 504.

Under the panel's approach, however, any person or business on the planet that can be alleged to "contribute to" global warming can be potentially liable—and any person allegedly harmed thereby can sue—for abatement. Though the panel concluded that evaluation under the tort standard for causation was improper at this stage, it does not follow that the panel's "contributes to" standard is appropriate. Article III requires more. "[P]leadings must be something more than an ingenious academic exercise in the conceivable." *United States v. SCRAP*, 412 U.S. 669, 688 (1973). Otherwise, every emitter, large and small, could be put through "the rigors of evidentiary proof." *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 347 (2d Cir. 2009). Indeed, this Court has rejected claims on causation grounds at the motion to dismiss stage. *See Allen*, 468 U.S. at 756-59.

Nor does *Massachusetts v. EPA* support standing here. *Massachusetts* did not mark a broad relaxation of traditional standing doctrine, or even a special carve-out for coastal States to bring suit as to land threatened

by climate change, and over which they were both "sovereign" and the "owner," as the United States argues in its curious position on standing. *See* Brief of United States at 27, 28.[4] Instead, in *Massachusetts*, the Court confronted the specific context of a challenge by several States to the EPA's decision not to regulate greenhouse gas emissions under the Clean Air Act, where that federal statute granted a right to judicial review. Treating the existence of a statutory basis for the claim as "of critical importance," *Massachusetts*, 549 U.S. at 516, the Court concluded that at least one State had standing. The Court determined that "Congress has ordered EPA to protect Massachusetts (among others) by prescribing standards" for auto emissions, and that "Congress has moreover recognized a concomitant procedural right to challenge the rejection of its rulemaking petition." *Id.* "Given that procedural right *and* Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis." *Id.* at 520 (emphasis added).

Nothing in the Court's decision held or hinted that in cases lacking such a statutory basis, the Court was prepared to dispense with the traditional demands of Article III. The Second Circuit's and the Acting Solicitor General's application of *Massachusetts* reads far more into the Court's decision than is justified. Respondents here creatively proceed under the purported federal common law of nuisance. They ask a federal court to use that federal common law to craft and enforce a standard of care for greenhouse gas emissions that the political

4. Though the Acting Solicitor General concludes that "at least some" of the state Respondents have Article III standing, he notes that "the question is not free from doubt." United States' Br. at 25.

branches have never "prescribed," and for which no right to review has ever been "recognized" by Congress. *Id.* at 519, 520. Thus, this case is missing the very authorization the Court deemed "of critical importance to the standing inquiry." *Id.* at 516.

Nor does *Massachusetts* constitute a sea change in the traditional demands of Article III, including causation. Having earlier concluded that States deserved special solicitude to enforce Congress' statutory command, the Court concluded that the causation element was satisfied. The Court concluded that "EPA's refusal to regulate such emissions 'contributes' to Massachusetts' injuries." *Id.* at 523. This statement cannot be taken out of context and read as a general endorsement of a relaxed "contributes to" standard for causation in the global warming or any other context. It must be understood in the context of the regulatory action Massachusetts was trying to force the EPA to take. The Court found "a 'substantial likelihood that the judicial relief requested' will prompt EPA to take steps to reduce . . . risk [to Massachusetts and other coastal states]." *Id.* at 521 (internal citations omitted).

The Court's analysis was informed by its apparent understanding that the EPA would use its expertise, national jurisdiction, and regulatory flexibility to regulate "the United States transportation sector" and "reduc[e] domestic automobile emissions," a step it characterized as "hardly [] tentative," though perhaps incremental. *Id.* at 524. Under the Second Circuit's approach, piecemeal and potentially inconsistent emissions caps and damage awards will be imposed on cherry-picked companies and industries, based solely on allegations that they "contribute to" global warming. This Court's causation standard is designed to filter out this type of speculative

and generalized claim. *Massachusetts* did nothing to disturb that foundational principle.

At bottom, Respondents have failed to establish Article III standing. Only by deviating from the "substantial likelihood" test, or extending *Massachusetts* well beyond its boundaries, could the panel find a cognizable "case or controversy" based on the facts alleged. If left unchecked, this error will cause lasting harm to the separation of powers and allow limitless numbers of plaintiffs to put countless defendants to the task of litigating speculative and attenuated claims.

II. THIS LAWSUIT WOULD FORCE A FEDERAL COURT TO MAKE POLICIES PROPERLY ADOPTED ONLY BY THE POLITICAL BRANCHES.

A. This Case Presents Nonjusticiable Political Questions.

Under the federal Constitution's separation of powers, "[i]t is emphatically the province and duty of the judicial department to say what the law *is*," *Marbury*, 5 U.S. at 177 (emphasis added), not what the law *should be*. The political question doctrine effectuates this core principle of the separation of powers.

Under the political question doctrine, courts wisely decline to resolve cases that "lack . . . judicially discoverable and manageable standards for resol[ution]," or are brought "without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. These principles ensure that "[q]uestions, in their nature political, or which are, by the constitution

and laws, submitted to the executive, can never be made in this court." *Marbury*, 5 U.S. at 170.

While judges should not exploit the political question doctrine to avoid deciding questions that happen to be politically sensitive, this case asks courts to venture far beyond constitutional and prudential limitations on their power. Respondents' attempt to conscript the judiciary into serving as a proxy Congress—while consistent with the calls of commentators, academics, and the plaintiffs' bar to seek change through the courts[5]—runs afoul of constitutional limits on judicial power.

---

5. *See, e.g.*, Randall S. Abate, *Automobile Emissions and Climate Change Impacts: Employing Public Nuisance Doctrine as Part of a "Global Warming Solution" in California*, 40 Conn. L. Rev. 591, 626-27 (2008) ("Desperate times call for desperate measures. In light of the climate change crisis . . . there is a need for heroic litigation to go beyond the bounds of traditional doctrine and try to promote public good through creative use of common law theories like public nuisance."); *see also* Mary Christina Wood, Atmospheric Trust Litigation, chapter in *Adjudicating Climate Change: Sub-National, National, And Supra-National Approaches*, 129 (William C.G. Burns & Hari M. Osofsky, eds. 2009), *available at* http://law.uoregon.edu/faculty/mwood/docs/atmospheric.pdf ("At a time in history when thinkers across the world are calling for new, innovative technologies and practices to address climate crisis, lawyers should pioneer promising, if untested, legal constructs to address carbon loading of the atmosphere."). Indeed, observers noted years ago that the plaintiffs' bar was likely to capitalize on global warming: "[a]s with tobacco, plaintiffs are trying out a variety of legal theories, some quite speculative." John Carey & Lorraine Woellert, *Global Warming: Here Come the Lawyers*, BusinessWeek Online (Oct. 30, 2006), *available at* http://www.businessweek.com/magazine/content/06_44/b4007044.htm. Noting pending suits, the authors observed that "[e]ven more litigation could be in the offing." *Id.*

Key to determining whether the judiciary has power to act is the presence of judicially discoverable and manageable standards. It is precisely the lack of such standards that led Respondents to seek judicial resolution of this matter. Making the requested determination of liability, whether at summary judgment or after trial, will necessarily require the district court to consider and decide, among other contested matters: whether global warming is an actual phenomenon; whether it is man-made; and whether it contributes to public health injuries, damage to coastal resources, contaminated water supplies, and reduced agricultural output.[6] The court will then have to: evaluate and identify the relative responsibility shared by individuals and businesses worldwide for what are admittedly undifferentiated greenhouse gas emissions; undertake (or omit) a cost-benefit analysis regarding the countless countervailing concerns of both national and international interests; assess the reasonableness of Defendants' particular emissions and activities in light of the benefits derived therefrom; and balance the trade-offs that come with establishing the standard of care of a greenhouse gas emitter. It will also have to impose, enforce and oversee its prescribed remedy for "at least a

---

6. Despite Respondents' claims that such questions are the subject of "clear scientific consensus," Compl. ¶ 1, a growing number of international scientists, including many current and former participants on the United Nations Intergovernmental Panel on Climate Change, dispute some or all of these "consensus" claims. Senate Minority Staff Report for S. Env't and Pub. Works Comm., *More than 700 International Scientists Dissent Over Man-Made Global Warming Claims*, at 2 (2009), *available at* http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=83947f5d-d84a-4a84-ad5d-6e2d71db52d9&CFID=74865098&CFTOKEN=32819534.

decade." Compl. ¶ 6. These tasks are squarely within the zone of activities which, if they are to be undertaken at all, are the responsibility of the legislative and executive branches.

The Second Circuit casually dismissed such concerns, reasoning that courts could turn to "familiar public nuisance precepts" or "common law tort principles" for standards to apply in this case. *Am. Elec. Power Co.*, 582 F.3d at 327-28. But such common law principles—derived from Restatements, treatises and case law—are inadequate to resolve the complex scientific, political, and foreign policy questions that this case presents. "One of the most obvious limitations imposed by [Article III, § 1, of the Constitution] is that judicial actions must be governed by *standard*, by *rule*." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion) (emphasis in original). In our system of government, the standards and rules necessary for judicial action are provided by the coordinate branches of government, not the judiciary. This is why federal courts generally eschew the creation of federal common law, and in particular are loathe to craft federal common law rights of action: "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004).

Respondents cloak their political grievances in the language of common law nuisance to coax the courts into taking action that the political branches have thus far declined to take. In actuality, the courts cannot adjudicate this case without first making initial determinations about environmental policy. This is not an easy task. Congress and the EPA have been grappling with the

appropriate approach, if any, to climate change. The EPA years ago stated: "It is hard to imagine any issue in the environmental area having greater economic and political significance than the regulation of activities that might lead to global climate change." 68 Fed. Reg. 52,922, 52,928 (Sept. 8, 2003). Respondents have and should continue to seek action from Congress. That the desired action has not been forthcoming or has not been what the Respondents want is not cause for regulation by the judiciary.

The remedy sought here confirms that this case presents a nonjusticiable political question. Respondents ask a court, based on a record created within the confines of the judicial process, to evaluate evidence of global phenomena dating back millions of years, determine complex facts about climate change, and balance a virtually endless array of competing interests to develop, impose and enforce specific emissions limits to reduce Petitioners' contributions by "a specifi[c] percentage" over many years. Compl. ¶ 6. "[R]equests for injunctive relief can be particularly susceptible to justiciability problems, for they have the potential to force one branch of government—the judiciary—to intrude into the decisionmaking properly the domain of another branch—the executive." *Gordon v. Texas*, 153 F.3d 190, 194 (5th Cir. 1998); *see also Chiles v. United States*, 69 F.3d 1094, 1097 (11th Cir. 1995) ("We recognize that the difficulty in fashioning a remedy for an alleged wrong can result in a case being nonjusticiable.").

While equitable relief obviously can have a proper place in the constitutional function of the judiciary, the duration and extent of the court's ongoing involvement can and should be relevant in determining whether the judiciary has an appropriate role in a particular case. *Cf. Marble Co. v. Ripley*, 77 U.S. (1 Wall) 339, 358-59 (1870)

("If performance be decreed, the case must remain in court forever . . ."). Considering the remedies sought, the contrast between the present case and *Massachusetts v. EPA* becomes readily apparent. While the Court in *Massachusetts* performed its familiar role of construing a statute, it was the EPA that had the burden on remand of evaluating the scientific and other issues arising from the petition for rulemaking at issue in that case. 549 U.S. at 534-35. Respondents here would instead have the district court not only make those evaluations itself, but continuously oversee, evaluate and even order adjustments to Petitioners' emissions-generating activities to ensure that they adhere to judicially-established standards. These are exactly the kind of "policy choices and value determinations" that this Court has determined "[t]he Judiciary is particularly ill suited to make." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

B. Global Warming Nuisance Suits Will Encourage the Politically Accountable Branches to Abdicate Their Duties.

Under the Second Circuit's approach, virtually any policy dispute is justiciable and subject to continued judicial oversight. If allowed to stand, the decision may require a single federal judge to craft, order, and oversee specific reductions in greenhouse gas emissions—a remedy strikingly similar to the regulatory and congressional actions considered and, to date, not enacted. Such "regulation by litigation" in the federal courts will embroil the judiciary in political controversies, pretermit administrative decisionmaking, and remove fundamental policy disputes from the democratic process.

The separation of powers is not an anachronism, and should not be casually overlooked in the pursuit of desired policy outcomes. Vigilance and humility are essential where, as here, the Article I and II branches might not simply acquiesce to, but may embrace the possibility that a judicial order will relieve them of the need to answer or be held accountable for difficult questions of national policy. When the judiciary resolves difficult questions of policy, "Congress is encouraged to shirk its constitutional obligation and leave the issue to the courts to decide." *Cannon*, 441 U.S. at 743 (Powell, J., dissenting). "[T]he more we allow the Legislature to avoid difficult questions, . . . the more our citizens get accustomed to turning to the courts for solutions rather than to their elected officials." *Hancock v. Comm'r of Educ.*, 443 Mass. 428, 472-73 (2005) (Corwin, J., concurring). "When this happens, the legislative process with its public scrutiny and participation has been bypassed, with attendant prejudice to everyone concerned." *Cannon*, 441 U.S. at 743 (Powell, J., dissenting).

The Article I and II branches of government have been and are presently wrestling with the appropriate governmental response, if any, to climate change. There is controversy over whether Congress or the EPA should be the source of any action, and some of the most contentious choices concern emissions caps of precisely the sort sought here.[7] Congressional votes on capping carbon emissions were the subject of intense election activity in the 2010

---

7. *See* Juliet Eilperin, *Effort to Block EPA from Regulating Greenhouse Gases Fails in Senate*, Wash. Post, June 10, 2010 (noting that in the Senate, the "central question was whether Congress or the administration would set the rules for curbing carbon dioxide").

mid-term cycle and have been credited with playing a large part in substantial losses by the Democratic Party.[8] On the regulatory side, the EPA is pursuing its own complex and controversial regulations under the Clean Air Act. And, the Administration's environmental policies will generate intense congressional oversight of the EPA: "[w]ith the federal government set to regulate climate-altering gases from factories and power plants for the first time, the Obama administration and the new Congress are headed for a clash that carries substantial risks for both sides." John M. Broder, *Clashes Loom, With E.P.A. Set to Limit Gases*, N.Y. Times, Dec. 31, 2010, at A1.

It should hardly come as a surprise that agreement on a government response to carbon dioxide emissions has been elusive or that the prospects seem dim for a near-term political consensus on carbon caps.[9] Yet it is into precisely that void that the Respondents and the Second Circuit would send the nation's federal courts.

While the legislative inertia that results from political battle may disappoint some, it is a salutary effect of our

---

8. *See* Darren Samuelsohn & Robin Bravender, *Democrats' Day of Reckoning Comes for Climate Vote*, Politico.com, Nov. 3, 2010, *available at* http://www.politico.com/news/stories/1110/44617.html#ixzz19zsF91V0 ("House Democrats who voted for the 2009 bill to cap greenhouse gas emissions – dubbed cap-and-tax by GOP opponents – had a terrible night. Over two dozen lawmakers who favored efforts to clamp down on heat-trapping emissions were swept away.").

9. *See, e.g.*, David A. Fahrenthold & Juliet Eilperin, *White House Takes a More Modest Plan B to Cancun Climate Talks*, Wash Post, Nov. 20, 2010, at A5 ("This is what the 2010 midterm elections will change about U.S. climate policy: Cap-and-trade was dead. Now it will be deader.").

political structure. Elected officials are "forc[ed]" to "negotiate with their opponents before they can pass binding rules that affect our lives, families, and futures. This should be a slow, grinding process. . . . [T]he incremental bipartisan gear that provides for slow and heavily contested progress . . . has a long history of success in building the great American concensus." W. Lee Rawls, *In Praise of Deadlock: How Partisan Struggle Makes Better Laws*, 112, 114 (Woodrow Wilson Center Press 2009). Inaction by the political branches is no mandate for a judicial remedy.

Elected and presidentially appointed officials, activists, and commentators may prefer to have carbon caps and other controversial environmental policies achieved as a result of litigation instead of risky votes or contentious rulemakings.[10] But this Court should not permit the judicial function to be improperly expanded. Doing so will unwisely embroil federal judges in contentious and complex policymaking, and improperly relieve the coordinate branches of the responsibilities assigned to them by our Constitution.

This Court has not been shy in rejecting "efforts to convert the Judiciary into an open forum for the resolution of political or ideological disputes about the performance of government." *Richardson*, 418 U.S. at 192-93 (Powell,

---

10. *See, e.g.*, Kirsten H. Engel, *Harmonizing Regulatory and Litigation Approaches to Climate Change Mitigation: Incorporating Tradable Emissions Offsets into Common Law Remedies*, 155 U. Penn. L. Rev. 1563, 1564, 1573 n.29 (2007) (noting that climate change litigation "opens up the possibility of a quid pro quo: industry accepts federal mandatory emissions limits in exchange for immunity from liability").

J., concurring). This Court should remind the lower courts of "the proper—and properly limited—role of the courts in a democratic society." *Warth*, 422 U.S. at 498. That role does not include crafting major economic and environmental policies out of whole cloth. As this Court has observed, "a court is likely to lose its way if it strays outside the modest bounds of its own special competence and turns the duty of adjudicating only the legal phases of a broad social problem into an opportunity for formulating judgments of social policy." *Williams v. North Carolina*, 317 U.S. 287, 307 (1942) (Frankfurter, J., concurring).

C. These Cases Will Burden Federal Courts and Ossify Regulatory Responses to Global Warming.

As noted, Congress and the EPA have been and currently are considering the extent of the threat of global warming and the proper response, if any. Congress first mandated research into air pollution in the Air Pollution Control Act of 1955. Pub. L. No. 84-159, 69 Stat. 322 (1955). The political branches began to address the environment in earnest in 1970, passing the National Environmental Policy Act and the Clean Air Act, creating the Environmental Protection Agency and the President's Council on Environmental Quality, and declaring the first nationwide Earth Day. *See* Richard J. Lazarus, *The Making of Environmental Law* 48 (2004).

Recent efforts to address climate change, including the so-called "cap and trade" bill, have disappointed activists who seek urgent action. But the pace of regulatory action is not surprising. Climate change is an extremely complex topic that depends on evolving science. Commenting on

the various efforts under consideration, a senior Obama administration official recently wondered, "Can we get it right? . . . Or is this just too big a challenge, too complex a legal, scientific, political and regulatory puzzle?" Broder, *supra*. Illustrating the complexity of fact-finding related to global warming, federal research alone on this topic spans the executive branch, with no fewer than thirteen departments and agencies contributing to annual research about climate change. U.S. Global Change Research Program, *Our Changing Planet* 4-5 (2010), *available at* http://downloads.globalchange.gov/ocp/ocp2010/ocp2010.pdf. These agencies spent a combined $2.4 billion on climate change research in 2009 and more than $6 billion between 2008 and 2010. *See id.* at 148. This massive commitment of resources to understand the nature of and possible responses to global warming underscores both the absurdity and the impossibility of a federal court determining and ordering abatement of Petitioners' contributions to global climate change.

The EPA's experience after the Supreme Court's decision in *Massachusetts* illustrates the unmanageability of the undertaking sought here—the complexity involved in crafting the very standards needed to reach a ruling that is principled, rational, and based on reasoned distinctions. After the Court instructed the EPA to reconsider the petition for rulemaking and, if appropriate, to determine whether to regulate automobile emissions under the Clean Air Act, it took more than two years for the EPA to publish proposed findings. 74 Fed. Reg. 18,886 (Apr. 24, 2009). The EPA received more than 380,000 public comments. *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,500 (Dec. 15, 2009). The

agency's response to the 11,000 comments addressing scientific, technical, legal, and procedural issues filled eleven volumes spanning more than 620 pages. *See* EPA, *Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act*, http://www.epa.gov/climatechange/endangerment.html#comments (last visited Jan. 6, 2011).

The issues implicated here are scientifically and politically controversial, and it is not absurd to think that they would implicate complexities like the EPA confronts. While anything approaching a similar influx of information would overwhelm a district court, the absence of such a thorough presentation about evolving and disputed facts would undermine the credibility of any judicial order predicated on fact-finding about global warming.

Not only would this particular case drain resources and convert the Southern District of New York into a mini-Congress or proxy EPA, this type of litigation will burden the judiciary by inviting a flood of cases by virtually any plaintiff against any conceivable source of emissions, from electric utilities to livestock farmers. But district court judges already are "burdened with extraordinary caseloads." John G. Roberts, *2010 Year-End Report on the Federal Judiciary* 8 (2010), *available at* http://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf. This case alone would linger, by design, for at least ten years after the initial order. Others like it would further burden the judicial system.

Beyond logistical challenges, the judiciary's deferential approach to administrative decisionmaking reinforces the impropriety of action here. Agency action is desirable both

for its "expertise, uniformity, wide-spread consultation, and resulting administrative guidance" and to "avoid the comparative risk of inconsistent interpretations and misincentives that can arise out of an occasional inappropriate application of the statute in a private action." *See, e.g., Gonzaga Univ. v. Doe*, 536 U.S. 273, 292 (2002) (Breyer, J., concurring). Those same considerations counsel against compelling federal courts to take the place of Congress and the EPA.

Finally, principles of judicial finality illustrate why an administrative or legislative response to climate change is preferable. Appeals of trial court fact-finding are highly deferential, and judicial decisions in particular cases, once "final," are not easily changed. Further, obligations imposed by injunction are not lightly lifted. Federal courts are confined by myriad finality and related doctrines that, in combination with the Federal Rules, will make it exceedingly difficult to revisit judicial decisions assigning responsibility for global warming and ordering abatement of activities that might contribute thereto.

By contrast, legislatures can act "one step at a time." *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955). And agencies "do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy." *Am. Trucking Ass'ns, Inc. v. Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397, 416 (1967); *accord Chevron, U.S.A., Inc. v. N.R.D.C.*, 467 U.S. 837, 863-64 (1984) ("An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed

rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.").[11]

As this Court has explained in a different context, "the judiciary is well advised to refrain from imposing . . . inflexible . . . restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions . . . and to keeping abreast of ever-changing conditions." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 43 (1973). So too here. The judiciary is ill-equipped to make the detailed fact and policy findings necessary to determine whether global warming exists, what parties contribute to it and how much, the amount of injury global warming inflicts upon Respondents, and whether, how, and to what degree Petitioners' emissions-producing activities should be curtailed.

---

11. The Acting Solicitor General agrees that the judicial system is ill-suited to handle global warming nuisance suits, though based on a different consequence of these same judicial finality principles. He points out that a binding judicial decision in one case may not assure a final resolution for particular defendants because other plaintiffs would not be bound by the earlier judgment. United States' Br. at 37. The risk of conflicting judgments and duplicative lawsuits involving the same activities or industries is real and should give this Court concern.

CONCLUSION

For the above reasons and to protect the traditional separation of powers between the political branches and the judiciary—which is both institutionally and constitutionally ill-suited for the role the Respondents seek to assign it—this Court should reverse the Second Circuit.

Respectfully submitted,

ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Ave, NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

MEGAN L. BROWN
Counsel of Record
BRENDAN T. CARR
J. MICHAEL CONNOLLY
ARI MELTZER
WILEY REIN LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000
mbrown@wileyrein.com

February 7, 2011

AMICUS CURIAE BRIEF

FILED
FEB 7 - 2011

No. 10-174

In the

Supreme Court of the United States

AMERICAN ELECTRIC
POWER COMPANY INC., et al.,

Petitioners,

v.

CONNECTICUT, et al.,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

EDWIN MEESE III
214 Massachusetts Ave. N.E.
Washington D.C. 20002

JOHN EASTMAN
ANTHONY T. CASO
Counsel of Record
KAREN J. LUGO
Center for Constitutional
Jurisprudence
c/o Chapman Univ. Sch. of Law
One University Drive
Orange, California 92886
Telephone: (714) 628-2530
E-Mail: caso@chapman.edu

Counsel for Amicus Curiae
Center for Constitutional Jurisprudence

139 b

QUESTION PRESENTED

For several years, Congress and the President have actively studied and debated the appropriate balance between avoiding environmental harm that may result from climate change and the economic dislocation that may result from new regulations to halt or reverse climate change. In light of this ongoing debate this case raises the following question:

1. Do federal courts have the constitutional authority to establish rules regarding domestic emission standards for greenhouse gases, under the "federal common law tort of public nuisance," in response to claims of injury due to global climate change?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. CONSTITUTIONAL AND STATUTORY AUTHORITY PRECLUDES THE JUDICIARY FROM CREATING FEDERAL COMMON LAW OF THE SCOPE AND BREADTH DEMANDED BY RESPONDENTS 4

II. ANY AUTHORITY FOR JUDICIAL CREATION OF FEDERAL COMMON LAW IS DISPLACED BY CONGRESSIONAL CONSIDERATION OF THE ISSUE 12

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Boy Scouts of America v. Dale,
530 U.S. 640 (2000) 1

Comm. for Consideration of Jones Falls Sewage Sys. v. Train, 539 F.2d 1006 (4th Cir. 1976) 7

Connecticut v. Am. Elec. Power Co., Inc.,
406 F. Supp. 2d 265 (S.D.N.Y. 2005) 11

Elk Grove Unified Sch. Dist. v. Newdow,
542 U.S. 1 (2004) 1

Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) 5

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010) 3

Frontiero v. Richardson, 411 U.S. 677 (1973) 14

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) 1

Illinois v. City of Milwaukee, Wisconsin,
406 U.S. 91 (1972) 8-9, 11

Kendall v. United States, 37 U.S. 524 (1838) 5

Massachusetts v. EPA, 549 U.S. 497 (2007) 12-13

McCulloch v. Maryland,
17 U.S. (4 Wheat.) 316 (1819) 4

Milwaukee v. Illinois, 451 U.S. 304 (1981) ..... passim

Mistretta v. United States, 488 U.S. 361 (1989) 3

Morrison v. Olson, 487 U.S. 654 (1988) 3

Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs,
531 U.S. 159 (2001) 1

Texas Indus., Inc. v. Radcliff Materials, Inc.,
451 U.S. 630 (1981) 8

United States v. Coolidge,
14 U.S. (1 Wheat.) 415 (1816) 4

United States v. Lopez, 514 U.S. 549 (1995) 4

United States v. Morrison, 529 U.S. 598 (2000) 1

Weiler v. Chatham Forest Prods., Inc.,
392 F.3d 532 (2nd Cir. 2004) 12

Wheaton v. Peters, 33 U.S. 591 (1834) 5

Wheeldin v. Wheeler, 373 U.S. 647 (1963) 7

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) 3

Zelman v. Simmons-Harris, 536 U.S. 639 (2002) 1

United States Constitution

U.S. Const. art. I 3-4

art. I, § 1 3

art. II, § 1 3

art. III, § 1 3

United States Statutes

Global Climate Change Research Act of 1990,
15 U.S.C. § 2921 13

15 U.S.C. § 2931(b) (2010) 13

28 U.S.C. § 1652 (2010) 7

42 U.S.C. § 7401 12

42 U.S.C. § 7545 12

Rules of Court

Sup. Ct. R. 37.3(a) 1

37.6 1

Miscellaneous

74 Fed. Reg. 66,496 (2009) 13

Capitol Hill Update: Priorities and Possibilities in the 110th Congress, SM083 ALI-ABA 175 10

Climate Stewardship Act, S. 139, 108th Cong. (2003) 13

Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922 (Sept. 8, 2003) 13

Energy and Tax Policy: Capital Hill Hearing Testimony, Before the H. Ways and Means Comm., 110th Cong. 4 (2007) 10

H.R. 230, 112th Cong. (2011) 14

H.R. 5966, 101st Cong. (1990) 13

Hall, Matthew, *A Catastrophic Conundrum, But Not a Nuisance: Why the Judicial Branch Is Ill-Suited to Set Emissions Restrictions On Domestic Energy Producers Through the Common Law Nuisance Doctrine*, 13 Chap. L. Rev. 265 (2010) 9

Harper, Benjamin P., *Climate Change Litigation: The Federal Common Law of Interstate Nuisance and Federalism Concerns*, 40 Ga. L. Rev. 661 (2006) 9, 12

Healy, J. Kevin & Tapick, Jeffrey M., *Climate Change: It's Not Just a Policy Issue for Corporate Counsel—It's a Legal Problem*, 29 Colum. J. Envtl. L. 89 (2004) 13-14

Kochan, Donald J., *Runoff and Reality: Externalities, Economics, and Traceability Issues in Urban Runoff Regulation*, 9 Chap. L. Rev. 409 (2006) 10

National Energy Policy Act of 1990, S. 324, 101st Cong. (1990) 13

Redish, Martin H., *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 Nw. U. L. Rev. 761 (1989) 7

S. 1224, 101st Cong. (1990) 13

S. 15, 112th Cong. (2011) 14

Smith, Henry E., *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 Journal of Legal Studies (2002) 10

The Federalist (Clinton Rossiter ed., 1961) 5-6

IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, Center for Constitutional Jurisprudence[1] is dedicated to upholding the principles of the American Founding, including separation of powers and due respect for the proper limit on those powers, including the judicial power. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); and *United States v. Morrison*, 529 U.S. 598 (2000). The Center also filed a brief in support of review in this action.

The Center believes that the issue presented in this case raises critical questions regarding the scope of the judicial power. The Constitution assigns the lawmaking power to Congress. The Framers saw the legislative branch as best able to balance the

---

[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

competing needs of the nation, especially in a case such as this that calls for a balance between harm prevention and economic dislocation.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents, a coalition of state and private parties, are asking this Court to authorize each federal district court to adopt its own emission standards for carbon dioxide and other gasses that Respondents believe will cause global climate change. Yet, Respondents seek to accomplish this not through the enforcement of any act of Congress. Instead, they seek this new level of regulation through the device of a federal common law tort of public nuisance.

Congress is currently debating what standards, if any, it should mandate. The Environmental Protection Agency is also exploring the reach of its current regulatory authority as a means of addressing respondents' concerns. The Second Circuit acknowledged these efforts of the legislative and executive branches, but deemed them insufficient.

For two reasons, Amicus maintains that federal court interference would exceed the bounds of federal judicial power. First, policy-making was committed to Congress under the Constitution and this case does not fit within the narrow exception to the rule against creation of federal common law by the courts. Second, any authority for federal courts to create the federal common law tort sought by Respondents has been displaced by Congress in its active

consideration of an appropriate response to climate change.

ARGUMENT

Although not expressly mentioned in the Constitution, the doctrine of separation of powers is implied from its structure: the exclusive and separate vesting of the legislative, executive, and judicial power in the Congress, the President, and in the Court, respectively, by Article I, section 1; Article II, section 1; and Article III, section 1, of the Constitution of the United States. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3146 (2010).

The legislative power is vested in Congress. U.S. Const. art. I, § 1. This makes Congress the primary policy-making branch of the federal government. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952). The structure of our federal system thus disallows the judiciary from usurping the legislature's function to create new laws. *Mistretta v. United States*, 488 U.S. 361, 383 (1989) (noting that it is a "danger" when the "Judicial Branch [is] assigned [or] allowed [to take on] 'tasks that are more properly accomplished by [other] branches'") (quoting *Morrison v. Olson*, 487 U.S. 654, 680-81 (1988)). This is significant since the respondents are asking the Court to create a new law that necessitates settling a truly remarkable number of policy decisions.

More specifically, separation of powers bars the relief sought by respondents for two reasons. First, both constitutional and statutory authority precludes the judiciary from creating this cause of action.

Second, congressional consideration and action concerning climate change generally, and greenhouse gas emissions specifically, displaces any authority a federal court may have to fashion this federal common law.

I. CONSTITUTIONAL AND STATUTORY AUTHORITY PRECLUDES THE JUDICIARY FROM CREATING FEDERAL COMMON LAW OF THE SCOPE AND BREADTH DEMANDED BY RESPONDENTS

The federal government is one of enumerated powers. *United States v. Lopez*, 514 U.S. 549, 552 (1995); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). Any exercise of federal power must be authorized by the Constitution. *McCulloch*, 17 U.S. at 405. The legislature is charged with the responsibility for enacting substantive law that creates, defines, and regulates rights. U.S. Const. art. I.

The Constitution does not assign any similar power to the federal courts, and this has long been seen as a barrier to fashioning federal common law. This Court has repeatedly recognized this proposition, holding in 1816 that no federal common law of crimes exists, *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415 (1816), and later ruling that no federal common law whatsoever exists:

> It is clear, there can be no common law of the United States . . . . There is no principle which pervades the Union and has the authority of law, that is not embodied in the constitution or laws of the Union. *The*

> *common law could be made a part of our federal system, only by legislative adoption.*

Wheaton v. Peters, 33 U.S. 591, 658 (1834) (emphasis added). *See also Kendall v. United States*, 37 U.S. 524 (1838).

This principal was reaffirmed in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). More recently, this Court has noted: "Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision." *Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981) (*Milwaukee II*).

These decisions comport with the Framers' view of judicial power, evidenced by their response to an Anti-Federalist argument. The Anti-Federalists feared that if the judiciary were independent of the political process, it would become "superior to that of the legislature" since it would "constru[e] the laws according to the *spirit* of the Constitution." *The Federalist*, No. 81, at 481 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis retained), which would "enable that court to *mold them* into whatever shape it may think proper; especially as its decisions will not be in any manner subject to the revision or correction of the legislative body." *Id.* (emphasis added).

Hamilton, speaking for the Federalists, had a two-fold reply. First he noted that federal courts must confine themselves to the letter, not the spirit of the law. "[T]here is not a syllable in the plan under consideration which *directly* empowers the national courts to construe the laws according to the spirit of the Constitution." *Id.* Second, he affirmed

that the judiciary "will always be the least dangerous to the political rights of the Constitution" because the judiciary "has no influence over either the sword or the purse . . . [it has] neither FORCE nor WILL, but mere[] judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." *The Federalist*, No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961). He elaborated that "the judiciary is beyond comparison the weakest of the three departments of power." *See also id.* ("To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them"). For these reasons Hamilton argued that the "danger of judiciary encroachments on the legislative authority . . . is in reality a phantom." *The Federalist*, No. 81, at 484. (Alexander Hamilton) (Clinton Rossiter ed., 1961).

However, Hamilton's second reply required the critical proposition that the judiciary refrain from assuming the roles of any other branch—particularly the legislature. *The Federalist*, No. 78. Unlike the courts in Britain, the Judiciary "remains truly distinct from both the legislature and the Executive." *Id.* at 465. Indeed, liberty, Hamilton said, requires this proposition, and were it negated, and the judiciary were to engage in legislation, we "would have every thing [sic] to fear." *Id. See also id.* at 466 ("there is no liberty, if the power of judging be not separated from the legislative and executive powers") (internal quotes omitted).

So important to the Framers was the proposition that the judiciary refrain from legislative-like activity that the First Congress enacted the Rules of Decision Act. This Act excludes federal common law from list of permissible controlling authority for rules of decision in civil actions filed in federal court. The Rules of Decision Act provides that "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652 (2010). A straightforward reading of this Act indicates that only state law or a congressional enactment may govern federal cases. Yet here we lack both. No statute speaks directly to the issue of greenhouse gas emissions. Thus, the Rules of Decision Act bars this Court from creating the Respondent's sought-for cause of action. *See also* Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 Nw. U. L. Rev. 761 (1989).

While recognizing that the Constitution assigns to Congress the policy-making power, this Court has also recognized very narrow enclaves where federal common law may be appropriate. This Court describes these exceptions to the general rule "unusual," *Milwaukee II*, 451 U.S. at 314, but at times a "necessary expedient," *id.* (quoting *Comm. for Consideration of Jones Falls Sewage Sys. v. Train*, 539 F.2d 1006, 1008 (4th Cir. 1976) (en banc)), that exists in only a "few and restricted" instances, *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963), and applies it only if the court is "compelled" to do so.

Milwaukee II, 451 U.S. at 314. Further, the Court has announced that it restricts federal common law to "such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981).

The present action, however, does not fall into one of these "narrow" exceptions where the application of federal common law may be appropriate. *Id.* Federal common law has arisen chiefly in the context of disputes between nearby States where the application of State law would frustrate the federal objective of providing a neutral forum for resolving their disputes peacefully.

In *Illinois v. City of Milwaukee, Wisconsin*, 406 U.S. 91 (1972) (*Milwaukee I*), four cities sued the state of Illinois to enjoin its pollution of Lake Michigan. The Court held that federal common law covered the interstate pollution issue, but stressed that "Congress has enacted numerous laws" on the issue in the past, and "recently" had "reinforced and broadened" them. *Id.* at 101. The Court was careful to ensure that the federal common law was "not inconsistent" with legislative intent. *Id.* at 104. Nine years later the Court declared that legislative action displaced the newly minted cause of action: When "Congress addresses a question previously governed by a decision rested on federal common law," then "the need for such an unusual exercise of lawmaking by federal courts disappears." *Milwaukee II*, 451 U.S. at 314.

This action is significantly distinct from the local pollution issue in *Milwaukee I*. The conditions for breach, the scope of the duty, and the nature of the causation involved are imperceptible if not inscrutable, unlike the direct pollution of the lake abutting a sister state which, by comparison, is abundantly local and detectable. Climate change is a *global* issue, and alterations in the climate are not attributable to a particular source or even timeframe. Matthew Hall, *A Catastrophic Conundrum, But Not a Nuisance: Why the Judicial Branch Is Ill-Suited to Set Emissions Restrictions On Domestic Energy Producers Through the Common Law Nuisance Doctrine*, 13 Chap. L. Rev. 265 (2010). This is pertinent since the Respondents allege that Petitioners' carbon dioxide emissions directly and proximately contribute to their injuries and threatened injuries. However, such a claim is highly speculative at best: there is nothing "direct" or proximate when the parties are thousands of miles apart. Actual causation is also inscrutable: it is impossible to know whether the Respondents' injuries would have occurred, or will occur, "but for" the Petitioners' actions.

Further, unlike a direct pollution case, the issues implicated in climate change involve a highly complex weighing of many policy factors. Benjamin P. Harper, *Climate Change Litigation: The Federal Common Law of Interstate Nuisance and Federalism Concerns*, 40 Ga. L. Rev. 661 (2006). In the first place, this is partly because climate change is a global *externality problem*, which arises when someone makes a decision to use his resources without considering the full effects of the decision. Many types of solutions exist to solve externality

problems.[2] Deciding which is best requires a complex "analysis of whether the market, common law concepts of nuisance or trespass, or governmental regulation is the most effective." Donald J. Kochan, *Runoff and Reality: Externalities, Economics, and Traceability Issues in Urban Runoff Regulation*, 9 Chap. L. Rev. 409 (2006). That analysis is multiplied when a global problem is implicated since it requires a *global* solution. Piecemeal, local solutions by federal courts may lead to inconsistent standards and, more importantly, will not ameliorate problems posed by climate change. For example, the official estimate of the effect of perfect compliance with the Kyoto Protocol is that, at best, it would slow the *acceleration* of the present warming by an undetectable 0.07 degrees centigrade by 2050. *Energy and Tax Policy: Capital Hill Hearing Testimony, Before the H. Ways and Means Comm.*, 110th Cong. 4 (2007) (statement of W. David Montgomery, CRA International). *See also Capitol Hill Update: Priorities and Possibilities in the 110th Congress*, SM083 ALI-ABA 175. By comparison, a local, piecemeal law created by a federal court to deal with this global externality problem would be even less effective, if not nugatory.

Yet, the situation is more complex still. Even after deciding on the *type* of externality solution,

---

[2] Correcting externalities can be approached in a number of different ways. "In general, these can be categorized as defining property rights and allowing bargaining, taxing negative externalities and subsidizing positive externalities, or establishing regulatory controls." Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 Journal of Legal Studies, S453-S489, S462 (2002).

other questions remain. As the District Court correctly recognized, the enormity of specifying the relief in this case would also require the Court to

> (1) determine the appropriate level at which to cap the carbon dioxide emissions of these Defendants; (2) determine the appropriate percentage reduction to impose upon Defendants; (3) create a schedule to implement those reductions; (4) determine and balance the implications of such relief on the United States' ongoing negotiations with other nations concerning global climate change; (5) assess and measure available alternative energy resources; and (6) determine and balance the implications of such relief on the United States' energy sufficiency and thus its national security—all without an "initial policy determination" having been made by the elected branches.

Connecticut v. Am. Elec. Power Co., Inc., 406 F. Supp. 2d 265, 272-73 (S.D.N.Y. 2005).

The complexity of the competing policy questions amply demonstrates why the Framers left policymaking to the legislative branch. The courts have not been given the resources to take on these types of problems. In any event, congressional action on the issue displaces even the narrow exception to federal common-lawmaking that was recognized in *Milwaukee I*.

II. ANY AUTHORITY FOR JUDICIAL CREATION OF FEDERAL COMMON LAW IS DISPLACED BY CONGRESSIONAL CONSIDERATION OF THE ISSUE

The unusual and narrow circumstances for creation of federal common law disappear once Congress has acted. *Milwaukee II.* This consideration prohibits judicial creation of a cause of action in this case because Congress and the EPA have *considered* the issue of climate change, thus displacing any judicial authority that might have existed. *Id.* at 313.

Indeed, Congress has also moved beyond "consideration" of the issue. It has also *enacted* statutes related to climate change. The most comprehensive regulatory scheme, however, is the Clean Air Act. 42 U.S.C. § 7401. *Massachusetts v. EPA*, 549 U.S. 497 (2007) (holding that the EPA may regulate carbon dioxide emissions under the CAA). When Congress acts, "the need for . . . lawmaking by federal courts disappears." *Milwaukee II*, 451 U.S. at 314. Judicial intervention at this point would encroach upon the legislature's prerogatives.

Both legislative activity and failed legislative activity supports these two points. Harper, *supra*, at 661. First, Congress enacted the Clean Air Act, which created a "comprehensive legislative scheme to protect and improve the nation's air quality." *Weiler v. Chatham Forest Prods., Inc.*, 392 F.3d 532, 534 (2nd Cir. 2004). This Court ruled that the Act gives the EPA the authority to regulate carbon dioxide emissions if the EPA Administrator forms the "judgment" that they contribute to climate change. *Massachusetts*, 549 U.S. at 528. EPA made such a

finding on December 15, 2009. 74 Fed. Reg. 66,496 (2009). No room exists for federal common-lawmaking when Congress has addressed the issue, and, according to this Court's ruling in *Massachusetts,* gave authority the EPA, to deal with carbon dioxide emissions.

Second, the existence of *other congressional action* related to climate change counsels against the creation of federal common law in climate change litigation. A significant number of proposed statutes[3] exist related to climate change. Indeed, "more than 50 bills and provisions relating to climate change were introduced in the 107th Congress." J. Kevin Healy & Jeffrey M. Tapick, *Climate Change:*

---

[3] A sampling of such activity includes the following: *Control of Emissions from New Highway Vehicles and Engines*, 68 Fed. Reg. 52,922, 52,927 (Sept. 8, 2003) (noting that some congresspersons have attempted to enact legislation similar to that proposed in the Kyoto Protocol to combat global warming), *id.* at 52, 926-28 (which outlines the history of congressional activity related to climate change); H.R. 5966, 101st Cong. (1990) (seeking to "amend the Clean Air Act to begin reducing the accumulation of greenhouse gases in the atmosphere"); *National Energy Policy Act of 1990*, S. 324, 101st Cong. (1990) (seeking to "establish a national energy strategy for the United States that reflects concern for the global environmental consequences of current trends in atmospheric concentrations of greenhouse gases, and for other purposes"); *Global Climate Change Research Act of 1990*, 15 U.S.C. § 2921 (which called for "a comprehensive and integrated United States research program which will assist the Nation and the world to under understand, assess, predict, and respond to human-induced and natural processes of global change." 15 U.S.C. § 2931(b) (2010)); S. 1224, 101st Cong. (1990) (seeking to enact automobile emissions controls); *Climate Stewardship Act*, S. 139, 108th Cong. (2003) (seeking to regulate greenhouse gas emissions).

It's Not Just a Policy Issue for Corporate Counsel—It's a Legal Problem, 29 Colum. J. Envtl. L. 89, 97 (2004). While many of these acts only reinforce further climate change research, nevertheless it would be imprudent for the Court to rule on an issue Congress is explicitly considering. *Milwaukee II*, 451 U.S. at 354. Indeed, some pending legislation *directly* concerns regulation of greenhouse gases. H.R. 230, 112th Cong. (2011). Just days ago (January 25, 2011), for example, Congress considered whether to "prohibit the regulation of carbon dioxide emissions in the United States until China, India, and Russia implement similar reductions." S. 15, 112th Cong. (2011). This is significant since "reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes." *Frontiero v. Richardson*, 411 U.S. 677, 692 (1973).

Third, even legislative action that has not (yet) resulted in an Act of Congress related to climate change cautions against a federal court usurpation of the power to regulate this issue. It is for the legislative branch, not a federal court, to decide what emission standards, if any, should exist. This is not just a scientific issue; it is a *policy* issue that will affect the American economy and political climate. As mentioned above, solving the global externality problem of climate change is a complex matter for which many possible types of solutions exist; it is a legislative decision which should be pursued.

CONCLUSION

State and private parties request this Court to create a new cause of action and remedy for

contributing to a public nuisance, global warming, under "federal common law of public nuisance." This case raises the question whether federal courts have the authority to create such an action. Consideration of the separation of powers doctrine answers this question in the negative. A separation of powers violation would occur if the Court grants the Respondent's request since (i) constitutional and statutory authority precludes the creation of federal law of the of the scope and breadth they demand, and (ii) it would encroach upon the legislative branch, which has both considered and acted on the issue, leaving no authority for the Court to rule in the Respondents' favor. This Court should deny the Respondents' request.

DATED: February, 2011.

Respectfully submitted,

EDWIN MEESE III
214 Mass. Ave. NE
Washington, DC 20002

JOHN EASTMAN
ANTHONY T. CASO
Counsel of Record
KAREN J. LUGO
Center for Constitutional Jurisprudence
c/o Chapman University School of Law
One University Drive
Orange, CA 92886
Telephone: (714) 628-2530
E-Mail: caso@chapman.edu

Counsel for Amicus Curiae
Center for Constitutional Jurisprudence

AMICUS CURIAE BRIEF

No. 10-174

In the Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY INC., ET AL.
Petitioners,

v.

STATE OF CONNECTICUT, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

ROBIN S. CONRAD
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

GREGORY G. GARRE
Counsel of Record
RICHARD P. BRESS
GABRIEL K. BELL
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTERESTS OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. FUNDAMENTAL CONSTITUTIONAL AND PRUDENTIAL LIMITS BAR PLAINTIFFS' UNPRECEDENTED COMMON LAW SUIT AGAINST GLOBAL CLIMATE CHANGE 6

A. The Court Should Decline Plaintiffs' Request To Make New Common Law 7

B. Plaintiffs' Suit Raises Non-Justiciable Political Questions 16

C. Plaintiffs Lack Standing 20

II. THE DRASTIC ECONOMIC AND POLITICAL CONSEQUENCES OF ALLOWING THIS ACTION TO PROCEED UNDERSCORE THE NEED TO RESPECT THE SEPARATION OF POWERS 24

A. The Potential Economic Implications Of Allowing Actions Like This To Proceed Are Staggering 24

B. Sanctioning Litigation Like This Case Will Undermine The Active And Ongoing Political Process 28

CONCLUSION 31

TABLE OF AUTHORITIES

Page(s)

CASES

Alexander v. Sandoval,
532 U.S. 275 (2001) 8

Allen v. Wright,
468 U.S. 737 (1984) 5, 23

Baker v. Carr,
369 U.S. 186 (1962) 17

Barr v. Stevens,
4 Ky. 292 (1808) 12

California v. General Motors Corp.,
No. C06-05755-MJJ, 2007 WL. 2726871
(N.D. Cal. Sept. 17, 2007), *appeal dismissed*,
No. 07-16908 (9th Cir. June 24, 2009) 25

City of Milwaukee v. Illinois,
451 U.S. 304 (1981) 15

Comer v. Murphy Oil USA,
No. 1:05-CV-436-LG-RHW, 2007 WL.
6942285 (S.D. Miss. Aug. 30, 2007), *rev'd*, 585
F.3d 855 (5th Cir. 2009), *opinion vacated*
pending reh'g en banc, 598 F.3d 208 (5th
Cir.), *appeal dismissed*, 607 F.3d 1049, 1055
(5th Cir. 2010) (en banc), *mandamus denied*,
No. 10-294 (U.S. Jan. 10, 2011) 25

TABLE OF AUTHORITIES—Continued

Page(s)

Comer v. Murphy Oil USA,
585 F.3d 855 (5th Cir. 2009), *opinion vacated pending reh'g en banc*, 598 F.3d 208 (5th Cir.), *appeal dismissed*, 607 F.3d 1049, 1055 (5th Cir. 2010) (en banc), *mandamus denied*, No. 10-294 (U.S. Jan. 10, 2011) 20

Corrie v. Caterpillar, Inc.,
503 F.3d 974 (9th Cir. 2007) 17

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006) 21

Dominus Rex v. Smith,
93 Eng. Rep. 795 (1725) 10

El-Shifa Pharmaceutical Industries Co. v. United States,
607 F.3d 836 (D.C. Cir. 2010), *cert. denied*, 79 U.S.L.W. 3419 (U.S. Jan. 18, 2011) (No. 10-328) 17, 18

Elk Grove Unified School District v. Newdow,
542 U.S. 1 (2004) 5, 21, 23

Fineux v. Hovenden,
78 Eng. Rep. 902 (1599) 10

Fowler v. Sanders,
79 Eng. Rep 382 (1617) 10

TABLE OF AUTHORITIES—Continued

Page(s)

Georgia v. Tennessee Copper Co.,
206 U.S. 230 (1907) 13

Illinois v. City of Milwaukee,
406 U.S. 91 (1972) 13

Iveson v Moore,
91 Eng. Rep. 16 (1702) 10

Linda R. S. v. Richard D.,
410 U.S. 614 (1973) 22

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) 9, 10, 14, 18

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 8, 21, 22

Luther v. Borden,
48 U.S. (7 How.) 1 (1849) 16, 17

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 16

Massachusetts v. EPA,
549 U.S. 497 (2007) ..... *passim*

McAndrews v. Collerd,
42 N.J.L. 189 (N.J. 1880) 11

Mills v. Hall & Richards,
9 Wend. 315 (N.Y. Sup. Ct. 1832) 11

TABLE OF AUTHORITIES—Continued

Page(s)

Missouri v. Illinois,
200 U.S. 496 (1906) 12

Native Village of Kivalina v. ExxonMobil Corp.,
663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal pending*, No. 09-17490 (9th Cir.) 25

New Jersey v. City of New York,
283 U.S. 473 (1931) 13

New York v. New Jersey,
256 U.S. 296 (1921) 13

North Carolina v. TVA,
615 F.3d 291 (4th Cir. 2010) 26

North Dakota v. Minnesota,
263 U.S. 365 (1923) 12, 13

Payne v Partridge,
91 Eng. Rep. 12 (1696) 10

People v. Detroit White Lead Works,
46 N.W. 735 (Mich. 1890) 11

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004) 8

Texas Industries, Inc. v. Radcliff Materials, Inc.,
451 U.S. 630 (1981) 8, 12, 14, 20

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. Hudson & Goodwin,
11 U.S. (7 Cranch) 32 (1812) 7

United States v. Ira S. Bushey & Sons, Inc.,
363 F. Supp. 110 (D. Vt.), *aff'd without op.*,
487 F.2d 1393 (2d Cir. 1973) 9

United States v. Standard Oil Co. of California,
332 U.S. 301 (1947) 8, 14

Vieth v. Jubelirer,
541 U.S. 267 (2004) 16

Warth v. Seldin,
422 U.S. 490 (1975) 22

Wesson v. Washburn Iron Co.,
95 Mass. (13 Allen) 95 (Mass. 1866) 11

Wheeldin v. Wheeler,
373 U.S. 647 (1963) 8

Wilkie v. Robbins,
551 U.S. 537 (2007) 8

Williams's Case,
77 Eng. Rep 164 (1592) 10

STATUTES AND LEGISLATIVE HISTORY

42 U.S.C. § 13381 29

TABLE OF AUTHORITIES—Continued

Page(s)

Statute of 12 Rich. II, c. 13 (1389) 10

American Clean Energy and Security Act, H.R. 2454, 111th Cong. (passed the House on June 26, 2009) 29

EPA Stationary Source Regulations Suspension Act, S. 231 112th Cong. (introduced Jan. 31, 2011) 29

Free Industry Act, H.R. 97, 112th Cong. (introduced Jan. 5, 2011) 29

Global Climate Protection Act of 1987, Title XI of Pub. L. 100-204, § 1103, 101 Stat. 1331, 1408-09 (codified at 15 U.S.C. § 2901 note) 29

National Climate Program Act, Pub. L. No. 95-367, 92 Stat. 601 (1978) 29

S. Res. 98, 105th Cong. (July 25, 1997) 28

74 Fed. Reg. 55,292 (Oct. 27, 2009) 15

OTHER AUTHORITY

4 William Blackstone, *Commentaries* 11

Nicholas Bloom, *The Impact of Uncertainty Shocks*, 77 Econometrica 623 (2009) 26

TABLE OF AUTHORITIES—Continued

Page(s)

Andrew Chamberlain & Feliz M. Ventura, Chamberlain Economic Policy Study No. 2010-06, *Paying for the "American Power Act": An Economic and Distributional Analysis of the Kerry-Lieberman Cap-and-Trade Bill* (2010) 27, 28

The Federalist No. 62 (1788) 27

Henry J. Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964) 9

Kenneth Green *et al.*, *Climate Change: Caps vs. Taxes*, American Enterprise Institute Environmental Policy Outlook, June 2007 26

Trevor Houser *et al.*, *Assessing the American Power Act: The Economic, Employment, Energy Security, and Environmental Impact of Senator Kerry and Senator Lieberman's Discussion Draft*, Peterson Institute for International Economics Policy Brief, May 2010 27

William A. McRae, Jr., *The Development of Nuisance in the Early Common Law*, 1 U. Fla. L. Rev. 27 (1948) 10

Restatement (Second) of Torts (1979) 9, 10, 11, 14

TABLE OF AUTHORITIES—Continued

Page(s)

Darren Samuelsohn, *Rockefeller Finds It's Better to Negotiate on Climate Than Sit on Sidelines*, N.Y. Times, Sept. 14, 2009 26

San Francisco Chronicle, Editorial Board, *An interview with Sen.* Barack Obama *at* 40:39 (Jan. 17, 2008) 27

Robert Stavins, *Addressing climate change with a comprehensive US cap-and-trade system*, 24 Oxford Review of Econ. Pol'y 298 (2008) 27, 28

U.N. Framework Convention on Climate Change (1992) 29

Bernie Woodall, *U.S. carbon cap to raise power prices: Moody's*, Reuters.com, Mar. 25, 2009 27

INTERESTS OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (Chamber) is the nation's largest federation of businesses and associations.[1] The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million U.S. businesses and professional organizations. At least 98% of the Chamber's members are small businesses with 100 or fewer employees. The Chamber advocates issues of vital concern to the nation's business community and has frequently participated as an *amicus curiae* before this Court and other courts. And when misguided lower court decisions threaten the interests of the business community and the greater public, the Chamber has supported challenges asking this Court to overturn those decisions. This is such a case.

The proper response to global climate change is an issue of profound concern to the Chamber's members. The Chamber works to discourage ill-conceived climate change policies and measures that could severely damage the security and economy of the United States, and instead encourages positive measures, such as long-term technological innovation and long-term clean technology deployment. The Chamber believes that common law suits such as this one, which seek to impose caps and reductions on carbon dioxide emissions in a piecemeal fashion on an arbitrary subset

---

[1] The parties have filed blanket letters of consent for *amicus* briefs. No counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund its preparation or submission.

of U.S. industry, are an especially ill-conceived and constitutionally illegitimate response. A meaningful and politically legitimate response to climate change must be national—indeed global—in nature, and must be fashioned by the politically accountable Branches.

The Chamber has a vital interest in ensuring that courts respect their constitutional role—and do not usurp the roles of the executive and legislative Branches in fashioning a politically accountable response to the global phenomenon of climate change.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs in this action, a consortium of states and private interests, seek to hold five American utilities jointly and severally liable for "contributing" to global climate change caused by billions of sources around the world over the course of centuries under a vague and far-reaching federal common law theory of "nuisance." Compl. 49, No. 04-5669 (S.D.N.Y. July 21, 2004), J.A. 110. Their suit asks the federal courts to "cap" defendants' carbon dioxide emissions and then reduce them by an unspecified percentage "each year for at least a decade." *Id.* The district court sensibly rejected that extraordinary request, recognizing that how best to address the complex issues implicated by global climate change is a question that can only be resolved by the political Branches. Pet.App.171a-187a.

The Second Circuit reversed, however, and permitted this unprecedented common law action to proceed. Pet.App.1a-170a. That decision is based on a profoundly misguided conception of the role of the courts in our constitutional democracy and has potentially disastrous implications for the U.S.

business community as well as this nation's efforts to address the phenomenon of global climate change. The United States agrees that the decision below cannot stand and that plaintiffs' action must be dismissed. *See generally* Tennessee Valley Authority Br (Jan. 31, 2011) (TVA Br.). The Chamber urges this Court to reverse the decision below and make clear that well-established limits on the exercise of judicial power prevent the courts from attempting to superintend the phenomenon of global climate change in the piecemeal and haphazard fashion urged by plaintiffs.

The court of appeals' decision offends three fundamental limits on the Judicial power. *First*, the court overstepped its authority by creating new federal common law to accommodate plaintiffs' claims. In recent times, this Court has repeatedly stressed that—with rare exception—the courts' days of federal common law making have passed. Despite their appellation, plaintiffs' claims bear scant resemblance to traditional "nuisance" claims. For centuries, public nuisance suits generally have been limited to situations where a discrete set of defendants allegedly directly caused harm by releasing obviously toxic or dangerous substances in a particular and nearby locale. Plaintiffs' suit, in stark contrast, asks the courts to assess fault for injuries caused by greenhouse gas emissions from literally billions of sources worldwide over the last "several centuries." Compl. ¶ 87, J.A. 81-82. The common law is ill-equipped to address such staggeringly complex—and "unprecedentedly broad" (TVA Br. 13)—nuisance claims. And there is no reason for this Court to invoke the very common law authority that the Court has repeatedly disavowed in modern

times to fashion a new common law action for such an indeterminate and diffuse phenomenon.

Second, the court of appeals erred in failing to appreciate that the global nature of climate change and the necessity in any bid for redress to balance an enormously vast array of interrelated interests are ill-suited to the *ad hoc* and piecemeal nature of litigation. The political question doctrine prohibits courts from acting where, as here, there are no judicially manageable standards and any adjudication would inevitably require initial policy decisions reserved to the political Branches on matters (to name only a few) such as the appropriate level of global emissions, the parties that should bear the costs of limiting emissions, and foreign policy and economic ramifications of attempting to address global climate change. Indeed, as the United States has explained, "plaintiffs' common-law nuisance suits present serious concerns regarding the role of an Article III court under the Constitution's separation of powers—especially in light of the representative Branches' ongoing efforts to combat climate change by formulating and implementing domestic policy and participating in international negotiations." TVA Br. 13. These matters are not just exceptionally complex or difficult—they have no "right" jurisprudential answers. Under our Constitution and this Court's precedents, such matters are reserved for the political Branches.

Third, the court of appeals erred in finding that plaintiffs have Article III standing to maintain this action. That defect provides a threshold basis for dismissing this action. The likelihood of redressability in this suit against a finite and arbitrary set of carbon-emitting entities is so remote and so speculative that

the ruling here would permit literally anyone alleging climate-change based damages to sue any entity or natural person in the world—an absurd result that highlights once again just how inapt the judicial forum is for addressing such inherently global concerns. *Massachusetts v. EPA*, 549 U.S. 497 (2007), does not dictate a contrary conclusion. The principles animating that decision—which focused on the ability of *Congress* to relax the Article III inquiry in the context of a statutory provision for challenging agency action—are inapplicable in this common-law context. Finding standing in this case would require a significant expansion of *Massachusetts* and (given the absence of the congressional action on which this Court relied in *Massachusetts* to find standing) put the courts well ahead of the democratic process in this area. It would also require the Court to disregard the prudential limits that the Court itself has imposed on judicial review of "'generalized grievances more appropriately addressed in the representative branches.'" *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

The astounding practical implications of the decision below underscore the separation-of-powers problems with allowing this unprecedented common law action to proceed. Especially since *Massachusetts*, an emerging category of litigation over greenhouse-gas emissions has developed implicating countless plaintiffs and defendants. If the decision of the Second Circuit is affirmed, this suit—and the countless others that inevitably follow—will destabilize our economy, undermine our democratic process, and impact sensitive foreign policy considerations. The debate over the appropriate response to climate change affects

every business concern and implicates virtually every facet of daily life. This complex political dialogue belongs in the political arena, not the courthouse—much less in scores if not hundreds of *different* courthouses across America as suits like plaintiffs' proliferate. Only the elected Branches are authorized and equipped to develop our nation's response to climate change and undertake any necessary reforms.

The judgment of the court of appeals should be reversed and the case remanded with instructions to dismiss this unprecedented and ill-founded action.

ARGUMENT

I. FUNDAMENTAL CONSTITUTIONAL AND PRUDENTIAL LIMITS BAR PLAINTIFFS' UNPRECEDENTED COMMON LAW SUIT AGAINST GLOBAL CLIMATE CHANGE

Throughout history this Court has time and again recognized that there are limits to the exercise of Judicial power in our constitutional democracy. The unprecedented common law action in this case transgresses several of those fundamental limits. It asks the federal courts to recognize a new breed of "public nuisance" action that has no analogue in our common-law tradition and no discernable limits in terms of its reach. It asks the federal courts to adjudicate among the most complex scientific, political, and international controversies in history, in the absence of any judicially manageable standards. And it asks the courts to do so where the plaintiffs themselves have pointed to no concrete and redressable interest—and no congressionally identified injury or interest. For any one of these reasons—or all of them—the Court should once again affirm that the Judicial power

does not extend to every alleged grievance, and hold that plaintiffs' unprecedented common law action against global climate change must be dismissed.

Although the United States agrees that this action should be dismissed, it goes to great—and at times perplexing—lengths to urge this Court to decide this case on the basis of "prudential standing," in particular. TVA Br. 13. Indeed, at times the government's brief seems to be at odds with itself. *Compare, e.g., id.* at 14-15 (arguing that this action presents "generalized grievances" unfit for judicial review) *with id.* at 28-30 (arguing that same alleged grievances are fit for review). The Chamber agrees with petitioners that prudential standing is an appropriate basis for reversing the decision below. *See* Petitioners Br. 30-31 (Jan. 31, 2011) (Pet. Br.). But as explained below and by petitioners, this action contravenes several accepted limits on the power of the courts. Lack of Article III standing provides a threshold basis for dismissing this action. *See infra* at 20-24. But as explained next, even if this Court concludes that plaintiffs have standing to maintain this action, the Court should hold that the action must be dismissed on that grounds that there is no basis for the federal courts to create the novel public nuisance action that plaintiffs have advanced, and that this action presents a non-justiciable political question.

A. The Court Should Decline Plaintiffs' Request To Make New Common Law

1. This Court has long understood that creating federal common law raises fundamental separation of powers concerns. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812) (refusing to fashion federal criminal common law). And, it is "needless to state that we are not in the free-wheeling days ante-dating

Erie R. Co. v. Tompkins." *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963). In the modern era, this Court has declared that it has generally gotten out of the business of making new federal common law, *see Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981), "sworn off the habit of venturing beyond Congress's intent," *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001), and stressed that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases," *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004).

Even in new situations that are arguably analogous to established common law actions, this Court has made clear that federal courts do not have unchecked "freedom to create new common-law liabilities." *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 313 (1947). It has further cautioned the courts to be particularly hesitant where judicial standards "would be endlessly knotty to work out" and liability is more properly addressed "through legislation." *Wilkie v. Robbins*, 551 U.S. 537, 562 (2007). The flip side of this restraint is that when the legislature *does* articulate "new rights of action that do not have clear analogs in our common-law tradition," the courts are "sensitive to the articulation of [such] new rights of action." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., joined by Souter, J., concurring in part and concurring in the judgment).

In this way, the courts ensure that they do not get ahead of the political process in addressing new harms or concerns. Respecting these limits is particularly important when it comes to addressing novel and exceptionally complex harms or issues—such as global climate change—which are most likely to benefit from

debate and consideration as part of the political process and most likely to engender controversy if the courts were to get ahead of that process in addressing such issues. To paraphrase Judge Friendly, the "spectacle of federal judges" making substantive common law in place of the political Branches to address such novel and complex issues is not "a happy one." Henry J. Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 N.Y.U.L. Rev. 383, 395 (1964).

2. Plaintiffs have brought this action not under any congressionally conferred right, but by asserting a violation of the federal common law of "public nuisance." Public nuisance indeed has a long pedigree in the common law. But plaintiffs' staggeringly broad claims, implicating every greenhouse gas emitter on the planet and attempting to grasp the current and future global impact of such emissions, bear little resemblance to the actions recognized throughout the centuries-old field of public nuisance law—especially not that subset ultimately incorporated into *federal* common law. Accordingly, while they attempt to sell this nuisance suit as old hat, sanctioning this common law action in fact would require creating a *new* federal common law action to address highly generalized and indeterminate phenomena or harms that have never previously been adjudicated at common law.

As a general matter, a public nuisance is "an unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B (1979) ("Restatement"); *see, e.g.*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030-31 (1992) (applying Restatement); *United States v. Ira S. Bushey & Sons, Inc.*, 363 F. Supp. 110, 120 (D. Vt.) (same), *aff'd without op.*, 487 F.2d 1393 (2d Cir. 1973).

As this Court has explained, public nuisance law "ordinarily entails" analysis of, among other things, the "degree of harm" posed by the activities, the "social value" of the activities, and their "suitability to the locality in question." *Lucas*, 505 U.S. at 1030-31; *see* Restatement §§ 821B, 826-31. The inquiry is typically guided by the "community standards of relative social value prevailing *at the time and place*." Restatement § 828 cmt. b (emphasis added); *see also id.* § 828 cmt. g.

Tracing its roots back centuries in England, public nuisance law has long been used to address discrete and obvious harms in geographically specific and definable areas. For example, one of the oldest known public nuisance statutes, from the 14th Century, outlaws casting "Dung and Filth of the Garbage and Intrails as well of Beasts killed" and "other Corruptions" into "Ditches, Rivers, and other Waters" around London and "other Cities, Boroughs, and Towns, through the Realm of England." Statute of 12 Rich. II, c. 13 (1389); *see* William A. McRae, Jr., *The Development of Nuisance in the Early Common Law*, 1 U. Fla. L. Rev. 27, 35 (1948).

Other traditional examples include obstructing a public way with ditches, logs, or other barriers, *see, e.g.*, *Iveson v Moore*, 91 Eng. Rep. 16 (1702); *Fowler v. Sanders*, 79 Eng. Rep 382 (1617); *Fineux v. Hovenden*, 78 Eng. Rep. 902 (1599); failure to maintain a public ferry, *see Payne v Partridge*, 91 Eng. Rep. 12 (1696); failure to hold Mass in a public chapel, *see Williams's Case*, 77 Eng. Rep 164 (1592); "making great noises in the night with a speaking trumpet, to the disturbance of the neighborhood," *Dominus Rex v. Smith*, 93 Eng. Rep. 795 (1725); "interference with the operation of a public market," Restatement § 821B cmt. a; and

"smoke from a lime-pit that inconvenienced a whole town," *id.* There is no simply historical analogue for the use of public nuisance law to address the sort of generalized and ubiquitous harm alleged here—a warming of the Earth due to greenhouse gases emitted by *billions* of different sources worldwide over the course of hundreds of years.

As Blackstone summarized in the mid-18th Century, the types of public nuisances at common law—all necessarily limited in scope—traditionally included annoyances in highways and rivers (including purprestures), offensive trades, disorderly houses, lotteries, fireworks, eavesdroppers, and common scolds. 4 William Blackstone, *Commentaries* *167-69,; *see also id.* at *167 ("Where there is an house erected, or an inclosure made, upon any part of the king's demesnes, or of an highway, or common street, or public water, or such like public things, it is properly called a *purpresture* ....").

Similarly, after English common law was imported into American law at the founding, public nuisance common law was consistently used to address discrete disturbances in particular, decidedly non-global areas. *See, e.g., People v. Detroit White Lead Works*, 46 N.W. 735, 735 (Mich. 1890) ("unwholesome, offensive, and nauseating odors, smells, vapors, and smoke" emitted by factory harmed people "in the neighborhood"); *McAndrews v. Collerd*, 42 N.J.L. 189 (N.J. 1880) (explosives stored in shed exploded and damaged houses within 1200-foot radius); *Wesson v. Washburn Iron Co.*, 95 Mass. (13 Allen) 95, 104 (Mass. 1866) ("noisome smells and noxious vapors" emitted by factory harmed the vicinity); *Mills v. Hall & Richards*, 9 Wend. 315, 316 (N.Y. Sup. Ct. 1832) (malarial pond

caused "disease and death through the neighborhood"); *Barr v. Stevens*, 4 Ky. 292, 293 (1808) ("fell[ing] trees in the highway" could cause "annoyance of the passengers").

When this Court incorporated a subset of public nuisance doctrine into federal common law, it was likewise inherently limited. In particular, primarily early in the last century, this Court recognized narrow instances in which states can bring "simple type" public nuisance claims under federal common law to enjoin interstate environmental harms. *See, e.g., North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923). Plaintiffs insist—and the Second Circuit agreed—that their nuisance suit fits comfortably within that paradigm. Compl. ¶¶ 152-64, J.A. 103-05; Pet.App.78a-95a. But the "simple type" public nuisance actions previously recognized by this Court—which are among the "'few and restricted'" (*Texas Indus.*, 451 U.S. at 640 (citation omitted)) instances in which this Court has recognized any federal common law cause of action—do not support the Second Circuit's decision.

3. Plaintiffs' suit likewise bears no resemblance to the traditional federal nuisance actions previously recognized by this Court. Plaintiffs' claims implicate non-toxic substances emitted by billions of sources worldwide over "several centuries," Compl. ¶ 87, J.A. 81-82, caused by everyone in every corner of the globe and—if plaintiffs' claims are to be believed—ultimately creating generalized harms worldwide. By contrast, the public nuisance cases that this Court has sanctioned involved allegations that a discrete set of defendants directly caused harm with obviously toxic or dangerous substances in a particular locale. *See, e.g., Missouri v. Illinois*, 200 U.S. 496 (1906) (Chicago

sewage harmed cities along Mississippi River); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (toxic chemicals emitted by Tennessee companies harmed air quality in five Georgia counties).[2] As the government recognizes, the traditional nuisance cases "involved only localized rather than global effects." TVA Br. 18 n.6; *see id.* at 17 ("The medium that transmits injury to potential plaintiffs is literally the Earth's entire atmosphere—making it impossible to consider the sort of *focused and more geographically proximate effects* that were characteristic of traditional nuisance suits targeted at particular nearby sources of water or air pollution." (emphasis added)).

Far from the historically modest application of existing tort principles to a discrete nuisance, plaintiffs advance claims that are "unprecedentedly broad" (TVA Br. 13) and seek to have the courts dictate the substance and implementation of federal climate change policy—with profound and inevitable effects on American businesses, jobs, and individuals. Indeed, because everyone still breathing on the planet contributes to greenhouse gas emissions, if plaintiffs' claims are permitted to go forward, all businesses—and, indeed, all individuals—will, overnight, become subject to unpredictable and open-ended *joint-and-several* liability. *See* TVA Br. 17 ("[A]ny potential

---

[2] *See also, e.g., New York v. New Jersey*, 256 U.S. 296 (1921) (sewage discharged by New Jersey harmed Upper New York Bay); *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (drainage system altered by Minnesota caused flooding in North Dakota); *New Jersey v. City of New York*, 283 U.S. 473 (1931) (garbage dumped by New York City harmed New Jersey shore); *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee I*") (pollution discharged by Wisconsin cities harmed Lake Michigan).

plaintiff could claim to have been injured by any (or all) of the potential defendants."). Such an extraordinarily broad assertion of common law liability is unheard of.

Such a novel and unbounded conception of a "public nuisance" is also incompatible with the longstanding nature of the common law cause of action for public nuisance. For example, as noted, the conventional "public nuisance" inquiry is guided by the "community standards of relative social value prevailing *at the time and place*." Restatement § 828 cmt. b (emphasis added); *see Lucas*, 505 U.S. at 1030-31; Restatement § 828 cmt. g. But that targeted "time and place" inquiry into "community standards" is simply unworkable when it comes to a *global* harm caused over the course of *centuries* by literally *billions* of different sources around the entire world.

The "exercise of judicial power" to expand "traditionally established" causes of action to the novel and pervasive problem of global climate change would impermissibly "intrud[e] within a field properly within Congress' control." *See Standard Oil*, 332 U.S. at 311-17 (refusing government's request to impose federal common law tort liability on defendant for loss of a services of injured soldier); *Texas Indus.*, 451 U.S. at 638-47 (refusing to create federal common law cause of action for contribution from antitrust conspirators, where sheer "range of factors to be weighed" in deciding whether to create such an action "demonstrate[d] the inappropriateness of judicial resolution"). "Whatever the merits of the policy" advocated by the plaintiffs in this case, "its conversion into law is a proper subject for congressional action, not for any creative power of [the courts]." *Standard Oil*, 332 U.S. at 314. And, as explained below, the

political process is active and ongoing when it comes to addressing global climate change.

As this Court has explained, "[t]he enactment of a federal rule in an area of national concern ... is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress." *City of Milwaukee v. Illinois*, 451 U.S. 304, 312-13 (1981) ("*Milwaukee II*"). That principle should be the beginning and end of this unprecedented "nuisance" suit: If ever there were an area "better left to legislative judgment," this case presents it. Global climate change presents exceptionally complex issues of enormous political, economic, and foreign policy significance. The customary restraint that this Court has long exercised in refusing to extend the common law in new ways is especially warranted here.[3]

---

[3] The Second Circuit also held that, notwithstanding this Court's decision in *Massachusetts* and the robust political response, the Clean Air Act (CAA) does not displace federal common law nuisance claims. Pet.App.137a-44a. The Chamber does not believe that *Massachusetts* permits EPA to "shoehorn greenhouse gas emissions controls into the existing [CAA]," for doing so would lead to "absurd" results, *see* Petition for Reconsideration, No. EPA-HQ-OAR-2009-0171, at 3, 10-19 (Mar. 15, 2010), *denied*, 75 Fed. Reg. 49,556 (Aug. 13, 2010), *pet. for review pending*, No. 10-1235 (D.C. Cir. Aug. 13, 2010), as EPA itself has elsewhere acknowledged, *see* 74 Fed. Reg. 55,292, 55,310 (Oct. 27, 2009) (applying entire CAA statutory scheme to greenhouse gas emissions would produce "absurd results"). EPA's ill-considered decision, manifested in a series of interrelated rulemakings spanning more than 600 pages in the Federal Register, to invoke the blunt instrument of the CAA to regulate the complex problem of climate change is subject to an ongoing array of litigation brought by states, industry, and public interest organizations. *See, e.g.*, Non-State Petitioners' Joint

B. Plaintiffs' Suit Raises Non-Justiciable Political Questions

Consistent with the Framers' tripartite scheme, courts have no authority to decide questions that are "in their nature political." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). "It is therefore familiar learning that no justiciable 'controversy' exists when parties seek adjudication of a political question." *Massachusetts*, 549 U.S. at 516 (citing *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849)). While it curiously goes to great lengths to avoid the label of "political question" (repeatedly insisting on using "prudential standing" instead), the United States itself recognizes that this action raises the core concerns addressed by the political question doctrine and, indeed, that a confluence of factors, including "the lack of judicial manageability," "demonstrates that plaintiffs' concerns should be resolved by the representative Branches, not federal courts." TVA Br. 20; *see id.* at 33-42.

1. Article III does not authorize "*whatever* judges choose to do" but, instead, the "law pronounced by the courts must be principled, rational, and based upon reasoned distinctions." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality). Under the familiar *Baker* framework, when a case presents no judicially

---

Briefing Proposal at 1-2, *Coalition for Responsible Regulation, Inc. v. U.S. EPA*, Nos. 09-1322, 10-1073, 10-1092 (D.C. Cir. Jan. 11, 2011). In light of those substantial challenges, this Court should decide the antecedent question whether federal common law can even accommodate a public nuisance tort of the nature suggested by plaintiffs in this case before considering whether displacement of such federal common law has in fact occurred. However, if the CAA did give EPA such authority, the Chamber agrees with petitioners that the common law claims presented here would be displaced under *Milwaukee II* and its progeny. Pet. Br. 40-46.

manageable standards by which a court (or jury) can make a rational decision or requires an initial policy judgment (*Baker* factors 2 and 3), it must be left to the elected Branches. *Baker v. Carr*, 369 U.S. 186, 210-11, 217 (1962). The political question doctrine also bars adjudication where there is a textual commitment to another Branch, a danger of disrespect to other Branches, a need to adhere to a political decision already made, or the potential for embarrassing other Branches (*Baker* factors 1 and 4-6). *Id.*

In this case, the Second Circuit recognized a new and categorical exception to those established principles. According to the Second Circuit, "where a case 'appears to be an ordinary tort suit,'" there is no political question bar. Pet.App.38a (citation omitted); *see* Pet.App.27a-41a. That approach cannot be squared with the careful, "case-by-case inquiry" that this Court requires (and that other lower courts have undertaken) to determine whether the question posed "lies beyond judicial cognizance." *Baker*, 369 U.S. at 211.

The courts have repeatedly refused to adjudicate political questions even when such questions arise in the context of private litigation involving common law and tort claims. *See, e.g., Luther*, 48 U.S. (7 How.) at 39-40 (trespass); *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 844 (D.C. Cir. 2010) (en banc) (defamation), *cert. denied*, 79 U.S.L.W. 3419 (U.S. Jan. 18, 2011) (No. 10-328); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982-84 (9th Cir. 2007) (public nuisance and wrongful death). This Court thus emphasized in *Baker* that the political question doctrine applies "even in private litigation which directly implicates no feature of separation of powers" and "though in form simply [a common law] action." 369 U.S. at 214, 218.

Accordingly, it is well-settled that a plaintiff cannot "clear the political question bar" simply by "'recasting'" a claim "'in tort terms.'" *El-Shifa Pharm. Indus. Co.*, 607 F.3d at 843 (citation omitted).

2. Plaintiffs' "nuisance" claims present no judicially manageable standards and their resolution requires myriad initial policy determinations reserved to the political Branches. *See* TVA Br. 37-38. In *Massachusetts*, this Court found no political question in assessing "the proper construction of a congressional statute," 549 U.S. at 516, but there is no such legislative guidance here. And contrary to the Second Circuit's suggestion, this case cannot be adjudicated under the "well-settled tort rules" found in prior nuisance cases and the Restatement, Pet.App.27a-35a, because neither source provides the necessary judicially manageable standards or obviates the need for an initial policy determination.

As noted above, public nuisance law "ordinarily entail[s]" analysis of various factors, including the "degree of harm" posed by the activities, the "social value" of the activities, and their "suitability to the locality in question." *Lucas*, 505 U.S. at 1030-31. In traditional tort cases, however, these are merely *incremental* determinations of policy, which courts appropriately make against a backdrop of well-established common law, without trespass on the political domain. But in this case the policy decisions necessary to resolve plaintiffs' claims are not incremental in nature. In the guise of a routine nuisance action, plaintiffs ask a single district court to balance the myriad environmental, economic, and geopolitical factors implicated by global climate change and make from whole cloth policy decisions that

continue to be the subject of intense political debate within our political Branches and with other nations through international diplomatic channels.

The Second Circuit characterized this as a "discrete domestic nuisance" case that does not require a court to fashion "across-the-board" domestic or international emissions limits or a "comprehensive and far-reaching solution to global climate change." Pet.App.25a-26a. But there is nothing remotely "discrete" about a nuisance action that tries to tackle the phenomenon of *global* climate change and necessarily requires the court to value these defendants' emissions against those of every other entity in the world. Given the global nature of greenhouse gases, the imposition of caps on any given enterprise (or handful of enterprises) is necessarily arbitrary. And, as the government has observed, "[p]laintiffs' theory of liability could provide virtually every person, organization, company, or government with a claim against virtually every other person, organization, company or government, presenting unique and difficult challenges for the federal courts," playing out in potentially hundreds of different courtrooms across the country. TVA Br. 37.

Because, as alleged, *every* enterprise—indeed *every breathing organism*—worldwide over the last several centuries is to some degree complicit in greenhouse gas emissions, this line-drawing is not just "difficult" for a court. The initial policy judgment about who should bear the cost of the harm is so complex and intimately entwined with every sector of the economy and every facet of daily life that it is the quintessential example of "'a matter of high policy'" that must be "'resol[ved] within the legislative process after the kind of investigation, examination, and study that legislative

bodies can provide and courts cannot.'" *Texas Indus.*, 451 U.S. at 647 (citation omitted).

For precisely these reasons, every district court to consider common law claims seeking redress for global warming has found them to raise political questions beyond judicial purview. *See supra* note 6. The unanimity of *trial* judges on this point is telling. These judges are on the front lines and must deal first-hand with the limits of judicial competence to manage such actions. The appellate courts that have disagreed with that conclusion, including the court of appeals below, have lost sight of the fundamental separation-of-powers principles underlying the political question doctrine and this Court's precedents.[4] And the fact that the political Branches have jumped into the debate and are actively seeking to implement a coordinated response to the phenomenon of global climate change underscores that there is no reason for this Court to push the settled limits on Judicial power by sanctioning the unprecedented common law action at issue.

C. Plaintiffs Lack Standing

As both petitioners (Pet. Br. 16-31) and the government (TVA Br. 13-24) have explained, settled limits on the standing of parties to maintain actions in federal court also provide a threshold—and entirely sufficient—basis for dismissing this action.

1. Article III's limitation to cases and controversies likewise "is crucial in maintaining the 'tripartite allocation of power' set forth in the

---

[4] *See* Pet.App.1a-170a; *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *opinion vacated pending reh'g en banc*, 598 F.3d 208 (5th Cir.), *appeal dismissed*, 607 F.3d 1049, 1055 (5th Cir. 2010) (en banc), *mandamus denied*, No. 10-294 (U.S. Jan. 10, 2011).

Constitution" and ensures that the judiciary "respects 'the proper—and properly limited—role of the courts in a democratic society.'" *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (citations omitted). In giving effect to that limitation, this Court has long held that plaintiffs must show they have suffered an injury-in-fact, caused by defendants' conduct and likely to be redressed by the relief sought. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The Court has also recognized prudential limits on the exercise of Article III jurisdiction—in effect creating a buffer zone at the outer reaches of Article III to ensure that the proper role of the federal courts is respected. *See Elk Grove Unified Sch. Dist.*, 542 U.S. at 12.

2. In finding that plaintiffs have standing to maintain this action, the court of appeals relied primarily on this Court's decision in *Massachusetts v. EPA*. But *Massachusetts* is distinguishable in critical respects. *Massachusetts* involved standing to enforce a *congressionally-conferred procedural* right. 549 U.S. at 516-20. This Court emphasized that Congress "'has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before'" and that "a litigant to whom Congress has 'accorded a procedural right to protect his concrete interests' ... 'can assert that right without meeting all the normal standards for redressability and immediacy.'" *Id.* at 516 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring)), 517-18 (quoting *Lujan*, 504 U.S. at 572 n.71). The Court therefore declared at the outset of its standing inquiry that the fact that the claim in *Massachusetts* turned on "the proper construction of a congressional statute, a question eminently suitable to resolution in federal

court," was "of critical importance to the standing inquiry." *Id.* at 516.

As this Court has previously explained, "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973). Indeed, "[a]s Government programs and policies become more complex and far reaching, [courts] must be sensitive to [Congress's] articulation of new rights of action that do not have clear analogs in our common-law tradition." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring). Even then, however, "Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." *Id.*

Of course, Congress cannot confer jurisdiction that does not otherwise exist under Article III. But when Congress creates a legal right, the denial of that right may well give rise to an injury that is cognizable and concrete for purposes of Article III. And (assuming the requirements of Article III and this Court's prudential limits are met), allowing suits to enforce congressionally conferred rights respects the political process that led to the creation of such rights. *See Warth v. Seldin*, 422 U.S. 490, 500-01 (1975).

Moreover, in *Massachusetts*, the challenge was to an *EPA action*, as opposed to suits against some subset of individual emitters. 549 U.S. at 516 (Congress had "authorized [that] type of challenge *to EPA action*" (emphasis added)). The Court explained that agencies implement regulatory schemes incrementally, "whittl[ing] away" at the underlying problem over time, such that the procedural relief at issue (requiring EPA to reconsider its refusal to regulate) might well

trigger systemic, nationwide regulation to address the asserted underlying injuries. *Id.* at 524. In that regard, the Court concluded that allowing the *Massachusetts* action to proceed could be viewed as giving effect to a statutory and regulatory scheme.

Those considerations do not support standing here. Plaintiffs invoke no congressionally-conferred procedural right and the redress they seek is not connected to any future agency action. Instead, they ask the courts to fashion and enforce an abstract common law nuisance action, and then assume judicial responsibility for redressing the alleged nuisance without any involvement of the political Branches—and, indeed, if the political response is not viewed as sufficient as a matter of public nuisance law, perhaps even at odds with the decisions of the political Branches. Finding standing here would therefore require a considerable *extension* of *Massachusetts*. As petitioners have explained, there is no reason for the Court to take that step. *See* Pet. Br. 24-29.

3. The government takes a seemingly schizophrenic view of standing—strenuously arguing that the Court should hold that plaintiffs *lack* prudential standing because the alleged grievances are so generalized but then maintaining that plaintiffs nevertheless *have* Article III standing under *Massachusetts*. Given the important distinctions between this case and *Massachusetts*, the government is wrong when it comes to Article III standing. But the Chamber agrees with the government and petitioners that plaintiffs lack prudential standing as well. Prudential standing principles preclude courts from adjudicating "'generalized grievances more appropriately addressed in the representative branches.'" *Elk Grove*

Unified Sch. Dist., 542 U.S. at 12 (quoting *Allen*, 468 U.S. at 751). Plaintiffs plainly seek to pursue just such a "generalized grievance" here, "simultaneously implicat[ing] many competing interests of almost unimaginably broad categories of both plaintiffs and potential defendants." TVA Br. 15-16.

In the Chamber's view, to eliminate confusion that led to the standing decision below, it is important for this Court to clarify that the Article III standing analysis in *Massachusetts* does not extend to the situation here, where plaintiffs do not assert a congressionally created procedural right in seeking to spur regulatory action. Nevertheless, whatever terminology the Court chooses to use, it should hold that plaintiffs lack standing to maintain this action for the very reasons that the United States recognizes.

II. THE DRASTIC ECONOMIC AND POLITICAL CONSEQUENCES OF ALLOWING THIS ACTION TO PROCEED UNDERSCORE THE NEED TO RESPECT THE SEPARATION OF POWERS

The important interests at stake—including the vitality of the national economy and the ongoing political and diplomatic efforts to address global climate change—underscore the need to respect the constitutional and prudential limits discussed above.

A. The Potential Economic Implications Of Allowing Actions Like This To Proceed Are Staggering

If allowed to stand, the decision below will impose punishing costs on businesses and consumers that will only be exacerbated as this emerging category of litigation sweeps the nation's courts.

First, allowing potentially hundreds of district courts across the country to attempt to administer global climate change through these types of piecemeal actions will create a hodge-podge of results and, inevitably, competing if not conflicting remedial demands. *See* TVA Br. 37 ("[D]ifferent district courts entertaining such suits could reach widely divergent results ...."). [5] Indeed, there have already been at least three other public nuisance common law suits against arbitrarily-selected greenhouse gas emitters across several industries. Pet. Br. 3 & n.1; Petition for Writ of Certiorari 8-10 (Aug. 2, 2010). [6] In those cases, plaintiffs sought damages from various groupings of automobile, oil, coal, chemical, energy, and utility companies. Although none of these plaintiffs has (yet) been successful, the Second Circuit's decision—which permits common law suits against virtually any emitter of carbon dioxide—will invite a potentially endless barrage of common law suits and produce a patchwork of judge-made regulation.

---

[5] Under plaintiffs' theory of personal jurisdiction, *any* carbon emitters could be sued in *any* district court in the country. *See* Compl. ¶ 38, J.A. 68; Mem. in Opp. to Mot. to Dismiss 13-14 (S.D.N.Y. Nov. 19, 2004), ECF No. 54.

[6] *See Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal pending*, No. 09-17490 (9th Cir.); *Comer v. Murphy Oil USA*, No. 1:05-CV-436-LG-RHW, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007), *rev'd*, 585 F.3d 855 (5th Cir. 2009), *opinion vacated pending reh'g en banc*, 598 F.3d 208 (5th Cir.), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010) (en banc), *mandamus denied*, No. 10-294 (U.S. Jan. 10, 2011); *California v. General Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), *appeal dismissed*, No. 07-16908 (9th Cir. June 24, 2009).

The resulting conflicting standards and regulatory uncertainty will impose enormous costs on the economy. Businesses large and small will face intractable challenges in assessing future capacity—not knowing when, whether, and to what degree a lone district court might impose onerous emissions caps (or damages) on them for alleged emissions or contributions to global climate change. *See North Carolina v. TVA*, 615 F.3d 291, 296, 306 (4th Cir. 2010) (application of "vague public nuisance standards" to emissions leaves companies "unable to determine [their] obligations ex ante"); TVA Br. 37-38 (such suits "lack the certainty and repose that the political Branches can afford through legislative and regulatory action"). Moreover, this potential for judicial mischief exacerbates an already-uncertain regulatory landscape in flux as a result of EPA's increasingly aggressive efforts to curb greenhouse gas emissions. As a result, firms will "become more cautious in responding to business conditions," resulting in decreased hiring, investment, and productivity. Nicholas Bloom, *The Impact of Uncertainty Shocks*, 77 Econometrica 623, 625 (2009).[7] The notion that regulatory uncertainty can lead to economic stagnation is hardly new. As the Founders long ago observed: "[G]reat injury results from an unstable government. ... What prudent merchant will hazard his fortunes in any new branch of

---

[7] *See also* Darren Samuelsohn, *Rockefeller Finds It's Better to Negotiate on Climate Than Sit on Sidelines*, N.Y. Times, Sept. 14, 2009 (because there is "'no predictability,'" Wall Street "'lends no money to people trying to build power plants'" (quoting Sen. Rockefeller)); Kenneth Green *et al.*, *Climate Change: Caps vs. Taxes*, American Enterprise Institute Environmental Policy Outlook, June 2007, at 2 3 (uncertainty of energy costs and fuel availability can lead to spikes in fuel prices).

commerce, when he knows not but that his plans may be rendered unlawful before they can be executed?" The Federalist No. 62, at 190-91 (1788). The lower court must be reversed to remove the cloud of uncertainty that will otherwise stunt economic growth and prevent businesses from efficiently ordering their affairs.

Second, the judicial imposition of emissions caps on utility industry defendants (and, inevitably, on other emitters as well) will dramatically increase U.S. energy prices. As the President has previously acknowledged, "capping greenhouse gasses" means "electricity rates would necessarily skyrocket."[8] And the "vast majority" of the burden of increased energy costs will fall on residential consumers.[9]

Third, those higher energy costs will drive up the cost of all manufactured goods and transportation.[10] As even emissions-capping advocates acknowledge,

---

[8] *San Francisco Chronicle*, Editorial Board, *An interview with Sen.* Barack Obama *at* 40:39 (Jan. 17, 2008); *see also, e.g.*, Trevor Houser *et al.*, *Assessing the American Power Act: The Economic, Employment, Energy Security, and Environmental Impact of Senator Kerry and Senator Lieberman's Discussion Draft*, Peterson Institute for International Economics Policy Brief, May 2010, at 13 (caps would increase household electricity, heating, and gasoline prices); Andrew Chamberlain & Feliz M. Ventura, Chamberlain Economic Policy Study No. 2010-06, *Paying for the "American Power Act": An Economic and Distributional Analysis of the Kerry-Lieberman Cap-and-Trade Bill*, at 6 (2010) (capping emissions "forc[es] up consumer prices"); Bernie Woodall, *U.S. carbon cap to raise power prices: Moody's*, Reuters.com, Mar. 25, 2009.

[9] Woodall, *supra*.

[10] *See, e.g.*, Robert Stavins, *Addressing climate change with a comprehensive US cap-and-trade system*, 24 Oxford Review of Econ. Pol'y 298, 312-14 (2008).

"most of the cost of the programme will be borne by consumers, facing higher prices of products, including electricity and gasoline."[11] And the compound effect is to threaten hundreds of thousands of jobs and depress wages, as companies downsize or relocate.[12] While legislators are able to consider the competing economic interests and tailor schemes to mitigate such hardships (e.g., through tax breaks or other incentives), courts cannot similarly ameliorate the unintended consequences of their mandates. Changes of such economic magnitude should be left to the legislative process, and this Court should restore the balance of power upset by the lower court's decision.

B. Sanctioning Common Law Actions Like This Case Will Undermine The Active And Ongoing Political Process

For decades, the legislative and executive Branches have struggled with global climate change. *See Massachusetts*, 549 U.S. at 507-09 (recounting prior legislation and treaties); Pet.App.145a-58a. They have long recognized that controlling greenhouse gas emissions involves a complex interrelation of environmental, economic, and geopolitical issues

---

[11] Stavins, *supra*, at 313.

[12] *See, e.g.*, Chamberlain & Ventura, *supra*, at 44 (predicting that capping scheme would reduce employment by 522,000 jobs in 2015 and reduce total wages earned by $23.9 billion); *see also* S. Res. 98, 105th Cong., at 3 (July 25, 1997) (passed 95-0) (stating that any international capping scheme failing to include developing countries "could result in serious harm to the United States economy, including significant job loss, trade disadvantages, increased energy and consumer costs").

requiring a comprehensive, coordinated approach.[13] To date, statutes and treaties have focused primarily on research and reporting requirements. The United States has not entered into any sweeping international agreements imposing particular limits on greenhouse gas emissions. *See Massachusetts*, 549 U.S. at 507-09; Pet.App.145a-59a.

In *Massachusetts*, this Court recognized that the politically accountable Branches must take the lead on regulating global climate change because the courts have "neither the expertise nor the authority to evaluate" the myriad policy judgments. 549 U.S. at 533. And that decision has spurred a serious political dialogue that is active and ongoing.[14] Allowing litigation like this action to proceed would interfere

---

[13] *See, e.g.*, 42 U.S.C. § 13381 (directing study of the "economic, energy, social, environmental, and competitive implications, including implications for jobs"); U.N. Framework Convention on Climate Change, prmbl. at 1 (1992) ("[T]he global nature of climate change calls for the widest possible cooperation by all countries ...."); Global Climate Protection Act of 1987, Title XI of Pub. L. 100-204, § 1103(b), (c), 101 Stat. 1331, 1408-09 (codified at 15 U.S.C. § 2901 note) (directing EPA to propose a "coordinated national policy on global climate change" and ordering the Secretary of State to work "through the channels of multilateral diplomacy"); National Climate Program Act, Pub. L. No. 95-367, § 2(5), 92 Stat. 601, 601 (1978) ("International cooperation for the purpose of sharing the benefits and costs of a global effort to understand climate is essential.").

[14] *See, e.g.*, EPA Stationary Source Regulations Suspension Act, S. 231 112th Cong. (introduced Jan. 31, 2011) (proposing to prohibit EPA from regulating stationary source greenhouse gas emissions for two years); Free Industry Act, H.R. 97, 112th Cong. (introduced Jan. 5, 2011) (proposing to amend CAA to explicitly exempt greenhouse gases); American Clean Energy and Security Act, H.R. 2454, 111th Cong. (passed the House on June 26, 2009) (proposing scheme for regulating greenhouse gas emissions).

with this process by permitting virtually anyone to go to the courts to address global warming as a private attorney general against the emitters of greenhouse gases of their choice and enlisting the courts to attempt to fashion a remedy on a haphazard basis and in a manner that unavoidably may conflict with congressional priorities or directives.

The business community has ordered its affairs on the reasonable assumption that it will continue to be an important stakeholder with a voice in the ongoing democratic process, as the elected Branches seek equitable and effective solutions. The court of appeals' decision threatens to eliminate that opportunity for debate, subvert the democratic process, and impose piecemeal court-ordered mandates in lieu of balanced, comprehensive legislative solutions. American businesses will not be the only losers. The nation's effort to address global climate change will suffer too. There is no reason to inflict that blow by permitting this ill-founded and improper action to proceed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

ROBIN S. CONRAD
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

GREGORY G. GARRE
Counsel of Record
RICHARD P. BRESS
GABRIEL K. BELL
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Amicus Curiae

February 7, 2011

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
FEB 7 - 2011
OFFICE OF THE CLERK

No. 10-174

In the
Supreme Court of the United States

AMERICAN ELECTRIC
POWER COMPANY INC., ET AL.,

PETITIONERS,

v.

STATE OF CONNECTICUT, ET AL.,

RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF CHEVRON U.S.A. INC., SHELL OIL COMPANY, CONOCOPHILLIPS, E.I. DU PONT DE NEMOURS & COMPANY, AND EDISON INTERNATIONAL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

DANIEL P. COLLINS
BENJAMIN MARO
MUNGER, TOLLES
& OLSON LLP
355 S. Grand Ave., 35th Fl.
Los Angeles, CA 90071
(213) 683-9100

Counsel for Shell Oil Co.

PAUL D. CLEMENT
Counsel of Record
ASHLEY C. PARRISH
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
pclement@kslaw.com
(202) 737-0500

Counsel for
Chevron U.S.A. Inc.

February 7, 2011 *additional counsel listed on inside cover

41699h
48

Additional counsel:

RAYMOND MICHAEL RIPPLE
DONNA L. GOODMAN
DUPONT COMPANY
Legal/D-7012
1007 Market St.
Wilmington, DE 19898
(302) 773-3072

Counsel for E.I. du Pont de Nemours & Co.

RUSSELL C. SWARTZ
Vice President and
Associate General Counsel
SOUTHERN CALIFORNIA EDISON COMPANY
2244 Walnut Grove Ave.
Rosemead, CA 91770
(626) 302-3925

Counsel for Edison International

ROBERT MEADOWS
TRACIE J. RENFROE
JONATHAN L. MARSH
KING & SPALDING LLP
1100 Louisiana St.,
Suite 4000
Houston, TX 77002
(713) 751-3200

Counsel for Chevron U.S.A. Inc.

ANDREW B. CLUBOK
SUSAN E. ENGEL
KIRKLAND & ELLIS LLP
655 Fifteenth St. N.W.
Washington, D.C. 20005
(202) 879-5000

Counsel for ConocoPhillips

QUESTIONS PRESENTED

The court of appeals held that States and private plaintiffs may maintain actions under federal common law that defendants—in this case, five electric utilities—have created a "public nuisance" by contributing to global warming, and may seek injunctive relief capping defendants' carbon dioxide emissions at judicially determined levels. The questions presented are:

1. Whether States and private parties have standing to seek judicially fashioned emissions caps on five utilities for their alleged contribution to harms claimed to arise from global climate change caused by more than a century of emissions by billions of independent sources.

2. Whether a cause of action to cap carbon dioxide emissions can be implied under federal common law where no statute creates such a cause of action, and the Clean Air Act speaks directly to the same subject matter and assigns federal responsibility for regulating such emissions to the Environmental Protection Agency.

3. Whether claims seeking to cap defendants' carbon dioxide emissions at "reasonable" levels, based on a court's weighing of the potential risks of climate change against the socioeconomic utility of defendants' conduct, would be governed by "judicially discoverable and manageable standards" or could be resolved without "initial policy determination[s] of a kind clearly for nonjudicial discretion." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 7

I. Article III Standing Requirements Preclude Efforts To Hold A Discrete Group Of Individual Companies Responsible For A Global Phenomenon. 7

A. The Second Circuit's Decision Is Based On A Fundamental Misreading Of *Massachusetts v. EPA*. 9

1. *Massachusetts v. EPA* Does Not Support The Decision Below. 10

2. Decisions Interpreting The Clean Water Act Do Not Support The Decision Below. 13

B. Mere Contribution To A Global Phenomenon Cannot Satisfy Article III's Fair Traceability Requirement. 16

C. This Court's Guidance Is Needed To Prevent Open-Ended And Abusive Litigation. 21

II. Plaintiffs' Global-Warming Claims Raise Nonjusticiable Political Questions. 24

A. A Case Presents A Nonjusticiable Political Question If Any One Of The Six *Baker v. Carr* Tests Is Satisfied. 25

B. Plaintiffs' Global-Warming Nuisance Claims Raise Nonjusticiable Political Questions Under Several of the *Baker* Tests. 29

CONCLUSION 37

TABLE OF AUTHORITIES

Cases

767 Third Ave. Assocs. v. Consulate Gen. of Socialist Fed'n Republic of Yugoslavia, 218 F.3d 152 (2d Cir. 2000) 29

Allen v. Wright, 468 U.S. 737 (1984) 11, 17, 20

Alperin v. Vatican Bank, 410 F.3d 532 (9th Cir. 2005) 33

Anderman v. Federal Republic of Austria, 256 F. Supp. 2d 1098 (C.D. Cal. 2003) 33

Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) 17

Baker v. Carr, 369 U.S. 186 (1962) ..... passim

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) 22

Bennett v. Spear, 520 U.S. 154 (1997) 17

BMW of N. Am., Inc. v. Gore, 517 U.S. 558 (1996) 22

California v. General Motors Corp. No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) ..... passim

Comer v. Murphy Oil USA, Inc. No. 1:05-CV-436-LG-RHW, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007) 2, 22, 35

Comer v. Murphy Oil USA, Inc.,
585 F.3d 855 (5th Cir. 2009),
vacated by, 598 F.3d 208 (en banc),
appeal dismissed,
607 F.3d 1049 (5th Cir. 2010) 10

Corrie v. Caterpillar, Inc.,
503 F.3d 974 9th Cir. 2007) 28

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006) 16, 18

Duke Power Co. v. Carolina
Envt'l Study Grp., Inc.,
438 U.S. 59 (1978) 17

Friends of the Earth, Inc. v.
Crown Cent. Petroleum Corp.,
95 F.3d 358 (5th Cir. 1996) 14, 15

Friends of the Earth, Inc. v. Gaston
Copper Recycling Corp.,
204 F.3d 149 (4th Cir. 2000) 14

Goldwater v. Carter,
444 U.S. 996 (1979) 26

Japan Whaling Ass'n v.
American Cetacean Soc'y,
478 U.S. 221 (1986) 25, 29, 36

Kelberine v. Societe Internationale,
363 F.2d 989 (D.C. Cir. 1966) 33

Leegin Creative Leather Prods. v. PSKS, Inc.,
551 U.S. 877 (2007) 22

Lewis v. Casey,
518 U.S. 343 (1996) 7

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) ..... passim

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 25, 26

Massachusetts v. EPA,
549 U.S. 497 (2007) ..... passim

Native Village of Kivalina v. ExxonMobil Corp.,
663 F. Supp. 2d 863 (N.D. Cal. 2009) ..... passim

Nixon v. United States,
506 U.S. 224 (1993) 26, 27, 28, 33

Ohio v. Wyandotte Chems. Corp.,
401 U.S. 493 (1971) 31

Public Interest Research Group v. Powell Duffryn Terminals, Inc.,
913 F.2d 64 (3d Cir. 1990) 14

Schneider v. Kissinger,
412 F.3d 190 (D.C. Cir. 2005) 30

Simon v. Eastern Ky. Welfare Rights Org.,
426 U.S. 26 (1976) 18

Snapp v. Puerto Rico ex rel. Barez,
458 U.S. 592 (1982) 10, 11

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 19

Stoneridge Inv. Partners, LLC v. Scientific-Atlantic, Inc.,
552 U.S. 148 (2008) 22

Summers v. Earth Island Inst.,
129 S. Ct. 1142 (2009) 16

Tellabs, Inc. v. Makor Issues & Rights, Ltd.,
551 U.S. 308 (2007) 22

Texas Indep. Producers & Royalty Owners Ass'n v. EPA,
410 F.3d 964 (7th Cir. 2005) 15

United States v. Pink,
315 U.S. 203 (1942) 28

United States v. Students Challenging Regulatory Agency Procedures,
412 U.S. 669 (1973) 17

Vieth v. Jubilerer,
541 U.S. 267 (2004) ..... passim

Ware v. Hylton,
3 U.S. (3 Dall.) 199 (1796) 25

Warth v. Seldin,
422 U.S. 490 (1975) 19, 21

Whiteman v. Dorotheum GmbH & Co. KG,
431 F.3d 57 (2d Cir. 2005) 28

Statutes

33 U.S.C. § 1365 13

Clean Air Act,
42 U.S.C. §§ 7401 *et seq* 9

Federal Water Pollution Control Act ("Clean Water Act"),
Pub. L. No. 80-845, 62 Stat. 1155 (1948)
(codified as amended at
33 U.S.C. §§ 1251–1376) 4

Other Authorities

RESTATEMENT (SECOND) OF TORTS (1979) 30

INTEREST OF *AMICI CURIAE*[1]

Amici Chevron U.S.A., Inc., Shell Oil Company, and ConocoPhillips are leaders in the energy industry. These companies (or their affiliates) are engaged in every aspect of the oil and natural gas industry, including exploration and production; refining, marketing, and transportation; and chemicals manufacturing and sales. *Amicus* E.I. du Pont de Nemours and Company is a science company, operating in approximately 80 countries. DuPont offers a wide range of products and services for markets including agriculture, nutrition, electronics, communications, safety and protection, home and construction, transportation, and apparel. *Amicus* Edison International is the parent of Southern California Edison Company, which is one of the Nation's largest electric utilities. Edison International is also the parent of Edison Mission Group, which, through various subsidiaries and affiliates, owns or operates independent generating facilities in Illinois, Pennsylvania, California, and several other States.

Amici have a particular interest in this case because they have witnessed first hand the aggressive misuse of *Massachusetts v. EPA*, 549 U.S. 497 (2007), by enterprising lawyers, state attorneys

---

[1] The parties have consented to the filing of this brief in letters on file in the Clerk's office. Pursuant to S. Ct. R. 37.6, amici state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than amici and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

general, and environmental groups seeking to recover massive damage awards and to enmesh the courts in disputes that raise political questions. In particular, *amici* have been singled out as defendants in one or more other actions—including *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 879 (N.D. Cal. 2009), and *Comer v. Murphy Oil USA, Inc.*, No. 1:05-CV-436-LG-RHW, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010), *mandamus petition denied sub. nom. In re Comer*, No. 10-294 (U.S. Jan. 10, 2011)—merely because they are alleged to have contributed to the global phenomenon of climate change. The same allegation, of course, could be made against any other company—or person—in the world. In the particular case before the Court, as in all of these related cases, the identity of the defendants is largely a matter of the plaintiffs' caprice in formulating the caption of their complaint.

Amici thus have a strong interest in having the Court resolve this case on a ground that goes to the fundamental defects with the broader litigation of which this case is a piece, and not on any narrow or case-specific ground that can be easily circumvented. In particular, although the Second Circuit's decision below could be reversed on any of several grounds, *amici* urge the Court to take this opportunity to clarify that the decision below cannot be reconciled with either bedrock principles of Article III standing or the properly limited role of courts asked to adjudicate political questions.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is but one part of a broader series of lawsuits that have been filed against discrete groups of defendants for alleged injuries purportedly resulting from the global phenomenon of climate change. Some of these lawsuits seek to obtain a windfall in the form of damage awards, while others aim to accomplish regulatory objectives not achievable through ordinary political processes. But all of these lawsuits share two critical features in common: *First*, they depend on an unjustifiably expansive reading of *Massachusetts v. EPA* to overcome traditional limits on judicial authority. *Second*, they seek to inject the courts into disputes that are not justiciable, at least absent prior action by the political branches to provide judicially manageable standards.

In the *Kivalina* litigation, for example, a village of Inupiat Eskimo, with a population of approximately 400, sued 24 oil, energy, and utility companies seeking $400 million in claimed damages resulting from thinning sea ice, which plaintiffs contend was caused by global climate change. *See* 663 F. Supp. 2d at 868–69. Similarly, in *Comer*, plaintiffs brought a putative class action on behalf of owners of land along the Mississippi Gulf coast alleging nuisance claims against certain oil and energy companies on the theory that their emission of greenhouse gases contributed to global climate change, which in turn added to the ferocity of Hurricane Katrina, which in turn destroyed plaintiffs' property.

This case, like these other related lawsuits, has a number of fatal flaws, but most importantly, it fails at the threshold of the basic Article III requirements for a controversy well-met for judicial resolution. First and foremost, this case should not go forward because plaintiffs cannot possibly satisfy the minimum requirements for Article III standing. In particular, plaintiffs cannot satisfy the requirement that their alleged injury "has to be 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.'" *Lujan v. Defenders of* Wildlife, 504 U.S. 555, 560 (1992) (internal quotation and alteration marks omitted).[2] As described in more detail below, the Second Circuit's decision in this case, finding that plaintiffs have standing, is based on a fundamental misreading of *Massachusetts v. EPA* and a misapplication of precedent interpreting the Federal Water Pollution Control Act ("Clean Water Act"), Pub. L. No. 80-845, 62 Stat. 1155 (1948) (codified as amended at 33 U.S.C. §§ 1251–1376). *Massachusetts* charted a narrow path for sovereign states to force federal action pursuant to a statute that provided an express procedural right to seek judicial review. The case should not be stretched to eviscerate constitutional standing requirements, especially in

---

[2] The "irreducible constitutional minimum of standing contains three elements": (1) an injury in fact; (2) that is "fairly traceable to the challenged action of the defendant"; and (3) that would likely be "redressed by a favorable decision." *Lujan*, 504 U.S. at 560-61 (internal quotation and alteration marks omitted).

circumstances where, as here, Congress has not established any such statutory and procedural right for parties to bring such an action in court.

In addition to rejecting the Second Circuit's novel doctrinal innovations, the Court should affirm that a mere contribution to a global phenomenon (like climate change) cannot satisfy the fair traceability requirement of Article III. In particular, because every living, breathing organism contributes to climate change by emitting carbon dioxide, and because greenhouse gases (like carbon dioxide) are undifferentiated and disperse evenly throughout the atmosphere, plaintiffs cannot show that their alleged harms were specifically caused by any particular emitter or group of emitters. Their claims instead rely on precisely the type of generalized grievance that, under this Court's precedents, has never been viewed as susceptible to resolution through the judicial system.

Plaintiffs' effort to have the courts take the lead in addressing the global phenomenon of climate change faces an additional threshold objection: Plaintiffs ask the courts to play a role that is inappropriate in the absence of an initial political judgment by the political branches. This Court's political question doctrine makes clear that some disputes are nonjusticiable unless and until the political branches act to create judicially manageable rules that would then allow the courts to act. That is the case here, because the invocation of common-law notions of "reasonableness" are wholly inadequate to allow the courts to make the inherently political judgments as to who in the world should be held liable—and with what consequences—for allegedly

contributing (along with everyone else) to the global phenomenon of climate change. The point is thus not that global climate change issues can *never* be suitable for judicial resolution. The point is that absent a congressional enactment that provides a specific right to judicial review of agency action in the context of substantive statutory provisions that guide the agency's exercise of discretion, global climate change disputes are simply not suited for judicial resolution. *Cf. Vieth v. Jubilerer*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring in the judgment). As explained below, plaintiffs' federal common law nuisance claims raise nonjusticiable political questions because, absent "an initial policy determination of a kind clearly for nonjudicial discretion," there are no "judicially discoverable and manageable standards" for deciding the "reasonableness" of any particular defendant's alleged contribution to global warming. *Baker v. Carr*, 369 U.S. 186, 217, 300 (1962).

Finally, by clarifying the requirements of Article III standing and reaffirming the continued vitality of the venerable political question doctrine, the Court should take this opportunity to nip this problematic litigation in the bud. Courts are not properly equipped to deal with the difficult issues raised in the context of litigation seeking to impose judicial remedies for the indeterminate harms allegedly attributable to the global phenomenon of climate change. Any litigation is bound to result in *de facto* and *ad hoc* judicial regulation of carbon emissions, thereby imposing arbitrary burdens on a subset of contributing parties and producing inequitable results. It is precisely for this reason that the

Constitution's unchanging case or controversy requirement preserves the judiciary's proper role by precluding lawsuits where plaintiffs cannot identify any particularized injury fairly traceable to any specific defendant. And the political question doctrine likewise protects the judiciary's proper role by ensuring that litigants do not do what the plaintiffs in these cases have sought to do—*viz.*, thrust the courts into disputes that cannot be resolved by the application of rules that are "principled, rational, and based upon reasoned distinctions," but that instead call for an initial set of "ad hoc" political judgments. *Vieth*, 541 U.S. at 278.

ARGUMENT

I. Article III Standing Requirements Preclude Efforts To Hold A Discrete Group Of Individual Companies Responsible For A Global Phenomenon.

The Second Circuit found Article III standing satisfied based on the defendants' alleged status as a mere "contributor" to global climate change—a status that is shared by virtually every living, breathing organism. That novel and misguided approach renders the constitutional standing requirements a complete nullity. If not corrected, the lower court's decision threatens to thwart fundamental separation-of-powers principles that are designed to prevent "courts of law from undertaking tasks assigned to the political branches." *Lewis v. Casey*, 518 U.S. 343, 349 (1996). And it opens the federal courts to precisely the types of litigation abuses that this Court's precedents have sought to curtail, with common law tort suits against

emitters of any quantity of greenhouse gas limited only by the plaintiffs' caprice in naming defendants and a court's ability to exercise personal jurisdiction.

While the Second Circuit's approach to standing is novel and unique, this litigation is unfortunately not unique. To the contrary, relying on erroneous and expansive interpretations of *Massachusetts v. EPA*, enterprising lawyers and environmental groups have filed a series of suits across the Nation seeking—not discrete regulatory action as in *Massachusetts*—but massive damages awards. Other suits have been filed seemingly to advance a regulatory agenda—through *de facto* regulation by the courts—that could not otherwise be achieved through ordinary political processes. While there are certainly other legal defects with the instant action, this case presents an opportunity for the Court to put an end to this abuse by reaffirming the basic standing principles that have long undergirded its precedents. In particular, the Court should dispose of this case by holding that plaintiffs cannot satisfy the requirements for constitutional standing because they cannot show that their alleged injuries are "fairly traceable" to the conduct of the specific defendants in this case, as opposed to the conduct of billions of past and present emitters of greenhouse gases over a period of many decades, if not centuries. *Lujan*, 504 U.S. at 560 (identifying traceability as one of the three elements of the "irreducible constitutional minimum of standing").

The novel theory adopted by the court below—that plaintiffs' alleged injuries are fairly traceable to the named defendants merely because those defendants have allegedly contributed in some

measure to an inarguably global phenomenon—is flatly inconsistent with precedent and rests on a flawed analogy to inapposite cases. The causal chain purportedly linking defendants' emissions to plaintiffs' claimed harm is simply too attenuated to satisfy the basic requirements for constitutional standing.

A. The Second Circuit's Decision Is Based On A Fundamental Misreading Of *Massachusetts v. EPA*.

The starting point for the Second Circuit—and enterprising lawyers elsewhere seeking to recover money damages for alleged "contributions" to global climate change—is a seriously flawed interpretation of this Court's decision in *Massachusetts*. While that decision certainly relaxed standing in the circumstances presented there, 549 U.S. at 536–37 (Roberts, C.J., dissenting), it was nonetheless a relatively narrow decision. The Court's opinion repeatedly emphasized not just the special status of States, but also the importance of congressional action in enacting *both* the substantive provisions of the Clean Air Act and its statutory procedural rights to challenge agency decisions in court. *See* 42 U.S.C. §§ 7401 *et seq*. In those unique circumstances, the Court's decision allowed the States, and the States alone, to seek judicial review, via the administrative review provisions of the Clean Air Act, in order to force regulatory action under that Act concerning greenhouse gas emissions. Because the result of the judicial proceeding would be only to force regulatory action, concerns with redressability and traceability were substantially reduced.

But all three elements of *Massachusetts* were critical: the States, the judicial review provisions of the Clean Air Act, and the substantive obligations created by that statute. The rationale of the court below expanded that decision to encompass a radically different context where only one of those critical elements—the presence of States seeking judicial relief—is present. Other decisions have done the court below one better and allowed private suits for monetary damages when none of these three factors was present. *See Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *vacated by*, 598 F.3d 208 (en banc), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010). This case gives the Court a critical opportunity to clarify the narrow scope of the standing decision in *Massachusetts* and to reaffirm that basic standing principles foreclose efforts to misuse tort theories to foist responsibility for a truly global phenomenon on a few handpicked defendants.

1. *Massachusetts v. EPA* Does Not Support The Decision Below.

The Second Circuit's decision concludes that the plaintiff-States likely have *parens patriae* standing and that, in any event, all plaintiffs satisfy the requirements for Article III standing. Relying heavily on *Snapp v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 603 (1982), the decision suggests that States do not have to comply with any of the traditional standing requirements of Article III as long as they are seeking to protect a quasi-sovereign interest.

This gets the analysis exactly backwards. The purpose of the *parens patriae* test is to ensure that a

State is defending a quasi-sovereign interest and asserting an interest "apart from the interests of particular private parties." *Snapp*, 458 U.S. at 607. The test does not displace the traditional "case or controversy" requirements of Article III. The constitutional requirements serve not only as a practical limit on a State's ability to bring suit but, more importantly, as a constraint on the federal judiciary—a constraint that has nothing to do with the State's special sovereign interests. As this Court has put it, Article III standing is not only about a litigant's rights, it is "about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government." *Allen v. Wright*, 468 U.S. 737, 750 (1984).

Attempting to avoid this conclusion, the Second Circuit's decision places heavy emphasis on *Massachusetts*, where the Court found that Massachusetts, by virtue of its special status as a State, had standing to challenge EPA's decision not to initiate a rulemaking in response to a request to regulate greenhouse gas emissions. Although it discussed the State's special status, the Court emphasized that point only in the context of acknowledging the existence of a congressionally conferred procedural right under the Clean Air Act to challenge agency action unlawfully withheld. 549 U.S. at 519–20.

As the Court explained, "'Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before,'" and "a litigant to whom Congress has 'accorded a procedural right to protect

his concrete interests ... can assert that right without meeting all the normal standards for'" standing. 549 U.S. at 516–17 (quoting *Lujan*, 504 U.S. at 572 n.7, 580 (1992) (Kennedy, J., concurring in part and in the judgment)). Accordingly, when "a litigant is vested" by statute "with a procedural right, the litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Id.* at 518. Congress's action alleviated concerns that the judiciary was overstepping its bounds because Congress had ordered EPA to protect Massachusetts (and others) by taking action to determine whether emissions endanger public health and welfare. In that context, because Congress had conferred a procedural right, and had given Massachusetts a "stake in protecting its quasi-sovereign interests," the Commonwealth was "entitled to special solicitude" in the Court's standing analysis. *Id.* at 520.

The court below failed to explain how any of the analysis in *Massachusetts* is relevant absent a statutory grant of a procedural right to bring suit. Indeed, it is undisputed that Congress has not created any procedural right to bring a nuisance suit in tort to recover for alleged injuries purportedly resulting from global climate change. Nor has it taken any other action to "define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." 549 U.S. at 516 (citation and quotation omitted). Unlike in *Massachusetts*, where the alleged injuries were at least arguably traceable to EPA's failure to initiate

rulemaking proceedings, and a statutorily authorized petition for judicial review would prompt the federal regulatory agency to act, here there is no plausible link between any specific defendant's emissions and any specific plaintiff's injuries, and the relief sought is equally unconnected to plaintiff's alleged injuries. In short, Congress has never conferred any procedural right on the States to bring common law claims seeking to regulate climate change and, in the absence of any such right, there plainly is no fairly traceable link between a State's alleged injuries and the greenhouse gas emissions of any specific defendant.

2. Decisions Interpreting The Clean Water Act Do Not Support The Decision Below.

In addition to misinterpreting *Massachusetts*, the lower court's standing analysis relies on cases applying the citizen suit provisions of the Clean Water Act. These cases are also readily distinguished.

Under the Clean Water Act, Congress created a framework of rights and liabilities, including conferring a procedural right for private citizens to bring suit, *see* 33 U.S.C. § 1365, that has a direct effect on the relevant standing analysis. Courts have held that, in the Clean Water Act context, a plaintiff can show a substantial likelihood that a defendant's conduct caused its alleged injury if the "defendant has (1) discharged some pollutant in concentrations greater than allowed by its permit (2) into a waterway in which [a] plaintiff[] ha[s] an interest that is or may be adversely affected by the

pollutant, *and* that (3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiff[]." *Public Interest Research Grp. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 72 (3d Cir. 1990) (emphasis added); *see also Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.*, 95 F.3d 358, 360–61 (5th Cir. 1996).

These cases recognize that federal permits are established under the Clean Water Act "at the level necessary to protect the designated uses of the receiving waterways" and it is therefore reasonable to conclude that a defendant's violation of the permit levels "necessarily means that these uses may be harmed" by the defendant's excessive discharges. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 157 (4th Cir. 2000); *see also Kivalina*, 663 F. Supp. 2d at 879. These cases thus present a paradigmatic example of a situation in which the Article III standing analysis rests on Congress's exercise of the "power to define injuries and articulate chains of causation" so as to "give rise to a case or controversy where none existed before." *Massachusetts*, 549 U.S. at 516 (quotation omitted).

In its decision below, the Second Circuit candidly acknowledged that the test for standing articulated in cases involving the Clean Water Act does not apply in the context of nuisance suits seeking redress for harms allegedly caused by global climate change. *See* Pet. App. 71a (noting that there is no comparable statute governing carbon dioxide emissions). It also recognized that the first two prongs of the *Powell Duffryn* test could not apply except in the Clean Water Act context. That should have been the end of its analysis. When two of a

test's three prongs are wholly inapplicable, it is a strong signal that the test is inapposite. The Second Circuit ignored that signal and held that merely because plaintiffs satisfy the third prong of the test, they also satisfy the requirements for Article III standing.

As other courts have recognized, this distortion of the three-part test, which "is stated in the conjunctive, not the disjunctive," is utterly "illogical." *Kivalina*, 663 F. Supp. 2d at 880 n.7. It also directly contravenes well-established precedent that, even in the Clean Water Act context, Article III's fair-traceability requirement requires a *geographic proximity* between the defendant's excessive emissions and the affected waters that give rise to the plaintiff's alleged injury. *See Texas Indep. Producers & Royalty Owners Ass'n v. EPA*, 410 F.3d 964, 973 (7th Cir. 2005) (en banc) (to "satisfy the 'fairly traceable' causation requirement, there must be a distinction between 'the plaintiffs who lie within the discharge zone of a polluter and those who are so far downstream that their injuries cannot be fairly traced to that defendant'"); *Crown Cent.*, 95 F.3d at 361 (18-mile distance between place of discharge and place of alleged impact was "too large to infer causation" for standing purposes). Of course, there is no geographic proximity between the inherently worldwide phenomenon of global climate change and any of its alleged particular effects.

B. Mere Contribution To A Global Phenomenon Cannot Satisfy Article III's Fair Traceability Requirement.

Because *Massachusetts* is readily distinguishable, plaintiffs' claims here must stand or fall based on this Court's traditional requirements for Article III standing. Applying those traditional tests, this action and the other tort suits seeking to obtain relief from mere contributors to a global phenomenon fail at the Article III threshold. As this Court has recognized, standing "is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan*, 504 U.S. at 560. This essential prerequisite to suit is not merely a constraint on the rights of litigants. To the contrary, it reflects bedrock principles enshrined in the Constitution's text and structure that are designed to preserve our "democratic form of government." *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009) (quotation marks and citation omitted). Constitutional standing requirements are "crucial in maintaining" the Constitution's "'tripartite allocation of power'" by ensuring that the judiciary "respects 'the proper—and properly limited—role of the courts in a democratic society.'" *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (quotation omitted).

To satisfy the minimum requirements for Article III standing, a plaintiff must show that it has suffered an injury-in-fact that is both caused by the defendants' conduct and likely to be redressed by the relief sought. *Lujan*, 504 U.S. at 560–61. Accordingly, at a minimum, there must be a "causal connection between the injury and the conduct complained of—the injury has to be 'fairly ...

trace[able] to the challenged action of the defendant." *Id.* at 560. The plaintiff must thus demonstrate a "substantial likelihood" that the defendant's challenged conduct, as opposed to the conduct of third parties not before the court, caused its alleged harm. *Duke Power Co. v. Carolina Envt'l Study Grp., Inc.*, 438 U.S. 59, 75 n.20 (1978); *see also Bennett v. Spear*, 520 U.S. 154, 167 (1997). And the plaintiff must show that it is pursuing a grievance that is not generalized and "common to all members of the public." *Lujan*, 504 U.S. at 575–76 (internal quotation marks omitted).

As with any other element of a claim, to establish standing a plaintiff must plead sufficient facts "to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (internal quotation marks omitted); *see also United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688 (1973) (allegations of standing "must be something more than an ingenious academic exercise in the conceivable"). At the pleading stage, courts are obliged to carefully examine a complaint's allegations to ensure that the judiciary is not overstepping its proper role and that the plaintiff is "entitled to an adjudication of the particular claims asserted." *Allen*, 468 U.S. at 752.

These principles make clear that plaintiffs in this case cannot satisfy the basic requirements for constitutional standing. Unlike a conventional common-law nuisance suit, in which a defendant releases a noxious substance that travels directly to a neighbor's property and causes immediate injury in a defined area, plaintiffs' alleged injuries have occurred because of a global phenomenon that is the

result of an undifferentiated worldwide accumulation of carbon dioxide and other greenhouse gases from billions of sources over a period of centuries. Because greenhouse gases are undifferentiated and disperse evenly throughout the atmosphere, climate change caused by greenhouse gas emissions is a global phenomenon that involves virtually every sector of the world economy.

Given these undeniable facts, plaintiffs' complaint faces at least two fundamental and insurmountable standing problems. *First*, because every living, breathing organism contributes to the global phenomenon of climate change, and because greenhouse gases mix evenly in the atmosphere, plaintiffs cannot show that their injuries were caused by any particular emitter or group of emitters. *See Cuno*, 547 U.S. at 346; *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 45 (1976) (standing does not exist when "[s]peculative inferences are necessary to connect [parties'] injury to the challenged actions"). Plaintiffs can no more show that defendants' conduct caused plaintiffs' alleged injuries than they can show that those injuries were caused by emissions from other sources, including rapidly accelerating emissions from developing countries, such as China and India, or even from other emissions from decades ago. Any effort to tease apart the nearly infinite, intertwined, and attenuated strands of causation devolves into hopeless speculation. And the complaint fails to allege "facts from which it reasonably could be inferred" that, absent the defendants' conduct, there is a "substantial probability" that the plaintiffs

would not have suffered the alleged injury-in-fact. *Warth v. Seldin*, 422 U.S. 490, 504 (1975).

Second, even if the chain of causation between defendants' conduct and plaintiffs' alleged injuries were not so weak and attenuated, plaintiffs still would lack standing because they cannot trace their injuries to any particularized defendant or group of defendants. Their claims are too generalized; they rely on the type of generalized grievance against societal harms writ large that have never been thought to be susceptible of resolution through the judicial system. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998) ("We have always taken [the case-or-controversy requirement] to mean cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process."). Although this Court's cases have typically focused on whether a plaintiff has alleged a sufficiently concrete, particularized injury, *see Lujan*, 504 U.S. at 573, constitutional standing also requires that a plaintiff trace its injury to a particularized defendant or group of defendants. Where, as here, there are so many entities (living, dead, human, and non-human) that, according to plaintiffs' allegations, have contributed to their alleged injuries, the judicial system could not adjudicate the claims in any non-arbitrary fashion and, accordingly, the grievance is too generalized to meet the minimum requirements of Article III standing.

In allowing this generalized grievance to proceed, the Second Circuit jettisoned the essential requirements for constitutional standing. In particular, the court of appeals concluded that identifying a mere "contributor" to climate change is

sufficient to satisfy Article III's causation requirements. Because all persons and entities emit some measure of greenhouse gases, the lower court's decision means that any person can be sued for any injury that might possibly be connected to any natural force or occurrence conceivably affected by climate change. That rule of standing would impose no limits at all on the judiciary's authority in this highly politicized arena.

That approach is also directly contrary to this Court's precedents. In *Allen v. Wright*, for example, the Court held that the plaintiffs lacked standing to challenge the Internal Revenue Service's non-enforcement of a policy denying tax-exempt status to racially discriminatory private schools, because the plaintiffs' alleged injuries were not "fairly traceable to the Government conduct respondents challenge[d] as unlawful." 468 U.S. at 757. In reaching that conclusion, the Court noted that the asserted injury—the inability of the plaintiffs' children to attend integrated schools—depended not only on the agency's conduct but also on decisions of numerous third parties, such as school officials and parents. *Id.* at 756–59. Accordingly, the Court concluded that the "links in the chain of causation between the challenged Government conduct and the asserted injury" were "far too weak for the chain as a whole to sustain" plaintiffs' standing. *Id.* at 759. Similarly, in *Warth v. Seldin*, the Court held that plaintiffs lacked standing to bring suit against a town and its board members on grounds that the town's zoning ordinances contributed to a shortage of low-income housing. Even though defendants' conduct "contributed, perhaps substantially, to the cost of housing,"

that was not sufficient to satisfy the fair-traceability requirement. 422 U.S. at 504. To the contrary, as the Court explained, the low-income housing shortage could also have been attributable to the conduct or decisions of third parties, including builders' unwillingness to build low-cost housing, and was therefore not "fairly traceable" to defendants.

Significantly, both *Allen* and *Warth* involved a finite number of third parties that theoretically could have been identified and required to join the lawsuit. Here, in contrast, plaintiffs' claims implicate the conduct of literally millions, if not billions, of other individuals and entities around the world, each of which emits or has emitted its own quantities and concentrations of greenhouse gases over varying periods of time. Because standing did not exist in *Allen* and *Warth*, there plainly can be no standing here. It is simply not possible to disentangle defendants' emissions from the emissions made by billions of third-parties over the preceding centuries, all of which have under plaintiffs' theory contributed to the global phenomenon of climate change.

C. This Court's Guidance Is Needed To Prevent Open-Ended And Abusive Litigation.

That the Court should take this opportunity to reconfirm the requirements of Article III standing is underscored by the mounting problem of climate-change-related litigation. This case presents an opportunity for the Court to put a stop to abusive litigation, reaffirm important separation-of-powers

principles that limit the judiciary's role to justiciable cases or controversies, and ensure that concerns about climate change do not become fuel for the fire of litigation abuse.

This Court has recognized the problems of abusive litigation in a wide variety of contexts. *See, e.g., Stoneridge Inv. Partners, LLC v. Scientific-Atlantic, Inc.*, 552 U.S. 148 (2008) (securities litigation); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (class actions); *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877 (2007) (antitrust); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 558 (1996) (tort law). Although intended to provide justice, the American litigation system may also create opportunities that, "if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007).

The danger of abusive litigation is especially acute in the context of litigation seeking to recover for indeterminate harms allegedly incurred as a result of climate change. In courts across the country, enterprising lawyers, including states attorneys general and environmental groups, are filing lawsuits seeking to collect a windfall in money damages or to force preferred regulatory changes that could not be achieved through ordinary political processes. *See Kivalina*, 663 F. Supp. 2d at 868 (Native Alaskan tribe and municipality seeking an award of money damages); *Comer*, 2007 WL 6942285, at *1 (private Mississippi residents seeking money damages); *California v. General Motors Corp.* ("*GMC*"), No. C06-05755 MJJ, 2007 WL 2726871, at

*1 (N.D. Cal. Sept. 17, 2007) (lawsuit by California seeking money damages). Even where, as here, the merits of the lawsuit are exceedingly weak, the *in terrorem* threat posed by the prospect of burdensome injunctions or staggering monetary damages awards is enough to extract potentially large settlements from companies unwilling to risk a loss in court.

Moreover, the burdens imposed are entirely arbitrary. In this case, for instance, plaintiffs decided to sue five major utilities. But there is no legal basis for distinguishing these defendants from any of the millions of other sources. Indeed, the arbitrariness inherent in a legal theory that allows defendants to be picked in the plaintiffs' discretion is underscored by a comparison of this suit to other climate-change-related tort litigation. In each action, the plaintiffs have selected varying subsets of particular U.S. industries. *Compare* Pet. App. 1a (naming five utilities) *with GMC*, 2007 WL 2726871, at * 1 (naming only six automakers); *Comer*, 2007 WL 6942285, at * 1 (naming the Tennessee Valley Authority and select oil, utility, coal, and chemical companies); *Kivalina*, 663 F. Supp. 2d at 863, 868 n.1 (naming oil companies and utilities). When different plaintiffs point to different defendants as legally responsible for the same global phenomenon, it is a sure sign that plaintiffs are pursuing a generalized grievance that does not involve a particularized injury fairly traceable to any specific defendant. And if the Second Circuit's "contribution to a phenomenon that contributed to injury" standard is not reversed, there is no reason any individual would not have standing to sue anyone with a carbon footprint.

II. Plaintiffs' Global-Warming Claims Raise Nonjusticiable Political Questions.

There is a further (and equally fatal) threshold problem with these global-warming nuisance lawsuits. Although the Second Circuit characterized this case as simply the next in a "long line of federal common law of nuisance cases," Pet. App. 30a, nothing could be further from the truth. Like the proverbial new wine poured into old wineskins—which "bursts the skins" (*Mark* 2:2)—plaintiffs' effort to squeeze the enormous "complexity of the initial global warming policy determinations" into the substantive rubric of ordinary tort law stretches the judicial function well past its breaking point and squarely into the realm of political questions. *GMC*, 2007 WL 2726871 at *6.

The problem with plaintiffs' claims goes beyond the particular allegations of this suit, the specific defendants that they have (arbitrarily) chosen to sue, or the kind of relief they have sought. Rather, the nonjusticiability of this suit stems from a more fundamental problem. As explained below, plaintiffs' federal common law nuisance claims raise nonjusticiable political questions because, absent "an initial policy determination of a kind clearly for nonjudicial discretion," there are no "judicially discoverable and manageable standards" for deciding the "reasonableness" of any particular defendant's alleged contribution to global climate change. *Baker*, 369 U.S. at 217, 300. Adjudication of this suit would thus improperly require the courts to address fundamental questions of "'national polic[y]'" that are "'not legal in nature'" and can only be resolved by a political judgment of the political branches. *Japan*

Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986) (citation omitted). By contrast, in *Massachusetts*, this Court found the case was justiciable precisely because (unlike this case), the suit was brought pursuant to a "congressional statute" and the limited claim asserted there—a challenge to agency action—turned simply on the "proper construction" of that statute. 549 U.S. at 516.

A. A Case Presents A Nonjusticiable Political Question If Any One Of The Six *Baker v. Carr* Tests Is Satisfied.

From its earliest days, this Court has acknowledged that certain disputes raise "political questions" that are not the proper domain of the courts. *See Baker*, 369 U.S. at 210–17 (collecting cases). Indeed, this venerable doctrine can trace its origins to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and beyond. *See Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 260 (1796) (Opin. of Iredell, J.) (whether Great Britain had breached treaty raised "considerations of policy, considerations of extreme magnitude, and certainly entirely incompetent to the examination and decision of a Court of Justice"). This doctrine of "nonjusticiable" or "political questions" is rooted in several distinct aspects of the Constitution's separation of powers. *Vieth*, 541 U.S. at 277–78.

The Constitution's grant of certain discretionary powers to the political branches, rather than to the courts, means that a case whose resolution calls for the "exercise of [such] a discretion" is nonjusticiable. *Baker*, 369 U.S. at 211; *Nixon v. United States*, 506

U.S. 224, 237–38 (1993) (Senate has constitutional power to determine manner of trying an impeachment). But even absent an affirmative grant of power to a political branch, Article III's limitation of the "judicial Power" to "Cases or Controversies" also means that the courts may not proceed to decide a case where there is a "'lack of satisfactory criteria for a judicial determination.'" *Baker*, 369 U.S. at 210 (citation omitted); *see also Vieth*, 541 U.S. at 278. Thus, the fact that a question has not been exclusively committed by the Constitution to a political branch is *not* sufficient to render it justiciable; the matter must also be one that is suitable for resolution by the *judiciary*, acting "in the manner traditional for English and American courts." *Vieth*, 541 U.S. at 278; *see also Marbury*, 5 U.S. at 166 (distinguishing between discretionary acts that are unreviewable and ministerial acts pursuant to a duty that "the legislature proceeds to impose"). In addition to these limitations arising directly from the Constitution's allocation of specific powers, the political question doctrine also rests in part on "prudential concerns calling for mutual respect among the three branches of Government." *Goldwater v. Carter*, 444 U.S. 996, 1000 (1979) (Powell, J., concurring); *see also Nixon*, 506 U.S. at 253 (Souter, J., concurring) (political question doctrine "deriv[ed] in large part from prudential concerns about the respect we owe the political departments").

Acknowledging the multiple concerns that animate the political question doctrine, the Court has distilled that doctrine, not into a single test, but into six alternative tests expressly framed in the

disjunctive. *Baker*, 369 U.S. at 217. A case is nonjusticiable if there is:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. If any "*one* of these formulations is inextricable from the case at bar," the suit should be dismissed as nonjusticiable on the ground that it presents a political question. *Id.* (emphasis added); *see also Vieth*, 541 U.S. at 277 (plurality opinion) (*Baker* establishes "*six independent tests* for the existence of a political question") (emphasis added).

To be sure, these six formulations overlap, *see Nixon*, 506 U.S. at 228–29, but they are not simply six ways of saying the same thing. Because each of the *Baker* tests reflects a distinct combination of separation-of-powers concerns, the various tests, in practice, will often capture different types of cases. For example, the first-*Baker*-test typically (but not

always) captures questions as to which the courts can *never* have any role in resolving, precisely because they are "textually committed" by the Constitution exclusively to a political branch. *E.g.*, *Nixon*, 506 U.S. at 237–38 (procedure for impeachment trial); *United States v. Pink*, 315 U.S. 203, 229 (1942) (recognition of foreign government). But the political question doctrine reaches beyond such all-or-nothing cases, and extends also to cases in which the judiciary's ability to play a role is *contingent* upon what the political branches have or have not done with the powers textually committed to them.

Thus, for example, the fourth *Baker* test reflects the recognition that an otherwise justiciable civil suit may be rendered nonjusticiable if adjudication would "express[] [a] lack of the respect due coordinate branches of government." *Baker*, 369 U.S. at 217.[3] Conversely, the third *Baker* test reflects the fact that there are areas in which the judiciary *might* play a role, but only if the political branches have *first* created the necessary legal framework in the exercise of their textually-

---

[3] *See, e.g.*, *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 980 (9th Cir. 2007) (plaintiffs' tort claims would require court to second-guess congressional foreign-aid decision); *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 70 (2d Cir. 2005) (dismissing expropriation claims against Austria under fourth *Baker* test, based on Executive Branch statement that dismissal would facilitate implementation of agreement with Austria).

committed constitutional powers.[4] The political question doctrine thus extends beyond that class of controversies in which judicially manageable standards can *never* be devised and also includes those cases where such standards must first be, but have not yet been, established by the responsible political branch. *Cf. Vieth*, 541 U.S. at 307–08 (Kennedy, J., concurring in the judgment) (because "there are *yet* no agreed upon substantive principles of fairness in districting, we have no basis on which to define clear, manageable, and politically neutral standards" for evaluating claim that partisan gerrymander impermissibly burdened representation rights) (emphasis added).

B. Plaintiffs' Global-Warming Nuisance Claims Raise Nonjusticiable Political Questions Under Several of the *Baker* Tests.

Determining whether a case involves a nonjusticiable political question requires a "discriminating inquiry into the precise facts and posture of the particular case," *Baker*, 369 U.S. at 217, and an evaluation of "the particular question

---

[4] *See, e.g., Japan Whaling*, 478 U.S. at 230 (once political branches' policy choices are reflected in treaties, executive agreements, and statutes, courts may construe those enactments without running afoul of political question doctrine); *767 Third Ave. Assocs. v. Consulate Gen. of Socialist Fed'n Republic of Yugoslavia*, 218 F.3d 152, 155 (2d Cir. 2000) (until Executive Branch made policy judgment about liability of successor states to Yugoslavia, courts could not resolve an otherwise "garden-variety landlord-tenant dispute" over consulate).

posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in light of its nature and posture in the specific case, and of the possible consequences of judicial action." *Id.* at 211–12. The "discriminating inquiry" mandated by *Baker* confirms that global-warming nuisance claims are nonjusticiable under several of the *Baker* tests.

1. The Second Circuit erred in concluding that application of the common law of nuisance to the problem of global climate change provides sufficient judicially manageable standards to obviate the need for an initial legislative judgment and to avoid entangling the courts in broader policy judgments that would invade the constitutionally committed authority of the political branches. Pet. App. 27a–39a. On the contrary, the law of nuisance does not *resolve* the political questions at the heart of this case but merely restates and highlights them. *Schneider v. Kissinger*, 412 F.3d 190, 197 (D.C. Cir. 2005) (the "recasting" of political questions "in tort terms does not provide standards for making or reviewing [such] judgments").

The substantive law of nuisance (were it applicable here) would instruct a court to decide the "reasonableness" of a given interference with a public right, which entails a "weighing of the gravity of the harm against the utility of the conduct." RESTATEMENT (SECOND) OF TORTS § 821B, cmt. e (1979). Application of those standards provides no difficulty in an ordinary nuisance case involving "a discrete number of 'polluters' that were identified as causing a specific injury to a specific area." *Kivalina*, 663 F. Supp. 2d at 875; *see also Ohio v.*

Wyandotte Chems. Corp., 401 U.S. 493, 495–96 (1971) (garden-variety nuisance claim involving mercury pollution in Lake Erie did not raise a political question). But the balancing that would be required here is of an entirely different nature and order of magnitude from those presented by any nuisance cause of action that courts have recognized.

The "balancing" required in these nuisance cases would require the courts to assess the significance of any contribution to global climate chage from the emissions of the (arbitrarily selected) group of companies or industries sued and then to weigh that against a number of countervailing fundamental national and international policy concerns. These latter concerns include: the importance of the defendants' activities to the particular sector of the economy involved (*e.g.*, energy, manufacturing, agriculture), as well as the importance of that sector to the overall national economy, and even to national security; the concern that *de facto* or *de jure* emissions caps (established by a determination that emissions were "unreasonable") would have dramatic consequences for multiple sectors of the national economy; the probability that imposing legal fault for global climate change on one particular industry (rather than others, such as the agricultural, manufacturing, transportation, or myriad other industries) would have additional, equally dramatic consequences for energy users; and the harm to the Nation's foreign policy that would be caused by judicially-imposed unilateral domestic emissions caps, which could impede the Executive Branch's foreign policy efforts, over decades, to obtain

multilateral reduction agreements. *Kivalina*, 663 F. Supp. 2d at 874–76.

Moreover, this balancing of competing concerns could not be done in isolation. Because the plaintiffs' theory in all of these global-warming cases inherently rests on the premise that *all* greenhouse gas emissions from *all* sources mix in the worldwide atmosphere and produce injury only as a result of that worldwide accumulation over centuries, any inquiry into whether a particular set of defendants' emissions were "reasonable" would be a *comparative* judgment. In other words, one must consider the emissions of all sectors of the economy, not only the energy sector, and from all regions of the world, not only the United States.

Contrary to what the Second Circuit held here, adjudication of global-warming nuisance lawsuits thus *would* "involve assessing and balancing the kind of broad interests that a legislature or a President might consider in formulating a national emissions policy." Pet. App. 34a. As this Court itself recognized in *Massachusetts*, the courts have "neither the expertise nor the authority" to resolve such broad and fundamental policy questions. 549 U.S. at 533.

The third *Baker* test is therefore satisfied, given that the necessary balancing of these competing interests requires an "initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. Balancing these competing and incommensurate interests, on an inherently national and international scale, requires a *legislative* judgment—one that the political branches have

grappled with for decades. The second *Baker* test is likewise met, because a generic invocation of nuisance principles leaves the courts without the "'judicially discoverable and manageable standards'" for resolving the case in a manner that is "principled, rational, and based upon reasoned distinctions." *Vieth*, 541 U.S. at 277–78 (plurality opinion). And because the powers to make the requisite initial policy determinations were all textually committed by the Constitution to the political branches, the first *Baker* test is met as well. *GMC*, 2007 WL 2726871 at *13–*14. Accordingly, plaintiffs' reliance upon public nuisance principles does not avoid or resolve the political question at the heart of this lawsuit, but merely begs the political question.

Contrary to what some courts have suggested, *see Alperin v. Vatican Bank*, 410 F.3d 532, 552–53 (9th Cir. 2005), the *practical* "difficulty of fashioning relief' is an additional factor that may demonstrate a lack of judicially manageable standards. *Nixon*, 506 U.S. at 236; *see also Kelberine v. Societe Internationale*, 363 F.2d 989, 995 (D.C. Cir. 1966) (suit over thousands of World War II claims was not "susceptible of judicial implementation" because, *inter alia*, dispute was "too complicated, too costly, to justify undertaking by a court without legislative provision of the means wherewith to proceed"); *Anderman v. Federal Republic of Austria*, 256 F. Supp. 2d 1098, 1114 (C.D. Cal. 2003) (noting that *Kelberine* has been followed "[f]or over thirty years") (collecting cases). This consideration further strongly confirms that *Baker*'s second test applies here. Although the Second Circuit sought to

trivialize the magnitude and implications of this extraordinary lawsuit by wrongly suggesting that this was merely a limited dispute about "six domestic coal-fired electricity plants," Pet. App. 26a, the court of appeals' endorsement of a legal theory under which any of the innumerable persons allegedly injured by global warming can arbitrarily choose to sue almost anyone else in the world—and those defendants, in turn, can assert that innumerable other persons are also (or more) responsible—is the very definition of unmanageability.

The utter arbitrariness and unmanageability of the global-warming nuisance theory at the heart of this case is starkly confirmed by again considering the wide range of other such cases that have been filed. As noted, one suit was filed against more than twenty defendants from the coal, oil, and electric industries, seeking to hold them liable for erosion at a remote Alaskan village. *Kivalina*, 663 F. Supp. 2d at 868. Another was filed against more than thirty defendants from the electric, coal, oil, and chemical industries seeking to hold them liable for purportedly exacerbating the intensity of Hurricane Katrina (and the plaintiffs in that case had sought leave to add more than *one hundred additional defendants*). *Comer*, 585 F.3d at 859-60. And yet another was filed against six automobile manufacturers. *GMC*, 2007 WL 2726871 at *1. The randomness of these choices of defendants underscores the standing difficulties addressed *supra*. But the sheer numerosity of these defendants, and the fact that all of them—and also countless more—could be named in any one suit underscores that the suits are simply

too unmanageable for judicial resolution given the absence of a prior action of the political branches to bring order to chaos. Indeed, it is telling that *every* district judge that has confronted such global-warming nuisance claims—that is, every front-line judge who would actually have to figure out *how* possibly to adjudicate such claims—has concluded that it cannot be done without antecedent determinations by the political branches. *Kivalina*, 663 F. Supp. 2d 863; *Comer*, 2007 WL 6942285, at *1; *GMC*, 2007 WL 2726871, at *1; Pet. App. 171a.

2. As noted earlier, the justiciability problem in these global-warming nuisance cases is not that the courts can *never* have a role in adjudicating such matters. Rather, the problem is contingent—unless and until the political branches create a valid legal framework of clearly defined and judicially enforceable obligations and duties with respect to past, present, and future greenhouse gas emissions, the courts lack "rules to limit and confine judicial intervention." *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment). To proceed to adjudicate global-warming suits in the absence of such standards would exceed the proper limits of the judicial role and "would risk assuming political, not legal, responsibility" for the matter. *Id.*

The critical role that an "initial policy determination" of the political branches can play in determining the justiciability of a controversy, *Baker*, 369 U.S. at 217, is confirmed by this Court's decision in *Massachusetts v. EPA*. As noted above, in *Massachusetts*, a group of States, among others, sought judicial intervention in an effort to require the EPA to reconsider its decision not to regulate

greenhouse gas emissions from new motor vehicles. 549 U.S. at 505. The Court concluded that the case was justiciable, because "[t]he parties' dispute turns on the proper construction of a congressional statute, a question eminently suitable to resolution in federal court." *Id.* at 516. Indeed, the challenge brought by the petitioners in that case was explicitly authorized by statute. *Id.*

By contrast, plaintiffs here seek to invoke question-begging notions of "reasonableness" in order to enmesh the courts in making "policy determination[s] of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. Moreover, they seek to do so *without* guidance from Congress or the Executive—if not in positive disregard of the choices to regulate or not to regulate that the political branches have made or may make. The court of appeals downplayed its decision as merely holding that "common law fills th[e] interstices" left by the political branches, Pet. App. 36a–37a, but that reflects a serious misunderstanding of the unique and severe justiciability concerns raised by tort suits over global climate change. Under our constitutional system, it is Congress and the Executive, not the courts, that have the responsibility for making the initial *political* decision as to what the proper policy should be. *See Japan Whaling*, 478 U.S. at 230 ("The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch."). The Second Circuit ignored these principles in erroneously concluding that plaintiffs

may adjudicate their global climate change tort claims under the aegis of federal common law.

CONCLUSION

For these reasons, the Court should reverse the judgment below.

Respectfully submitted,

DANIEL P. COLLINS
BENJAMIN MARO
MUNGER, TOLLES & OLSON LLP
355 S. Grand Ave., 35th Floor
Los Angeles, CA 90071
(213) 683-9100

Counsel for Shell Oil Co.

PAUL D. CLEMENT
Counsel of Record
ASHLEY C. PARRISH
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
pclement@kslaw.com
(202) 737-0500

Counsel for Chevron U.S.A. Inc.

RAYMOND MICHAEL RIPPLE
DONNA L. GOODMAN
DUPONT COMPANY
Legal/D-7012
1007 Market St.
Wilmington, DE 19898
(302) 773-3072

Counsel for E.I. du Pont de Nemours & Co

ROBERT MEADOWS
TRACIE J. RENFROE
JONATHAN L. MARSH
KING & SPALDING LLP
1100 Louisiana St., Suite 4000
Houston, TX 77002
(713) 751-3200

Counsel for Chevron U.S.A. Inc.

RUSSELL C. SWARTZ
Vice President and
Associate General Counsel
SOUTHERN CALIFORNIA
EDISON COMPANY
2244 Walnut Grove Ave.
Rosemead, CA 91770
(626) 302-3925

Counsel for
Edison International

ANDREW B. CLUBOK
SUSAN E. ENGEL
KIRKLAND & ELLIS LLP
655 Fifteenth St. N.W.
Washington, D.C. 20005
(202) 879-5000

Counsel for
ConocoPhillips

February 7, 2011

AMICUS CURIAE BRIEF

No. 10-174

In The Supreme Court of the United States

AMERICAN ELECTRIC POWER CO. INC., et al.,

Petitioners,

v.

STATE OF CONNECTICUT, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICI CURIAE* CONSUMER ENERGY ALLIANCE; NATSO, INC.; AMERICAN TRUCKING ASSOCIATIONS; PETROLEUM MARKETERS ASSOCIATION OF AMERICA; PEABODY ENERGY CORPORATION; AND INTERNATIONAL LIQUID TERMINALS ASSOCIATION IN SUPPORT OF PETITIONERS URGING REVERSAL

TRISTAN L. DUNCAN
SHOOK, HARDY & BACON LLP
2555 Grand Boulevard
Kansas City, MO 64108
(816) 474-6550
tlduncan@shb.com

JONATHAN S. MASSEY
MASSEY & GAIL LLP
1325 G St. NW, Suite 500
Washington, D.C. 20005
(202) 652-4511
jmassey@masseygail.com

LAURENCE H. TRIBE
Counsel of Record
420 Hauser Hall
1575 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-1767
tribe@law.harvard.edu

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the political question doctrine renders nonjusticiable the claims asserted in this case under federal common law alleging that defendants – in this case, five electric utilities – have created a "public nuisance" by contributing to alleged global warming, and seeking injunctive relief capping defendants' carbon dioxide emissions at judicially determined "reasonable" levels, based on a court's weighing of the potential risks of climate change against the socio-economic utility of defendants' conduct.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

A. PLAINTIFFS' CLAIMS RAISE "AN INITIAL POLICY DETERMINATION OF A KIND CLEARLY FOR NONJUDICIAL DISCRETION" 8

1. The Decision Whether To Create A Public Nuisance Claim For Alleged Climate Change Raises A Political Question 8

2. The Elements Of A Public Nuisance Claim Also Raise Political Questions ... 11

B. THERE ARE NO "JUDICIALLY DISCOVERABLE AND MANAGEABLE STANDARDS FOR RESOLVING" PLAINTIFFS' CLAIMS 14

1. Plaintiffs' Global Warming Claims Are Qualitatively Different From Other Public Nuisance Claims 15

2. Affixing A Recognizable Common-Law Label Does Not Render Plaintiffs' Claims Justiciable 20

TABLE OF CONTENTS – Continued

Page

3. In Any Event, The Law Of Public Nuisance Represents An Inappropriate Basis For Federal Common-Law Claims 23

4. Recognizing Public Nuisance Claims Here Would Create Vague And Inconsistent Standards 27

5. Public Nuisance Actions Divorced From Traditional Common-Law Limits Promote Unintended Consequences 29

C. THE TASK OF DECIDING WHETHER AND HOW TO LIMIT GREENHOUSE GASES IS TEXTUALLY COMMITTED TO THE POLITICAL BRANCHES 32

CONCLUSION 39

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Sandoval, 532 U.S. 275 (2001) 9, 25

American Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003) 35

Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) 21

Baker v. Carr, 369 U.S. 186 (1962) 8, 26, 32, 33, 39

Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) 21

Bell Atl. Tel. Cos. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994) 11

Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888 (1988) 19

Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984) 12

Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948) 35

City of Milwaukee v. Illinois, 451 U.S. 304 (1981) 5, 14, 23, 24, 25

Correctional Servs. Corp. v. Malesko, 534 U.S. 61 (2001) 24

Diamond v. Chakrabarty, 447 U.S. 303 (1980) 9

Eastern Enters. v. Apfel, 524 U.S. 498 (1998) 11

Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) 22

Gilligan v. Morgan, 413 U.S. 1 (1973) 6, 21

Hein v. Freedom From Religion Foundation, Inc., 551 U.S. 587 (2007) 26

TABLE OF AUTHORITIES – Continued

Page

Illinois v. City of Milwaukee, 406 U.S. 91 (1972) ...23, 24

Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987) 27, 29

Lance v. Coffman, 549 U.S. 437 (2007) 26

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 29

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 26

Luther v. Borden, 48 U.S. (7 How.) 1 (1849) 6, 21

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 6

Massachusetts v. EPA, 549 U.S. 497 (2007) 3, 8, 15, 16, 20

Mistretta v. United States, 488 U.S. 361 (1989) 7

Monaco v. Mississippi, 292 U.S. 313 (1934) 34

Nevada v. Hall, 440 U.S. 410 (1979) 34

New York v. New Jersey, 256 U.S. 296 (1921) 25

Nixon v. United States, 506 U.S. 224 (1993) 33

North Carolina, ex rel. Cooper v. TVA, 615 F.3d 291 (4th Cir. 2010) 27, 30

O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994) ...13, 14

Ohio v. Wyandotte Chems. Corp., 401 U.S. 493 (1971) 25

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) 9, 24

TABLE OF AUTHORITIES – Continued

Page

Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Protection, 130 S. Ct. 2592 (2010) 11

Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) 9, 23

U.S. Dep't of Commerce v. Montana, 503 U.S. 442 (1992) 6

United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) 34

United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812) 26

United States v. Munoz-Flores, 495 U.S. 385 (1990) 21

United States v. Standard Oil Co., 332 U.S. 301 (1947) 10

Vieth v. Jubelirer, 541 U.S. 267 (2004) 7, 15, 22, 33

Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955) 12

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 11, 35, 36, 37, 38

CONSTITUTION

U.S. CONST. art. I, § 8, cl. 3 34

U.S. CONST. art. I, § 8, cl. 18 34

U.S. CONST. art. II, § 2, cl. 2 35

TABLE OF AUTHORITIES – Continued

Page

RULES

Sup. Ct. R. 37.6 1

REGULATIONS

74 Fed. Reg. 66,496 (Dec. 15, 2009) 8

75 Fed. Reg. 25,324 (May 7, 2010) 8

75 Fed. Reg. 31,514 (June 3, 2010) 8, 17

SCHOLARLY AUTHORITIES

HERBERT WECHSLER, *Introduction* TO RESTATEMENT (SECOND) OF TORTS, VOL. 4 (1979) 22

JESSE DUKMINIER ET AL., PROPERTY (6th ed. Aspen Publishing 2006) 23

John P. Weyant and Thomas Olavson, *Issues in Modeling Induced Technological Change in Energy, Environment, and Climate Policy*, 4 ENVTL. MODELING AND ASSESSMENT 67 (1999) 30

Jonathan B. Wiener, *Radiative Forcing: Climate Policy to Break the Logjam in Environmental Law*, 17 N.Y.U. ENVIRO. L.J. 210 (2008) 31

Michael Toman et al., *The Economics of "When" Flexibility in the Design of Greenhouse Gas Abatement Policies*, 24 ANNUAL REV. OF ENERGY AND THE ENV'T. 431 (1999) 30

RESTATEMENT (SECOND) OF TORTS § (1979) 12, 22, 26

TABLE OF AUTHORITIES – Continued

Page

Richard B. Stewart & Jonathan B. Wiener, *The Comprehensive Approach to Climate Policy: Issues of Design and Practicality*, 9 ARIZ. J. INT. & COMP. L. 83 (1992) 31

Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153 (2009) 16

W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS (5th ed. 1984) 25, 26, 28

OTHER AUTHORITIES

AMERICAN TRUCKING ASSOCIATION, U.S. FREIGHT TRANSPORTATION FORECAST TO 2021 (American Trucking Association 2010) 27

AMERICAN TRUCKING TRENDS 2009-2010 (American Trucking Association 2010) 27

Scott Barrett & Robert Stavins, *Increasing Participation and Compliance in International Climate Change Agreements* (2003) *available at* http://ksghome.harvard.edu/~rstavins/Papers/Barrett_and_Stavins_2003.pdf 31

The Economic Impacts of the Oil and Natural Gas Industry (Sept. 8, 2009) *available at* http://www.api.org/aboutoilgas 27

U.S. Dept. of State, *U.S. Climate Action Report 2010*, *available at* http://www.state.gov/documents/organization/140636.pdf 35

BRIEF OF *AMICI CURIAE* CONSUMER ENERGY ALLIANCE; NATSO, INC.; AMERICAN TRUCKING ASSOCIATIONS; PETROLEUM MARKETERS ASSOCIATION OF AMERICA; PEABODY ENERGY CORPORATION; AND INTERNATIONAL LIQUID TERMINALS ASSOCIATION IN SUPPORT OF PETITIONERS URGING REVERSAL

INTEREST OF *AMICI CURIAE*

Amici curiae and their members are active participants in the ongoing climate change debate before the political branches and have a strong interest in ensuring that the judiciary does not improperly arrogate to itself matters of national and international policy that are reserved for the legislative and executive branches.[1] *Amici* represent a cross-section of views on these policy issues, but they are united in their belief that courts should not allow public nuisance litigation to dictate these policy issues.

Amici include Consumer Energy Alliance, a nonprofit, nonpartisan organization that supports the thoughtful utilization of energy resources to help ensure improved domestic and global energy security and stable energy prices for consumers; NATSO, Inc.,

---

[1] This brief has been filed with the written consent of the parties, which is on file with the Clerk of Court. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

a national trade association representing the travel plaza and truckstop industry, whose members run the gamut from small mom-and-pop stores and family-run businesses to medium and larger sized corporations; American Trucking Associations, a national trade association representing the interest of the trucking industry; the Petroleum Marketers Association of America, a federation of 47 state and regional trade associations representing approximately 8,000 independent petroleum marketers nationwide, the majority of which are small businesses; Peabody Energy Corporation, the world's largest private-sector coal company; and the International Liquid Terminals Association, an international trade association representing 81 commercial operators of bulk liquid terminals, aboveground storage tank facilities, and pipeline companies, as well as suppliers of goods and services to the bulk storage industry.

Amici curiae have an important interest in this case, which threatens to disrupt business practices, jeopardize predictable energy supplies, and trigger substantial job losses, at a time when the nascent economic recovery can ill afford such shocks.

SUMMARY OF ARGUMENT

The political question doctrine bars the federal courts from creating unprecedented common law liability for contributing to alleged global warming

and establishing de facto national emissions standards.

A. In deciding whether to create a public nuisance claim for contributing to alleged global warming, a court would need to undertake a host of political tasks of a kind clearly reserved for nonjudicial discretion, including balancing incommensurable social costs and benefits and designing a method to implement plaintiffs' requested remedy of reducing defendants' emissions "by a specified percentage each year for at least a decade." Joint Appendix ("J.A.") 110, 153. Such judicial action is foreclosed by the fact that Congress has already authorized the Environmental Protection Agency (EPA) to regulate those emissions.

B. There are no judicially manageable standards to govern plaintiffs' claims. This Court has opined, in recognizing EPA's regulatory jurisdiction, that the judiciary has "neither the expertise nor the authority to evaluate [climate change] policy judgments. . . ." *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007). The Solicitor General has similarly observed that "Plaintiffs' common-law nuisance claims are quintessentially fit for political or regulatory – not judicial – resolution, because they simultaneously implicate many competing interests of almost unimaginably broad categories of both plaintiffs and defendants." Brief of the Tennessee Valley Authority at the Cert. Stage in Support of Petitioners, No. 10-174, at 13.

Justiciability turns on the judiciary's competence to apply coherent legal principles to the specific dispute before it, rather than on plaintiffs' ability to affix a common-law label to their claims. Although misleadingly couched as a garden-variety public nuisance action, plaintiffs' claim that defendants should be held liable for contributing to global climate change is actually a radical departure from traditional common-law torts. It is completely different from a nuisance action alleging that a particular point source emitted particles or gases of pollution that found their way onto another's property. Here, plaintiffs' utterly unprecedented claim is that the climate of planet Earth has been altered through the long-term cumulative interaction of greenhouse gases with various global feedback mechanisms. Plaintiffs' claim is unparalleled not simply because the causal paths at stake are quantitatively longer and more circuitous, or because computer climate models are inherently more speculative and incomplete (though these differences are important), but because the very nature of the alleged "harm" – a changed global climate – is of a qualitatively different kind.

A court lacks the power to address such deeply systemic and global allegations by judicial devices that are every bit as likely to exacerbate the situation as to improve it. Public nuisance claims would create vague and inconsistent standards, denying courts a manageable test and posing a very real danger of economic disruption. Even if one accepts the premises of alleged global warming and that emission

reductions could address climate change,[7] public nuisance suits could well prove counterproductive, because of risk-risk tradeoffs, technology lock-in, and other unintended side effects. For example, a shift from coal-fired to natural gas power plants could increase leakages of methane, another gas identified as a "greenhouse gas."

In any event, public nuisance law is a wholly inappropriate basis for plaintiffs' claims, which are premised on an obsolete conception of federal common law and ignore the modern approach embodied in *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) (*Milwaukee II*).

C. The task of deciding whether and how to limit greenhouse gases in coping with alleged global climate change is textually committed to the political branches. To be sure, there is no explicit "Climate Change Clause" in the Constitution, but that is hardly the appropriate test. Rather, this Court may infer a textual commitment to the political branches. Here, the controlling constitutional postulates mark the functions in question as ones that only Congress or the President could discharge competently.

The judgment should be reversed.

---

[7] *Amici* do not uniformly accept these premises and nothing in this brief shall be construed as an admission of these premises by any party.

ARGUMENT

The political question doctrine famously originated in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), where Chief Justice Marshall opined that "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." *Id.* at 170. The political question doctrine is "a function of the separation of powers," which diffuses governmental power in order to secure liberty. *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 456 (1992).

The doctrine helps to protect the political branches from improper judicial intrusion. Thus, in *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), this Court dismissed a trespass action that presented a political question committed to Congress because a court must "take care not to involve itself in discussions that properly belong to other forums." *Id.* at 47; *see also Gilligan v. Morgan*, 413 U.S. 1, 7-10 (1973) (civil rights action nonjusticiable because case involved the appropriate organization and discipline of the National Guard, which was exclusively committed to the political branches).

The political question doctrine also prevents the judicial branch from becoming enmeshed in matters beyond the practical competence of courts to address or manage successfully. *See Gilligan*, 413 U.S. at 10 (applying the political question doctrine where "it is difficult to conceive of an area of governmental activity in which the courts have less competence"); *Vieth*

v. Jubelirer, 541 U.S. 267, 281 (2004) (plurality) (dispute nonjusticiable due to the absence of judicially manageable standards).

This case implicates the core purposes of the political question doctrine. Plaintiffs ask the judiciary to make unprecedented policy determinations of breathtaking scope and to impose them as a matter of judicial fiat without judicially manageable standards. Plaintiffs specifically ask the federal courts to (1) legislate a cause of action for contributing to alleged global warming, (2) establish liability standards that would retroactively determine whether particular emissions of greenhouse gases were permissible, and (3) impose permanent injunctive relief requiring defendants to cap and then reduce their emissions "by a specified percentage each year for at least a decade." J.A. 110, 153.

Plaintiffs' claim would require a court to strike a balance between social costs and benefits so far-reaching and global in character, and so ungrounded in any preexisting body of binding rules or principles, that it would clearly entail *making* rather than *applying* law. Any court attempting to resolve the complex and inextricable policy issues presented by plaintiffs' claim would be acting as "a sort of junior-varsity Congress." *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

Plaintiffs' action thus runs afoul of the central purposes of the political question doctrine. It also

fails all of the tests for political questions set forth in *Baker v. Carr*, 369 U.S. 186, 217 (1962).

A. PLAINTIFFS' CLAIMS RAISE "AN INITIAL POLICY DETERMINATION OF A KIND CLEARLY FOR NONJUDICIAL DISCRETION."

1. The Decision Whether To Create A Public Nuisance Claim For Alleged Climate Change Raises A Political Question.

Plaintiffs' claim presents a host of political determinations "of a kind clearly for nonjudicial discretion. . . ." *Id.* at 217. A court would first need to consider the utility of recognizing a greenhouse gas cause of action at all, given that Congress has already authorized EPA to regulate that very subject. *See Massachusetts*, 549 U.S. at 532-33.

In 2009, EPA found that greenhouse gas emissions from motor vehicles contribute to air pollution that endangers public health and welfare. 74 Fed. Reg. 66,496 (Dec. 15, 2009). EPA has exercised its regulatory authority under the Clean Air Act and propounded, *inter alia*, a final regulation governing greenhouse gas emissions from light duty vehicles, 75 Fed. Reg. 25,324 (May 7, 2010), and rules addressing greenhouse gas emissions from stationary sources, *e.g.*, 75 Fed. Reg. 31,514 (June 3, 2010), including the facilities operated by defendants in this case.

Any argument that a common-law claim is "necessary" to address alleged climate change is, in essence, an invitation to the courts to fashion a

regulatory regime different from what Congress has authorized[3] and to enforce it by remedies that Congress has not provided. The federal courts have no authority to accept such an invitation, "no matter how desirable that might be as a policy matter, or how compatible with the statute." *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001).

"[T]his Court has recently and repeatedly said that the decision to create a private right of action is one better left to legislative judgment," because it entails quintessential policy judgments in balancing public costs and benefits. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004). For example, in *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), this Court refused to craft a federal common-law rule establishing a right to contribution in antitrust cases because "[t]he choice we are urged to make is a matter of high policy ... which in our democratic system is the business of elected representatives." *Id.* at 647 (quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980)). Sound policy judgments require "the kind of investigation, examination, and study that legislative bodies can provide and courts cannot." *Id.*

---

[3] *Amici* do not concede that EPA has properly exercised its authority. Whether EPA has properly found that greenhouse gases cause endangerment, and otherwise properly interpreted the Clean Air Act in its regulation of greenhouse gases, is the subject of numerous appeals currently pending in the U.S. Court of Appeals, D.C. Circuit.

In *United States v. Standard Oil Co.*, 332 U.S. 301 (1947), this Court held that federal courts are prohibited from imposing novel duties enforced by liability rules, even in domains of uniquely federal interest. *Standard Oil* was a common-law tort action brought by the Government for losses incurred as a result of the defendant's actions injuring a soldier. This Court opined that the case presented a matter of such inherently federal interest that it was governed by federal law. *See id.* at 305. However, even though federal common law applied, the Court adopted a no-liability rule, reasoning that the development of a liability regime lay beyond the practical and constitutional competence of the federal courts. *See id.* at 313. The requisite policy judgments, and their "conversion into law," were "a proper subject for congressional action, not for any creative power of ours. . . ." *Id.* at 314. "To accept the challenge, making the liability effective in this case, also would involve a possible element of surprise, in view of the settled contrary practice, which action by Congress would avoid, not only here but in the many other cases we are told may be governed by the decision." *Id.* at 316.

The separation-of-powers principles that mandated a no-liability rule in *Standard Oil* would apply *a fortiori* to plaintiffs' asserted cause of action here. The issues raised by global warming entail balancing competing policy interests and thus are "a proper subject for congressional action, not for any creative power of" the federal courts. *Id.* at 314.

Indeed, plaintiffs' claims would unquestionably "involve a possible element of surprise, in view of the settled contrary practice," *id.* at 316, that could, potentially, raise concerns of fundamental fairness under the Takings and Due Process Clauses. *Cf. Eastern Enters. v. Apfel*, 524 U.S. 498 (1998) (imposition of large, unanticipated, and disproportionate liability based on past conduct violates the Constitution); *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Protection*, 130 S. Ct. 2592, 2601 (2010) ("It would be absurd to allow a State to do by judicial decree what the Taking Clause forbids it to do by legislative fiat."). Because a judicial taking would trigger just compensation obligations and thus implicate federal fiscal interests, this Court should avoid any construction of the common law that might expose the Treasury to liability not expressly authorized by Congress. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 631-32 (1952) (Douglas, J., concurring) (arguing that Presidential power to take over operation of steel mills should be narrowly construed because it could give rise to rights to compensation); *id.* at 655 (Jackson, J., concurring) (same); *Bell Atl. Tel. Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994) (narrowly construing agency order to avoid taking).

2. The Elements Of A Public Nuisance Claim Also Raise Political Questions.

Plaintiffs argued below that their claim is justiciable because the political branches supposedly have

already made an initial policy judgment to reduce greenhouse gas emissions. Such an argument is far too facile. Even if a court could identify an "official" U.S. policy that greenhouse gas emissions should be reduced, it is an altogether distinct policy question whether the creation of a public nuisance action for contributing to alleged global warming is a desirable mechanism for achieving such reductions. The court would need to consider whether the availability of public nuisance suits would abet or retard efforts to address the issue of global warming – a topic that is very much open to debate, even among those who concur about the need to take vigorous action.

The elements of a public nuisance claim raise a host of legislative questions. In fact, the Restatement would *require* the court to employ a cost-benefit balancing that is a form of policy-making. RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979) ("A public nuisance is an *unreasonable* interference with a right common to the general public.") (emphasis added). "But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement." *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955). "The responsibilities for assessing the wisdom of . . . policy choices and resolving the struggle between competing views of the public interest are not judicial ones. . . ." *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 866 (1984).

A court hearing a public nuisance claim would be required to ask whether some carbon-emitting activities are more "reasonable" than others and to decide

how to consider and weigh in principled fashion countless perspectives to determine what is "reasonable." The court would need to determine how to trade off economic productivity against the alleged harms, and resolve whether it would be reasonable for a defendant to conclude that, absent politically negotiated international climate agreements, unilateral reductions of greenhouse gas emissions in the United States would have been ineffective in reducing any alleged harm and, accordingly, that unilateral, economically costly emission-reducing measures are not mandated by a sensible balance of costs and benefits.

Plaintiffs' requested relief also illustrates the inherently legislative character of their claim. Plaintiffs expressly request injunctive relief requiring defendants to cap and then reduce their emissions "by a specified percentage each year for at least a decade." J.A. 110, 153. The court would need to confront such critical questions as the extent to which greenhouse gases should be curbed; how the specified percentage should be measured; which firms and individuals should be targeted; and the manner in which the emissions should be reduced.

Courts have no competence to perform the standard-setting and allocative functions required to develop a federal cause of action for contribution to alleged global warming. As this Court explained in *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), in the course of declining to fashion a rule of federal common law to govern claims by the Federal Deposit

Insurance Corporation (FDIC), as receiver for failed savings and loans, "[w]hat sort of tort liability to impose . . . involves a host of considerations that must be weighed and appraised" and is "more appropriately for those who write the laws, rather than for those who interpret them." *Id.* at 89 (internal quotations and citations omitted). That lesson is squarely applicable here.

B. THERE ARE NO "JUDICIALLY DISCOVERABLE AND MANAGEABLE STANDARDS FOR RESOLVING" PLAINTIFFS' CLAIMS.

As this Court has recognized, the "nuisance concepts" under which plaintiffs ask the judiciary to create liability for contributing to alleged climate change are "vague and indeterminate," even as applied to relatively traditional cases. *Milwaukee II*, 451 U.S. at 317. In this extraordinary case, which involves some of the most profound and complex policy questions now confronting Congress, the President, and the international community, "vague and indeterminate" nuisance concepts fall far short of furnishing judicially manageable standards.

Indeed, the common law of public nuisance is *structurally* deficient in terms of its ability even to conceptualize plaintiffs' claims in the appropriate way. Public nuisance actions conceived as devices to combat alleged climate change most certainly are not within the institutional competence of individual courts, each acting on the record compiled in a

lawsuit brought by some self-selected collection of individuals and entities alleging that they are adversely affected by what they call man-made climate change, designating as defendants whichever carbon emitters they choose to target.

As this Court has explained, "judicial action must be governed by *standard*, by *rule*," and "must be principled, rational, and based upon reasoned distinctions." *Vieth*, 541 U.S. at 278 (emphases in original). The claims asserted by plaintiffs fail this standard.

1. Plaintiffs' Global Warming Claims Are Qualitatively Different From Other Public Nuisance Claims.

Plaintiffs seek to frame alleged climate change as a traditional pollution problem. In fact, it is anything but. Plaintiffs assert that climate change is simply a bigger version of a classic air pollution problem and that the nuisance doctrine is therefore equipped to manage it. That assumption is fatally flawed. There is a dramatic difference in *kind* between global warming litigation and other pollution cases to which nuisance law has been applied in the past.

In *Massachusetts*, the Court determined that carbon dioxide is a "pollutant" under the Clean Air Act, but even so, it plainly is not a *traditional* "pollutant." The injuries associated with alleged climate change stem only from the overall worldwide concentration of carbon dioxide, irrespective of source, anthropogenic or natural; therefore, it is referred to

by some as a "stock pollutant."[1] *See Massachusetts*, 549 U.S. at 529 n.26 ("greenhouse gases permeate the world's atmosphere rather than a limited area near the earth's surface"). The alleged relationship between carbon emissions and climate change "does not operate like the kind of simple, short-term, more linear relationship between cause and effect that most people . . . assume is at work when they contemplate pollution." Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1164 (2009).

As a result, plaintiffs' claims have a uniquely and inescapably global and systemic character. There is simply no cause-and-effect relationship between the actions of any individual defendant and the alleged injury of any specific plaintiff. Further, the types of harms plaintiffs claim could potentially be alleged by virtually any landowner – and, ultimately, by virtually any citizen in the United States or indeed the world. The range of possible defendants is equally limitless. Plaintiffs' complaints name a handful of entities that happen to operate power plants in some 20 states. But these entities represent a mere fraction

---

[1] None of the following arguments requires any additional judicial fact-finding inappropriate for the pleading stage of the litigation. "Stock pollutant" description of carbon dioxide merely clarifies what the plaintiffs have already alleged, as it is the scientific theory upon which their allegations rely. *See* J.A. 56, Complaint, paras. 87-94.

of the power industry, and other sectors of the economy produce substantial greenhouse-gas emissions as well. EPA has noted that "important sources" of such emissions include motor vehicles, "industrial processes (such as the production of cement, steel, and aluminum), agriculture, forestry, other land use, and waste management." 75 Fed. Reg. at 31,514.

The limitless range of potential parties, the nebulous nature of public nuisance claims, and the inherently global nature of climatic interactions, combine to produce something that is different in kind from traditional pollution cases. As the Solicitor General has observed:

> The problem is not simply that many plaintiffs could bring such claims and that many defendants could be sued. Rather, it is that essentially any potential plaintiff could claim to have been injured by any (or all) of the potential defendants. The medium that transmits injury to potential plaintiffs is literally the Earth's entire atmosphere – making it impossible to consider the sort of focused and more geographically limited effects characteristic of traditional nuisance suits targeted at particular nearby sources of water or air pollution.

Brief of the Tennessee Valley Authority at the Cert. Stage in Support of Petitioners, No. 10-174, at 15.

It is as though the defendants were accused, through their combined activities, of causing an aggregate shift of the Earth's axis in a potentially

dangerous direction, through a complex interaction of the effects of what the defendants were doing in emitting certain gases and of what tens of millions of others, not parties to the lawsuit, were doing in addition to naturally-occurring emissions of those same gases. Unlike the situation in which specific, identifiable pollution sources discharge some noxious material onto a plaintiff's home – a situation in which it would of course be helpful, even if only marginally so, to order each of those sources to emit less of the noxious gas – the notion that the Earth's tilt would be helpfully corrected, at least a little, by telling each of the tens of millions of emitters just to do a little less of what is currently being done would be sheer fantasy, demonstrating more about the institutional limits of the judicial process than about the problem of global tilt.

In a traditional nuisance abatement case, the Restatement's balancing test provides a vague (but perhaps tolerable) basis for telling a polluting neighbor what to do vis-à-vis the injured neighbor down the road. But when the resolution of the claims being pressed and evaluated through the Restatements' balancing test would result in the "balancing" of innumerable costs against innumerable benefits, with no readily discernable pattern linking one to the other, the question of what constitutes a "nuisance" cannot be defined against any traditional baseline.

Because a linear cause and effect relationship is absent here, any attempt to fashion a remedy is even less amenable to reasoned adjudication than

attempting to "balance" interests that "are incommensurate." In that context, Justice Scalia wrote that "balancing" interests that "are incommensurate" is "more like judging whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring). Here, the very *concept* of balancing the cost and benefit of each incremental reduction in carbon emissions from a particular point source is beside the point, because there is no way for a court to reason that reducing emissions from a given source to a specifiable degree would translate into some corresponding "improvement" in global climate, or even some measurable reduction in the degree of purportedly adverse climate change, that one could proceed to "balance" against the costs of requiring that degree of emission reduction – even if we knew which precise climate changes could rightly be deemed "adverse" and which might be innocuous or even beneficial. Here, the "balancing" called for is more like judging whether changing the angles of some of the lines between the heavier and the lighter rocks in a limited landscape would alter the course of the shifting tectonic plates that contribute to earthquakes and tsunamis.

Furthermore, for a court to pick a number and tell an individual plant to cut its emissions by that amount – and pretend to have any idea how effective that individual cap would be or indeed to pretend to know that such a cap would make a positive rather than a negative contribution to the policy objective –

is unwise to the point of irrationality. This Court itself recognized the futility of judicial management of these issues in *Massachusetts*, when it noted that the "EPA said that a number of . . . programs already provide an effective response to the threat of global warming [and] . . . curtailing motor-vehicle emissions would reflect an inefficient, piecemeal approach." 549 U.S. at 533 (internal quotation omitted). EPA possesses "significant latitude as to the manner, timing, content, and coordination of its regulations. . . ." *Id.* A court lacks all of these advantages.

2. Affixing A Recognizable Common-Law Label Does Not Render Plaintiffs' Claims Justiciable.

Plaintiffs have attempted to establish the justiciability of their claims by arguing that they represent traditional common-law actions. However, the determination of whether a dispute is amenable to sufficiently principled resolution to comply with the Article III conception of the "judicial power" requires a "discriminating analysis of the particular question posed" and in particular "the possible consequences of judicial action." *Baker*, 369 U.S. at 211-12. *Baker* explained that courts may not rely on mere "semantic cataloguing" when evaluating whether a case presents political questions. *Id.* at 217.

Plainly, the justiciability of a claim cannot depend on the label assigned by a litigant or a court to that claim. Otherwise, resourceful attorneys could

routinely circumvent the political question doctrine, merely by pleading a common-law label. Proper pleading "requires more than labels and conclusions, and a mere formulaic recitation of the elements of a cause of action will not do. . . ." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) ("plaintiff armed with nothing more than conclusions" is subject to dismissal).

A claim's justiciability must instead turn on the issues underlying the claim, including those that will emerge during the course of the litigation. *See United States v. Munoz-Flores*, 495 U.S. 385, 386, 394 (1990) (argument about the identity and character of the parties to the case "is simply irrelevant to the political question doctrine").

In *Luther v. Borden*, 48 U.S. (7 How.) 1, 4 (1849), for example, this Court held that a common-law trespass claim presented a nonjusticiable political question, because the underlying issues were for Congress to decide, even though the tort pleaded by the plaintiff was a longstanding one.

In *Gilligan v. Morgan*, 413 U.S. 1, 7-10 (1973), this Court held that a civil rights action under the Fourteenth Amendment presented a nonjusticiable political question because it requested injunctive relief seeking the judicial creation and supervision of new standards for militia discipline – a matter that was for Congress to decide, even though civil rights actions are familiar federal claims.

And in *Vieth v. Jubelirer*, 541 U.S. 267, 296-97 (2004), this Court held that an equal protection challenge was a political question due to lack of judicially manageable standards for determining when a political gerrymander goes "too far," despite the fact that equal protection claims are ordinarily justiciable. *See id.* at 290-91 (distinguishing the "easily administrable standard" provided by the Equal Protection Clause in one-person, one-vote cases from the more problematic standards proposed for partisan gerrymandering cases).

In arguing that the Restatement (Second) of Torts supplies judicially manageable standards, plaintiffs suggest that any nuisance case is justiciable. But the Restatement's introduction acknowledges that courts "regard the law of torts as a dynamic set of norms, inviting adaptation as social conditions and prevailing values change, [but] *within the limits of the judicial function*." HERBERT WECHSLER, *Introduction* to RESTATEMENT (SECOND) OF TORTS, VOL. 4, at viii (1979) (emphasis added). Plaintiffs ignore the Restatement's own restrictions on the common-lawmaking power. The Restatement instructs that courts should root their judgments of "unreasonableness" in nuisance cases in "community standards," because, apart from community standards "there is often no uniformly acceptable scale or standard of social values to which courts can refer." RESTATEMENT (SECOND) OF TORTS § 828 cmt. b. But no "community standards" exist in this case. The judgments of national and international policy that plaintiffs ask the

judiciary to make in this case lie far beyond the scope of properly judicial common-law decision making. A court could not proceed without making uncabined policy judgments that even the Restatement recognizes courts should eschew as outside the limits of the judicial function. *See generally* JESSE DUKMINIER ET AL., PROPERTY 665 (6th ed. Aspen Publishing 2006) ("[N]uisance litigation is ill-suited to other than small-scale, incidental, localized, scientifically uncomplicated pollution problems.").

3. In Any Event, The Law Of Public Nuisance Represents An Inappropriate Basis For Federal Common-Law Claims.

Plaintiffs' unprecedented public nuisance claims fly in the face of the fundamental principle that "[f]ederal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision." *Milwaukee II*, 451 U.S. at 312 (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)). Although federal common law exists in a few enclaves in which it is "necessary to protect uniquely federal interests," *Texas Indus.*, 451 U.S. at 640, there is no federal common law cause of action for contributing to alleged global warming, and the federal courts have no authority to legislate one.

In the pollution context, this Court last recognized a federal common-law cause of action nearly four decades ago, in *Illinois v. City of Milwaukee*, 406

U.S. 91 (1972) (*Milwaukee I*), during "the heady" but now bygone "days in which th[e] Court assumed common-law powers to create causes of action." *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

However, a decade after *Milwaukee I*, this Court held that the water-pollution claims asserted in that case had been displaced by later statutory amendments. *See Milwaukee II*, 451 U.S. at 313, 315 n.8. In reasoning that is fully apposite here, this Court explained that "[t]he enactment of a federal rule in an area of national concern . . . is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress." *Id.* at 312-13.

> Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency.

Id. at 317.

Plaintiffs ignore the sea change represented by *Milwaukee II* and subsequent cases. Bluntly put, plaintiffs' approach to federal common law is hopelessly obsolete. *See Sosa*, 542 U.S. at 726 (recognizing that "along with, and in part driven by," modern understandings of the nature of "common law has

come an equally significant rethinking of the role of the federal courts in making it"); *Alexander*, 532 U.S. at 286-87 (declining to "revert in this case to the understanding of private causes of action that held sway 40 years ago" under "the *ancien regime*").

Moreover, even in its pre-*Milwaukee II* decisions involving relatively simple, ordinary nuisances with localized rather than global effects, this Court has expressed unease about the quasi-legislative aspect of its role. *See, e.g., Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 501 (1971) ("History reveals that the course of this Court's prior efforts to settle disputes regarding interstate air and water pollution has been anything but smooth."); *New York v. New Jersey*, 256 U.S. 296, 313 (1921) ("The grave problem of sewage disposal presented by the large and growing populations living on the shores of New York Bay is one more likely to be wisely solved by co-operative study and by conference and mutual concession on the part of representatives of the states so vitally interested in it than by proceedings in any court however constituted."). The instant action is infinitely more complex.

Still other features of the common law of public nuisance make it an especially unsuitable source for deriving plaintiffs' sweeping and unprecedented claim. Public nuisance suits arose in close connection to criminal law. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 645 & n.33 (5th ed. 1984) ("PROSSER AND KEETON") ("At common law, a public nuisance was always a crime, and punishable as such. . . . No case has been found of tort liability

for a public nuisance which was not a crime."). This history means that public nuisance claims are particularly unlikely candidates for recognition under federal common law, because there is no federal common law with respect to criminal claims. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812) (under separation of powers, judicial power does not extend to "exercise of criminal jurisdiction in common law cases").

In addition, public nuisance claims necessarily entail an element of generalized grievance that is incompatible with Article III. *See* PROSSER AND KEETON at 645 ("To be considered public, the nuisance affects an interest common to the general public, rather than peculiar to one individual, or several."); RESTATEMENT (SECOND) OF TORTS § 821B(1) (public nuisance involves "a right common to the general public"). Of course, generalized grievances fall outside the "Case or Controversy" requirement of Article III. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-75 (1992). This Court's "refusal to serve as a forum for generalized grievances has a lengthy pedigree." *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam).

The generalized grievance element of a public nuisance claim "would open the Judiciary to an arguable charge of providing 'government by injunction.'" *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587, 612 (2007) (citations omitted). And government by injunction is neither accountable to majority will nor a product of the consent of the governed.

4. Recognizing Public Nuisance Claims Here Would Create Vague And Inconsistent Standards.

Public nuisance claims pose further dangers. As this Court has observed, "nuisance standards often are vague and indeterminate," *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 496 (1987) (citation omitted), creating the very real danger that confusing and inconsistent judicial mandates could disrupt vital sectors of the American economy and cost significant numbers of jobs.[5] "[T]he ancient common law of public nuisance is not ordinarily the means by which such major conflicts among governmental entities are resolved in modern American governance." *North Carolina, ex rel. Cooper v. TVA*, 615 F.3d 291, 301 (4th Cir. 2010) ("TVA").

Public nuisance is an all-purpose tort that encompasses a truly eclectic range of activities. As one

---

[5] Disruption would occur within almost every major sector of the American economy. The oil and gas industry, for example, contributes more than $1 trillion to the national economy or 7.5% of the U.S. gross domestic product and generates over nine million jobs. *See* American Petroleum Institute, *The Economic Impacts of the Oil and Natural Gas Industry* (Sept. 8, 2009) *available at* http://www.api.org/aboutoilgas. The Trucking industry generates an estimated $544 billion in revenue annually and employs nearly 7.4 million Americans. *See* AMERICAN TRUCKING ASSOCIATION, AMERICAN TRUCKING TRENDS 2009-2010, 5 (American Trucking Association 2010); AMERICAN TRUCKING ASSOCIATION, U.S. FREIGHT TRANSPORTATION FORECAST TO 2021, 34 (American Trucking Association 2010).

authority has noted, "public nuisance" includes such broad-ranging offenses as:

> interferences with the public health, as in the case of a hogpen, the keeping of diseased animals, or a malarial pond; with the public safety, as in the case of the storage of explosives, the shooting of fireworks in the streets, harboring a vicious dog, or the practice of medicine by one not qualified; with public morals, as in the case of houses of prostitution, illegal liquor establishments, gambling houses, indecent exhibitions, bullfights, unlicensed prize fights, or public profanity; with the public peace, as by loud and disturbing noises, or an opera performance which threatens to cause a riot; with the public comfort, as in the case of bad odors, smoke, dust and vibration; with public convenience, as by obstructing a highway or a navigable stream, or creating a condition which makes travel unsafe or highly disagreeable, or the collection of an inconvenient crowd; and in addition, such unclassified offenses as eavesdropping on a jury, or being a common scold.

PROSSER AND KEETON at 643-45 (citing numerous examples).

Public nuisance law operates at such a high level of generality as to provide no meaningful notice or consistent standard of application. "If we are to regulate smokestack emissions by the same principles we use to regulate prostitution, obstacles in highways,

and bullfights, we will be hard pressed to derive any manageable criteria." *TVA*, 615 F.3d at 302 (internal quotation and citation omitted). "[O]ne searches in vain . . . for anything resembling a principle in the common law of nuisance." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting).

There could not be a greater contrast than that between the detailed standards of the Clean Air Act and the ill-defined, omnibus tort of public nuisance. Plaintiffs' approach risks the substantial danger that productive economic activities will be crippled by the inconsistent application of a confusing, open-ended standard by multiple courts in different states. An EPA-sanctioned state permit may set one standard, a judge in a nearby state another, and a judge in another state a third. *See Ouellette*, 479 U.S. at 496 n.17, 497 (warning that "common-law suits" "have the potential to undermine [a] regulatory structure").

5. Public Nuisance Actions Divorced From Traditional Common-Law Limits Promote Unintended Consequences.

Even assuming *arguendo* that one accepts the premises of alleged global warming and that emission reductions could helpfully address climate change, creating a federal law of public nuisance carries the very real risk of counterproductive judgments. Judge Wilkinson has warned:

> [A] patchwork of nuisance injunctions could well lead to increased air pollution. Differing standards could create perverse incentives for power companies to increase utilization of plants in regions subject to less stringent judicial decrees. Similarly, rushed plant alterations triggered by injunctions are likely inferior to system-wide analysis of where changes will do the most good. Injunction-driven demand for such artificial changes could channel a limited pool of specialized construction expertise away from the plants most in need of pollution controls to those with the most pressing legal demands.

TVA, 615 F.3d at 302 (internal citations omitted). Moreover, public nuisance suits run the risk of "locking in" inferior technology, as companies rush to innovate quickly enough to comply with short-term reduction requirements. Once companies commit to overhauling their technological infrastructure in order to achieve compliance with a judicial order, the changes they make are likely to be extremely difficult and costly to reverse. *See* Michael Toman et al., *The Economics of "When" Flexibility in the Design of Greenhouse Gas Abatement Policies*, 24 ANNUAL REV. OF ENERGY AND THE ENV'T. 431-460 (1999) (warning of the dangers of "haste further lead[ing] to wrong choice of technology"); John P. Weyant and Thomas Olavson, *Issues in Modeling Induced Technological Change in Energy, Environment, and Climate Policy*, 4 ENVTL. MODELING AND ASSESSMENT 67 (1999) (cautioning that "the stochastic nature of the innovation

process" forced by climate change requirements "may lead to technology 'lock-in,' even by inferior technologies").

In addition, judicially established limits on carbon emissions could result in an export of manufacturing activities from the United States to other, less regulated jurisdictions – thereby increasing the overall level of global emissions. *See* Scott Barrett & Robert Stavins, *Increasing Participation and Compliance in International Climate Change Agreements* (2003) *available at* http://ksghome.harvard.edu/~rstavins/Papers/Barrett_and_Stavins_2003.pdf (noting that, as a result of this "carbon leakage" phenomenon, "global emissions may increase").

Further, the inherent limitation of any public nuisance action in addressing a small percentage of overall worldwide anthropogenic and natural emissions only compounds unintended consequences. Any individual case or set of cases will require a myopic focus on one or more limited pieces of a complex and developing scientific puzzle, resulting in potentially self-defeating piecemeal regulation. Legal scholars have argued that regulatory approaches must be more holistic than any one case would allow. *See, e.g.*, Jonathan B. Wiener, *Radiative Forcing: Climate Policy to Break the Logjam in Environmental Law*, 17 N.Y.U. ENVIRO. L.J. 210, 225-26 (2008) (emphasis added); *see also* Richard B. Stewart & Jonathan B. Wiener, *The Comprehensive Approach to Climate Policy: Issues of Design and Practicality*, 9 ARIZ. J. INT. & COMP. L. 83, 91-92 (1992). These unintended

side effects militate strongly against the reckless creation of public nuisance claims and the imposition of remedies through the blunt instrument of judicial injunctions.

In contrast, the political branches enjoy vast advantages in information and expertise. Legislative and regulatory initiatives can be fine-tuned and adapted over time to minimize pernicious side effects. Far from supplementing such schemes, precipitate judicial action would likely disrupt them. For example, many carbon control proposals being considered by Congress would create a comprehensive national market. If individual courts implemented injunctions placing arbitrary caps upon carbon emissions of individual plants, guided by nothing more than nuisance doctrine, the effect would be to balkanize and severely inhibit this national market.

C. THE TASK OF DECIDING WHETHER AND HOW TO LIMIT GREENHOUSE GASES IS TEXTUALLY COMMITTED TO THE POLITICAL BRANCHES.

As one of the tests for a political question, *Baker* instructs a court to search for "a textually demonstrable commitment of the issue to a coordinate political department." *Baker*, 369 U.S. at 216. The Constitution is, of course, linguistically silent as to which branch of government is empowered to address "climate change" as such. Needless to say, there is no

"Climate Change Clause" or "Carbon Emissions Clause."

But a narrow emphasis on a literalist understanding of the Constitution's individual clauses to control the application of the political question doctrine is misguided, for it ensures that issues involving rapid technological change and policy complexity — the very types of issues that would not have been foreseeable at the time of the Constitution — would be deemed the ones most appropriate for judicial intervention, when of course just the opposite is true.

Accordingly, this Court has explained that the *Baker* criteria are not isolated tests but instead interact with, and support, one another. *See Nixon v. United States*, 506 U.S. 224, 228-29 (1993) (recognizing that "the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch."). Here, the need for initial policy determinations and the absence of judicially manageable standards help establish that plaintiffs' claims present a political question under the first *Baker* factor.

This case presents a perfect instance for inferring a textual commitment. There are few, if any, unequivocal instances in the Constitution of explicit textual commitments of particular issues to specific branches, and prior political question cases have employed inferential reasoning regarding delegations of authority. *E.g.*, *Vieth*, 541 U.S. at 275 ("It is significant that

the Framers provided a remedy for such practices in the Constitution.").

In circumstances such as this, political questions must be identified on the basis of the import and structure of the Constitution as a whole and its immanent logic. "Behind the words of the constitutional provisions are postulates which limit and control." *Monaco v. Mississippi*, 292 U.S. 313, 322 (1934). Indeed, the "tacit postulates" of the Constitution "are as much engrained in the fabric of the document as its express provisions." *Nevada v. Hall*, 440 U.S. 410, 433 (1979) (Rehnquist, J., dissenting).

In this case, the controlling postulates mark functions that only Congress or the President could discharge competently. Article I vests lawmaking power exclusively in Congress, not the federal courts. Thus, the Commerce Clause grants to Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. The Necessary and Proper Clause, in turn, gives Congress the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." U.S. CONST. art. I, § 8, cl. 18. An ad hoc mishmash of common-law regimes would frustrate legislators' attempts to design coherent and systemic solutions.

In addition, the President is the nation's chief voice and representative in the domain of foreign affairs. *See United States v. Curtiss-Wright Export*

Corp., 299 U.S. 304, 320 (1936) (recognizing "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations"). In particular, it is only the President who can negotiate treaties. U.S. CONST. art. II, § 2, cl. 2. *See, e.g.*, U.S. Dept. of State, *U.S. Climate Action Report 2010*, *available at* http://www.state.gov/documents/organization/140636.pdf (noting efforts to address climate change in international negotiations). By textually committing this power to the President, Article II precludes judicial authority to establish de facto regulatory standards for greenhouse gas emissions that might disrupt a treaty-based or other internationally negotiated response to the inescapably global issue of climate change. "[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions . . . are delicate, complex, and involve large elements of prophecy . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility." *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 110-14 (1948); *cf. American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 424 (2003) (invalidating a state law because it interfered with presidential prerogatives by giving "the President . . . less to offer and less economic and diplomatic leverage" in negotiations with foreign governments) (internal citation and quotation omitted).

Youngstown, though not a political question case as such, is highly relevant to the separation-of-powers issues here. While the instant case involves a

requested judicial order to *shut down* industrial facilities, *Youngstown* concerned an Executive Order compelling steel companies to *continue operations* supplying steel for the war effort. *See generally* 343 U.S. 581. This Court, after examining the President's Article II powers and Congress' Article I authority, concluded that the Executive Order exceeded presidential power and encroached on congressional authority. The Court's analysis of the textual commitments in Articles I and II provides a blueprint for how to proceed in this case.

Starting with the constitutional text, the *Youngstown* Court observed that there was no single textual provision committing the power over the production of steel to a particular branch. However, the Court examined the textual provisions in Article I and Article II to determine whether, in the "aggregate," *id.* at 587, those provisions indicated an implied power for either branch of government to address the issues in the case. In the end, the Court concluded that the Executive Order at issue involved the use of legislative power to *make* law, rather than being an act consistent with the executive's power to *enforce* the law:

> [T]he constitution is neither silent nor equivocal about who shall make the laws. . . . [T]the first section of the first article says that '*All legislative powers herein granted shall be vested in a Congress of the United States*'. . . . After granting many powers to the Congress, *Article I goes on to provide that*

> *Congress 'may make all Laws* which shall be necessary and proper for carrying into Execution the foregoing Power and all other Powers vested by this Constitution in the Government of the United States. . . .'

Id. at 587-88 (emphases added).

The relief sought by the instant plaintiffs, a cap on emissions, has the direct effect of regulating the generation of electricity at power plants, in a manner quite similar to the way that the executive order in *Youngstown* regulated the commercial activities of industrial facilities. The implied textual commitment to Congress is the same in both cases. The only difference is that the plaintiffs in this case seek to have the Judiciary, rather than the Executive Branch, encroach on congressional lawmaking power. But judicial legislation would be every bit as much an affront to the separation of powers. A judicial abatement order would represent a legislative judgment about what the Nation's carbon emissions policy ought to be, derived from a utilitarian analysis of costs to plaintiffs versus the supposed benefits of continued energy production at current levels. As such, like the policy question in *Youngstown*, it is inherently legislative.

In the context of the uniquely global and systemic nature of alleged climate change, the balancing of competing considerations of costs and utility cannot be performed with any traditional common-law calculus. Indeed, such substantive, non-interstitial, lawmaking in the guise of the common

law unconstitutionally aggrandizes judicial power beyond the Judiciary's law application function and violates separation of powers.

The political question doctrine, like *Youngstown*, is ultimately about much more than simply observing the procedural niceties of an organization chart. The doctrine is concerned with the arbitrary constraints on liberty, unjust deprivations of property, and indefensible denials of equality that arise unless we adhere to the political question doctrine and the separation-of-powers principles it reflects. By proposing that we instead submit ourselves to government by judiciary, the plaintiffs' proposed approach would exact a terrible price. It would permit self-selected plaintiffs, accountable to nobody, to arbitrarily single out their preferred handful of defendants to bear the burdens of addressing global climate change, when there is no reason to believe that the situation would thereby be improved and every reason to believe that, even if it would, the burdens are ones that should be borne by the public as a whole in a far more equitable way. *See id.* at 646 (Jackson, J., concurring). ("That authority [vested by the Constitution in a federal branch] must be matched against words of the Fifth Amendment that 'No person shall be . . . deprived of life, liberty, or property, without due process of law . . .' One gives a governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no farther. These signify about all there is of the principle that ours is a

government of laws, not men, and that we submit ourselves to rulers only if under rules.").[*]

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

TRISTAN L. DUNCAN
SHOOK, HARDY & BACON LLP
2555 Grand Boulevard
Kansas City, MO 64108
(816) 474-6550
tlduncan@shb.com

JONATHAN S. MASSEY
MASSEY & GAIL LLP
1325 G St. NW, Suite 500
Washington, D.C. 20005
(202) 652-4511
jmassey@masseygail.com

LAURENCE H. TRIBE
Counsel of Record
420 Hauser Hall
1575 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-1767
tribe@law.harvard.edu

Counsel for Amici Curiae

February 2011

[*] The remaining *Baker* factors – which involve the potential for disagreement between the judicial and political branches – plainly are triggered in this case as well, for reasons already discussed.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
MAR 18 2011
OFFICE OF THE CLERK

No. 10-174

In The Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY INC., *et al.*,

Petitioners,

v.

STATE OF CONNECTICUT, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR *AMICI CURIAE* DEFENDERS OF WILDLIFE, CENTER FOR BIOLOGICAL DIVERSITY, AND NATIONAL WILDLIFE FEDERATION IN SUPPORT OF RESPONDENTS

JASON C. RYLANDER
DEFENDERS OF WILDLIFE
1130 17th Street, N.W.
Washington, D.C. 20036
(202) 682-9400

SEAN H. DONAHUE
DONAHUE & GOLDBERG, LLP
2000 L Street, N.W.
Suite 808
Washington, D.C. 20036
(202) 277-7085

ERIC R. GLITZENSTEIN
Counsel of Record
WILLIAM S. EUBANKS II
SHRUTI SURESH
MEYER GLITZENSTEIN & CRYSTAL
1601 Connecticut Avenue, N.W.
Suite 700
Washington, D.C. 20009
(202) 588-5206
EGlitzenstein@meyerglitz.com

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. THE STATE RESPONDENTS HAVE ARTICLE III STANDING 7

A. The State Respondents Have Article III Standing Based On The Court's Ruling And Reasoning In *Massachusetts v. EPA* 7

B. Petitioners' Standing Objections Are Groundless 11

II. PETITIONERS' AND TVA'S PRUDENTIAL STANDING ARGUMENTS LACK MERIT 21

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

Allen v. Wright, 468 U.S. 737 (1984) 8

Ass'n of Data Processing Service Orgs. v. Camp, 397 U.S. 150 (1970) 23

Baur v. Veneman, 352 F.3d 625 (2d Cir. 2003) 18

Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) 12

Bennett v. Spear, 520 U.S. 154 (1997) 15, 16

Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978) 26

Elk Grove v. Evans, 997 F.2d 328 (7th Cir. 1993) 18

Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1 (2004) 21, 22, 25, 26

Fed. Election Comm'n v. Akins, 524 U.S. 11 (1998) 13, 14, 20

Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149 (4th Cir. 2000) ... 18, 19

Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907) 27

Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979) 14

Helling v. McKinney, 509 U.S. 25 (1993) 18

Illinois v. City of Milwaukee, Wis., 406 U.S. 91 (1972) 27

Kowalski v. Tesmer, 543 U.S. 125 (2004) 22, 23

Larson v. Valente, 456 U.S. 228 (1982) 19

TABLE OF AUTHORITIES – Continued

Page

Loggerhead Turtle v. County Council of Volusia County, 148 F.3d 1231 (11th Cir. 1998) 19

Lozano v. City of Hazleton, 620 F.3d 170 (3d Cir. 2010) 15

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 8, 9, 10, 16, 20

Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990) 10

Massachusetts v. EPA, 549 U.S. 497 (2007) ..... *passim*

Meese v. Keene, 481 U.S. 465 (1987) 19

Missouri v. Illinois, 200 U.S. 496 (1906) 27

Mountain States Legal Found. v. Glickman, 92 F.3d 1228 (D.C. Cir. 1996) 17, 18

Natural Res. Def. Council v. EPA, 464 F.3d 1 (D.C. Cir. 2006) 17

Natural Res. Def. Council v. Watkins, 954 F.2d 974 (4th Cir. 1992) 19

Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440 (1989) 14

Pye v. United States, 269 F.3d 459 (4th Cir. 2001) 15

Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47 (2006) 7

Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1975) 22, 24, 26

Sierra Club v. Cedar Point Oil Co. Inc., 73 F.3d 546 (5th Cir. 1996) 18

TABLE OF AUTHORITIES – Continued

Page

Sierra Club v. EPA, 292 F.3d 895 (D.C. Cir. 2002) 10

United States v. Richardson, 418 U.S. 166 (1974) 26

Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc., 454 U.S. 464 (1982) 14, 21, 23

Warth v. Seldin, 422 U.S. 490 (1975) 22, 23

STATUTES

16 U.S.C. §§ 1531-1544 4

FEDERAL REGISTER NOTICES

71 Fed. Reg. 26,852 (May 9, 2006) 4

73 Fed. Reg. 28,212 (May 15, 2008) 4

75 Fed. Reg. 61,872 (Oct. 6, 2010) 5

75 Fed. Reg. 77,476 (Dec. 10, 2010) 5

MISCELLANEOUS

Austl. Inst. of Marine Sci., *Status of Coral Reefs of the World: 2004* 7 (Clive Wilkinson ed., 2004) 4

Camille Parmesan, *Ecological and Evolutionary Responses to Recent Climate Change*, 37 Annual Rev. Ecol. & Evol. Syst. 637-69 (2006) 3

TABLE OF AUTHORITIES – Continued

Page

Nat'l Research Council, *America's Climate Choices: Advancing the Science of Climate Change* (2010) 3, 4

Ove Hoegh-Guldberg, *et al.*, *The Impact of Climate Change on the World's Marine Ecosystems*, 328 Science 1523 (2010) 4

INTERESTS OF *AMICI CURIAE*

Amici are leading non-profit conservation and wildlife protection organizations with longstanding interests in protecting wildlife, particularly endangered and threatened species, from various forms of habitat destruction and degradation, including the devastation that is being, and will be, wrought by global warming on wildlife and the ecosystems on which they depend.[1]

Defenders of Wildlife ("Defenders") is a non-profit conservation organization with over one million members and supporters across the country. Defenders is dedicated to the protection and restoration of all native animals and plants in their natural communities.

The Center for Biological Diversity is a non-profit environmental organization dedicated to protecting endangered species and wild places through rigorous science, advocacy, and environmental law, and that has over 320,000 members and online activists. The Center's Climate Law Institute develops and implements

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons or entity other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. One of the counsel for Respondents, Matthew Pawa, is a member of the Board of Directors of Defenders of Wildlife, but he played no role in the organization's decision-making concerning the filing of this brief or its contents. Parties have filed letters indicating their consent to the filing of *amicus* briefs.

legal campaigns to limit global warming pollution and prevent it from driving species to extinction.

The National Wildlife Federation is a non-profit conservation education and advocacy organization with over four million members and supporters in the United States. The Federation works in communities across the country to protect and restore wildlife and wildlife habitat, to confront global warming, and to connect people with nature.

Amici seek to protect and restore wildlife and the ecosystems on which animal and plant species depend through a variety of means, including litigation in federal court under statutes designed to conserve wildlife and protect other natural resources. Although *amici*'s ability to bring such statutorily-based claims predicated on climate-related impacts or other environmental harms is not at issue in this case, and although *amici* have not pursued common law public nuisance claims and have no plans to pursue such claims in the future, *amici* are nonetheless concerned that several of the standing arguments advanced by Petitioners and the Tennessee Valley Authority ("TVA"), could, if endorsed by the Court, impede the ability of *amici* to further their and their members' interests even through more routine federal litigation brought under longstanding federal statutory provisions that authorize citizens to enforce federal statutory and regulatory safeguards for imperiled wildlife and other natural resources.

As alleged in Respondents' Complaints, there is a clear scientific consensus that global climate change is already having a deleterious impact on a plethora of animal and plant species, and that such effects will be devastating to ecosystems around the world unless rapid action is taken in the near future. *See, e.g.*, J.A. 58, 91, 97, 98. Since the Complaints were filed in 2004, the scientific data have become even more overwhelming that global warming, if left unchecked, threatens a global extinction crisis and an unprecedented world-wide collapse of ecosystems. According to a 2010 National Academy of Sciences report that was requested by Congress, climate shifts have already begun dramatically to change the ranges and distribution of many animals and plants. Nat'l Research Council, *America's Climate Choices: Advancing the Science of Climate Change* (2010), at 212 ("NAS Report"); *see also* Camille Parmesan, *Ecological and Evolutionary Responses to Recent Climate Change*, 37 Annual Rev. Ecol. & Evol. Syst. 637-69 (2006). At present, the problem is particularly acute for cold-adapted species in the Arctic and Antarctic, such as the polar bear and some species of seals and penguins, where sea ice is rapidly diminishing. NAS Report, *supra*, at 212. Species adapted to mountaintops are also diminishing rapidly as boreal forests invade their tundra habitat. Parmesan, *supra*, at 649.

Tropical coral reefs and amphibians have likewise been severely negatively affected as global warming both raises water temperatures and alters the ocean's chemical composition. *Id.* at 649-50. Recent studies

indicate that rapidly rising greenhouse gas concentrations are driving natural ocean systems toward conditions not seen for millions of years, with an associated risk of "fundamental and irreversible ecological transformation." Ove Hoegh-Guldberg, *et al.*, *The Impact of Climate Change on the World's Marine Ecosystems*, 328 Science 1523 (2010); *see also* William W.L. Chung *et al.*, *Projecting Global Marine Biodiversity Impacts Under Climate Change Scenarios*, Fish & Fisheries 235-51 (2009) (climate change threatens "dramatic species turnovers of over 60 percent of the present biodiversity, implying ecological disturbances that could potentially disrupt ecosystem services").

The Intergovernmental Panel on Climate Change estimates that 20 to 30 percent of plant and animal species assessed to date are likely to be at a high risk of extinction as global average temperatures exceed a warming of 3.6 to 5.4 °F (2 to 3 °C) above pre-industrial levels. NAS Report, *supra*, at 213. Numerous species of amphibians, butterflies, mammals, and coral have already been documented as declining drastically due to climate-related impacts, and many more are at great risk of such declines in the foreseeable future. *See* Parmesan, *supra*, at 653; Austl. Inst. of Marine Sci., *Status of Coral Reefs of the World: 2004* 7 (Clive Wilkinson ed., 2004). Accordingly, the federal agencies charged with implementing the Endangered Species Act, 16 U.S.C. §§ 1531-1544, have already listed a number of species as endangered or threatened due to climate change effects, *see, e.g.*, 71 Fed. Reg. 26,852 (May 9, 2006) (corals); 73 Fed. Reg.

28,212 (May 15, 2008) (Polar bear), and have formally proposed the listing of other such species. *See, e.g.*, 75 Fed. Reg. 77,476 (Dec. 10, 2010) (Ringed seal); 75 Fed. Reg. 61,872 (Oct. 6, 2010) (Atlantic sturgeon).

Amici recognize that the common law claims in this case arise in a legal context that is very different from the kind of statutory citizen suits that *amici* normally pursue. Nevertheless, *amici* have a vital interest in ensuring that new jurisdictional barriers are not erected that could block otherwise viable, statutorily-based claims not at issue here, including claims that seek to mitigate the impacts of climate change on wildlife species as to which *amici* and their members have longstanding interests.

SUMMARY OF ARGUMENT

1. As TVA concedes, the State Respondents have Article III standing for essentially the same reasons that Massachusetts was deemed to have standing in *Massachusetts v. EPA*, 549 U.S. 497 (2007). As in *Massachusetts*, the State Respondents have asserted concrete sovereign and proprietary interests that are being harmed by global warming, and the Complaint proffers plausible allegations that Petitioners are major carbon dioxide polluters whose emissions are materially contributing, and will continue to contribute, to the serious harms and risks inflicted on the States. Their allegations that Petitioners' (and TVA's) emissions have caused them injury, and that their

risk of injury would be reduced at least in part by a favorable decision, readily satisfy the injury, causation, and redressability requirements established by the Court's precedents.

2. TVA's and Petitioners' prudential standing arguments, advanced for the first time in this Court, are groundless. This Court has directed dismissal of cases on prudential standing grounds only in very narrow circumstances, none of which is present here. Further, TVA's novel rationale for why prudential standing is lacking – *i.e.*, that many people and entities will suffer concrete injuries from global climate change – could, if endorsed by the Court, have adverse and unanticipated consequences for other types of litigation concerning serious but widely-felt injuries. There is no legal or practical justification for the Court to create such a standing precedent in order to resolve this case, particularly because common law adjudication provides other, much better suited means of circumscribing a nuisance cause of action based upon global warming impacts.

ARGUMENT

The focus of this brief is on the threshold standing issues raised by Petitioners and TVA, including the prudential standing arguments invoked for the first time in this Court, because the resolution of those issues may have a bearing not only on whether the specific claims at issue here may be pursued,

but on environmental litigation generally. Indeed, although the standing issues here are extremely narrow – pertaining solely to whether Respondents have standing to bring common law nuisance claims – in crucial respects, Petitioners' and TVA's Article III and prudential standing objections contravene well-entrenched standing principles and precedents and would, if adopted, needlessly muddy and complicate this Court's standing jurisprudence even as it applies to more garden-variety, statutorily-based claims.

I. THE STATE RESPONDENTS HAVE ARTICLE III STANDING.

A. The State Respondents Have Article III Standing Based On The Court's Ruling And Reasoning In *Massachusetts v. EPA*.

As acknowledged by TVA, under this Court's ruling in *Massachusetts v. EPA*, it is clear that at least the State Respondents have Article III standing. Hence, it is unnecessary for the Court to address the standing of the other Respondents, who seek relief identical to that sought by the States. *See, e.g.*, *Massachusetts*, 549 U.S. at 518 ("Only one of the Petitioners needs to have standing to permit us to consider the petition for review."); *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 53 n.2 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement.").

In *Massachusetts*, the Court held that at least the "special position and interest of Massachusetts" afforded it Article III standing in challenging the EPA's refusal to regulate greenhouse gas emissions, both because the State had sued in its "'capacity of *quasi*-sovereign'" with a cognizable interest in conserving the "'earth and air within its domain'" for the benefit of its residents, and because the State had a "particularized injury in its capacity as a landowner" whose coastal property was already being "swallow[ed]" by rising seas caused by global warming. 549 U.S. at 518-19, 522-23 (internal quotation omitted). The same interests support Connecticut's and the other State Respondents' standing in this case.

Indeed, if anything, the State Respondents have an even more compelling argument for Article III standing here. First, whereas Massachusetts had sued a federal agency for failing to regulate the carbon dioxide emissions of third parties – a kind of claim that, as this Court has explained, can raise particular causation and redressability concerns, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (explaining that "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish" (quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984))) – the State Respondents here have sued the carbon dioxide emitters alleged to be *directly* responsible for contributing to the ongoing and future injuries to their sovereign and proprietary interests. Consequently, the

issues that arise when "causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction," *Defenders of Wildlife*, 504 U.S. at 562, simply are not present in this case. *See* TVA Br. 31 ("Plaintiffs' chains of causation and redressability are *shorter* than the ones in *Massachusetts*, because they seek judicial relief directly from the entities responsible for the allegedly unlawful emissions."). Indeed, Petitioners cite no precedent in which this Court (or any other) has ever found that a common law nuisance claim failed for lack of Article III standing.[2]

---

[2] The Court in *Massachusetts* also stressed that Congress had enacted a citizen suit provision that specifically "authorized" the kind of challenge to agency action (or refusal to act) that was at issue there, but that authorization was deemed important in the context of a claim asserting that a "procedural right" had been violated by EPA, *i.e.*, the "right to challenge agency action unlawfully withheld." *Massachusetts*, 549 U.S. at 516-17 (internal quotation omitted). It is well-established that a "person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Defenders of Wildlife*, 504 U.S. at 573 n.7. For example, a plaintiff complaining that the government has failed to follow a required procedure need not establish that the agency would have made a decision favorable to the plaintiff had the agency followed the procedure. *See id.* That part of the Court's analysis in *Massachusetts* has no relevance where, as here, the State Respondents are not asserting a procedural right to the government's compliance with a step that *may* further their concrete interests but, rather, are claiming that Petitioners' activities are themselves *directly* contributing to the impairment of the sovereign and proprietary interests deemed sufficient for Article III standing in *Massachusetts*.

Second, in *Massachusetts*, the Court was required to consider whether the State had actually submitted affirmative evidence – *e.g.*, detailed declarations – to support its standing, because that case arose in the context of a petition for review in the D.C. Circuit, and this Court obviously could not resolve the merits in the State's favor (as the Court ultimately did), without finding that the State in fact *had* standing to assert its claims. *See Massachusetts*, 549 U.S. at 522 (explaining that "petitioners' unchallenged affidavits" set forth anticipated rises in sea level due to global warming and how this will inevitably destroy and impair a "significant fraction" of the State's coastal property); *see also Sierra Club v. EPA*, 292 F.3d 895, 898-99 (D.C. Cir. 2002) (explaining that petitions for review in the D.C. Circuit must be supported by affirmative evidence of standing).

In sharp contrast, in this case, since the standing issue was raised in the district court at the motion to dismiss stage, "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Defenders of Wildlife*, 504 U.S. at 561 (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)) (contrasting the standing analysis at the motion to dismiss stage with that at the summary judgment and trial stages, where "mere allegations" no longer suffice).

B. Petitioners' Standing Objections Are Groundless.

Especially in view of *Massachusetts,* Petitioners' arguments for why the State Respondents lack Article III standing are baseless. To begin with, Petitioners assert that the "pleadings never allege the requisite direct connection between these defendants' emissions and the individual risks to which plaintiffs are allegedly exposed." Pet. Br. 18. This is erroneous. The State Respondents' complaint contains specific allegations that Petitioners are "major emitters" of carbon dioxide and "substantial contributors to global warming"; that their emissions "constitute approximately one quarter of the U.S. electric power sector's carbon dioxide emissions and approximately ten percent of all carbon dioxide emissions from human activities in the United States"; that emissions of this magnitude are sufficient to constitute a "direct and proximate contributing cause of global warming and of the injuries and threatened injuries" to the State Respondents, their citizens, and residents; that Petitioners' "emission of millions of tons of carbon dioxide each year contribute to the risk of an abrupt change in climate due to global warming"; and that "[r]eductions in the carbon dioxide emissions of the defendants will contribute to a reduction in the risk and threat of injury to the plaintiffs and their citizens from global warming," including a reduction in the risk that an "abrupt and catastrophic change in the Earth's climate" will occur. J.A. 57, 84-85, 101, 102, 104.

As TVA recognizes, these allegations cannot meaningfully be distinguished from the assertions of injury deemed sufficient to support a *ruling on the merits* in *Massachusetts*, *see* TVA Br. 29-30, and Petitioners present no persuasive reason why they should be deemed inadequate here, especially when this case is still at the initial pleading stage. In any case, the State Respondents most certainly have alleged an "actual causal connection between the particular risk of injury to the plaintiff and the particular conduct of the defendant[s]," Pet. Br. 19 – entities that are alleged to be the "five largest emitters of carbon dioxide in the United States" and "among the largest in the world," J.A. 57 – and also that the State Respondents have a "distinct interest in the subject matter at issue," Pet. Br. 19, especially in light of the State Respondents' *present and projected* loss of land, as alleged in the Complaint, along with the many other concrete injuries and risks to which the States maintain that Petitioners are major contributors.[3]

---

[3] Consequently, Petitioners' claim that allowing this case to go forward would "allow[ ] suits by each against all, for any injury resulting from virtually any climate-related natural event," Pet. Br. 20, is hyperbole. Here, as in *Massachusetts*, the State Respondents have made eminently "plausib[le]" allegations, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 560 (2007), that entities that are among the leading emitters of greenhouse gas emissions in the world are in fact contributing to the State Respondents' concrete injuries and grave risks to their sovereign and proprietary interests. Once again, since comparable factual assertions were deemed sufficient to support a favorable resolution on the merits in *Massachusetts*, there is no legal or logical basis for

(Continued on following page)

Accordingly, Petitioners' claim that others may also assert concrete injuries from global warming, Pet. Br. 21-22, is of no moment. The legal adequacy and "plausibility" of those allegations would have to be assessed in the context of the particular allegations made and claims proffered. However, the fact that "sovereign State[s]," whose coastal landholdings and natural resources are, according to leading climate scientists, *now* being destroyed through precisely the kinds of massive carbon dioxide emissions for which Petitioners are responsible hardly means that the floodgates are being opened to every possible allegation of injury conceivably connected to global warming. *Massachusetts,* 549 U.S. at 518.

In any event, as *Massachusetts* also makes clear, that "climate-change risks are 'widely shared' does not minimize [the States' interests] in the outcome of this litigation." *Id.* at 522 (quoting *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24 (1998)). In this connection, Petitioners' transparent effort to conflate an abstract, "generalized grievance," Pet. Br. 30, or an amorphous "risk to 'society,'" *id.* at 19, with a *concrete,* albeit widely shared, harm, should be rejected. It is certainly the case that, as a matter of both Article III and prudential standing, the federal

---

foreclosing the State Respondents' standing at the threshold of litigation here. On the other hand, such a ruling would hardly mean that every assertion of a global warming-related injury would satisfy threshold pleading standards, let alone be deemed adequate to support a ruling on the merits.

courts cannot be used as vehicles merely for the "ventilation of public grievances" that have no tangible impact on the particular plaintiff. *Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982). However, it is equally well-established that, when the plaintiff alleges "some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99 (1979), no barrier to standing is posed by the fact that, as is the case with many environmentally-related injuries, others may also be injured or imperiled by the same conduct.

Indeed, as the Court reaffirmed in the specific context of asserted global warming impacts, "*to deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious*" conduct "*could be questioned by nobody*. We cannot accept that conclusion." *Massachusetts*, 549 U.S. at 526 n.24 (internal quotation omitted); *see also Akins*, 524 U.S. at 24 (A widely shared injury, "where sufficiently concrete, may count as an 'injury in fact.' *This conclusion seems particularly obvious where (to use a hypothetical example) large numbers of individuals suffer from the same common-law injury (say, a widespread mass tort)*, or where large numbers of voters suffer interference with voting rights conferred by law.") (emphasis added); *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449-50 (1989) ("The fact that other citizens or groups of citizens might make the same complaint

after unsuccessfully demanding disclosure under [the Federal Advisory Committee Act] does not lessen appellants' asserted injury, any more than the fact that numerous citizens might request the same information under the Freedom of Information Act entails that those who have been denied access do not possess a sufficient basis to sue."); *Lozano v. City of Hazleton*, 620 F.3d 170, 186 (3d Cir. 2010) ("The fact that an injury is widely-shared is not the primary focus of the particularized inquiry. . . . The question of particularity turns on the nature of the harm, not on the total number of persons affected."); *Pye v. United States*, 269 F.3d 459, 469 (4th Cir. 2001) ("So long as the plaintiff himself has a concrete and particularized injury, it does not matter that legions of other persons have the same injury."). In short, Petitioners' peculiar proposition that the more widespread the damage that a particular defendant inflicts or contributes to, the more that defendant should be insulated from liability for the resulting harm, is simply not compatible with this Court's precedents.

Also misplaced is Petitioners' contention that the State Respondents lack standing because "third parties" not before the Court may also contribute to the States' asserted injuries. Pet. Br. 22-23 (citing *Bennett v. Spear*, 520 U.S. 154, 169 (1997)). Under elementary standing principles, the existence of a third-party contributor to the plaintiff's injuries is only relevant to the Court's inquiry if the third party's *independent* actions are crucial to the chain of causation between the defendant's actions and the

plaintiff's alleged injuries, and there is no basis for finding that the third party will act in a manner that will alleviate those injuries. For example, in *Defenders of Wildlife*, invalidation of a regulation issued by one federal agency could have *no* impact whatsoever on the interests of the plaintiffs in the absence of action by other agencies not before the Court – agencies that were not "obliged to honor an incidental legal determination the suit produced," and that in fact had made clear that they did not consider themselves bound by the regulation at issue. 504 U.S. at 569.[4]

In contrast, in this case, the State Respondents' ability to obtain *some* tangible relief from the carbon dioxide emissions that the States allege are contributing to their injuries is not dependent at all on the actions of third parties. Rather, should they prevail on the merits, the State Respondents would accomplish a direct reduction of hundreds of millions of tons of greenhouse gas emissions – a result that the States specifically allege will, at the very least,

---

[4] On the other hand, in *Bennett*, the Court found standing because a decision document issued by one agency had a "virtually determinative effect" on the actions of other agencies not before the Court. 520 U.S. at 170. Thus, although they came to differing results, the focus in both cases was on the anticipated behavior of a third party whose actions were a "step in the chain of causation." *Id.* at 169. Where, as here, it is the defendants themselves whose actions are alleged to directly cause or contribute to the plaintiff's injury, the *Defenders/Bennett* scrutiny of third-party behavior is immaterial.

"contribute to a reduction in the risk and threat of injury to the [States] and their citizens and residents. . . ." J.A. 102. Under the reasoning in *Massachusetts*, this is plainly sufficient for Article III standing, especially at the pleading stage and before the parties have been called on to proffer evidence on whether the injury to the State Respondents' interests, such as property loss or risk of cataclysmic storm events, will in fact be ameliorated by the relief sought. *See Massachusetts*, 549 U.S. at 525 (addressing "emissions [that] make a meaningful contribution to greenhouse gas concentrations and hence . . . to global warming" adequate for standing); *id.* at 526 ("A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere. . . . *The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced to some extent if petitioners received the relief they seek.*") (emphasis added).

Consistent with *Massachusetts*, the federal courts of appeals have consistently held that a standing theory based on the proposition that a favorable judicial result will reduce the *risk* of a harmful impact occurring – especially an impact of catastrophic proportions – is sufficient for Article III standing, particularly in the context of environmental and public health claims, which "often are purely probabilistic." *Natural Res. Def. Council v. EPA*, 464 F.3d 1, 6 (D.C. Cir. 2006) (environmental organization had standing to challenge an EPA rule that would allegedly result in an increased risk that one in 200,000 people

would develop skin cancer); *see also Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1235 (D.C. Cir. 1996) (standing existed where the defendant's actions allegedly contributed to an increased risk of wildfire; "the potential destruction of fire is so severe that relatively modest increments in risk should qualify for standing" notwithstanding the "presence of other causal factors"); *Baur v. Veneman*, 352 F.3d 625, 633, 637 (2d Cir. 2003) (the plaintiff's allegation that he faced an increased risk of contracting a food-borne illness from the consumption of downed livestock constituted a "'credible threat of harm' [sufficient] to establish injury-in-fact based on exposure to enhanced risk" (internal quotation omitted); the "courts of appeals have generally recognized that threatened harm in the form of increased risk of future injury may serve as injury-in-fact for Article III standing purposes"); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000) (*en banc*) (finding water pollution that increased risks of health problems and resource impacts for those living in proximity to the water body sufficient for standing; "Threats or increased risk thus constitutes cognizable harm. Threatened environmental injury is by nature probabilistic. And yet other circuits have had no trouble understanding the injurious nature of risk itself." (citing *Vill. of Elk Grove v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993) and *Sierra Club v. Cedar Point Oil Co. Inc.*, 73 F.3d 546, 556 (5th Cir. 1996))); *cf. Helling v. McKinney*, 509 U.S. 25, 35 (1993) (a prisoner had standing to bring an Eighth Amendment claim based on allegations that prison

officials had exposed him to second-hand smoke posing an increased risk of damage to his future health). The identical principle supports the State Respondents' standing here, especially in the absence of any legitimate legal basis on which the Court could simply *presume*, as Petitioners urge, that the relief sought by the States would afford them no meaningful benefit.[5]

---

[5] That other entities will continue to emit greenhouse gases, or even increase their emissions, does not defeat the States' ability to obtain a reduction in the risk of catastrophic harm to the States' sovereign and proprietary interests relative to a case in which their emissions continued unabated. As *Massachusetts* holds, it is sufficient for standing that the relief sought will help to "'relieve a discrete injury'" and "reduce the probability" of harm to some extent; the States "'need not show that a favorable decision will relieve [their] *every* injury'" or entirely eliminate the risk of harm. 549 U.S. at 525, 526 n.23 (quoting *Larson v. Valente*, 456 U.S. 228, 244 n.15 (1982)); other internal quotations omitted; *see also Meese v. Keene*, 481 U.S. 465, 476 (1987) (finding standing where "enjoining the application of the words political propaganda to the films would at least partially redress the reputational injury of which appellee complains"). Indeed, as a matter of both Article III standing and traditional tort law, that entities other than Petitioners may *also* be contributing to the harms and risks suffered by the State Respondents is no impediment to the pursuit of their claims. *See, e.g., Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d at 161 ("Rather than pinpointing the origins of particular molecules, a plaintiff 'must merely show that a defendant discharges a pollutant that causes or contributes to the kind of injuries alleged' in the specific geographic area of concern." (internal quotation omitted)); *Loggerhead Turtle v. Cnty. Council of Volusia Cnty.*, 148 F.3d 1231, 1247 (11th Cir. 1998) ("[S]tanding is not defeated merely because the alleged injury can be fairly traced to the actions of both parties and non-parties."); *Natural Res. Def. Council v. Watkins*, 954 F.2d 974, 980 (4th Cir. 1992).

Many of the arguments of Petitioners and their *amici* essentially invite the Court to disregard the procedural posture of this case. The Court, however, should reject emphatically arguments that seek to deny Article III standing based on controverted contentions about the physics of climate change, or about the alleged relationship between Petitioners' emissions and alleged harms to Respondents.[6] Plaintiffs have alleged facts that suffice, at the motion to dismiss stage, to establish injury, causation, and redressability. Whether they can prove each of those elements, and whether they can ultimately establish an entitlement to relief under their common law nuisance claim, should be determined, not on the bare assertions of counsel, but on the application of the pertinent legal standards to evidence proffered by the parties in accordance with governing procedural and evidentiary rules. *See Defenders of Wildlife*, 504 U.S. at 561; *cf. Akins*, 524 U.S. at 21 (courts must assume the validity of the plaintiff's "view of the law" in ruling on their standing to bring suit).

---

[6] *See, e.g.*, Br. of Cato Inst. 16-17 (asserting the Respondents could not prove that Petitioners' emissions are substantially likely the cause of their injuries); Br. of Chevron USA, Inc., *et al.* 18 (arguing that the physical realities of climate change make it impossible to establish Article III causation against any emitter); Br. of S.E. Legal Found., Inc., *et al.* 12-20 (asking Court to make factual determinations about the magnitude of Petitioners' contribution to injury and effect of possible remedies).

II. PETITIONERS' AND TVA'S PRUDENTIAL STANDING ARGUMENTS LACK MERIT.

Especially since the State Respondents have satisfied the requirements for Article III standing in view of *Massachusetts* and other precedents, the Court should also reject Petitioners' and TVA's argument that the case should be dismissed on prudential standing grounds – a rationale for dismissal that has been raised for the first time in this Court. The Court's standing precedents "subsume[] a blend of constitutional requirements and prudential considerations," and it "has not always been clear in the opinions of [the] Court whether particular features of the 'standing' requirement have been required by Art. III *ex proprio vigore*, or whether they are requirements that the Court itself has erected and which were not compelled by the language of the Constitution." *Valley Forge,* 454 U.S. at 471. Although the Court has not "exhaustively defined the prudential dimensions of the standing doctrine," *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004), only in a handful of cases has the Court directed dismissal *solely* on prudential standing grounds, and the Court has never previously done so based on the kinds of arguments advanced by Petitioners and TVA here.[7]

---

[7] Tellingly, neither Petitioners nor TVA has cited a single case in which the Court has found that a particular plaintiff had Article III standing (as the government concedes here in view of *Massachusetts*), and yet rejected standing on "prudential" grounds. Rather, the Court has either relied on rationales that

(Continued on following page)

The Court's precedents set forth three basic categories of cases that implicate prudential standing concerns. First, overlapping with Article III considerations, "the Court has held that when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." *Warth*, 422 U.S. at 499; *see also* States Br. 23 (explaining that the generalized grievance requirement is "properly part of the Article III – not prudential standing – inquiry, because it addresses whether the plaintiff has suffered an injury-in-fact").

Second, "even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim on the legal interests of third parties." *Warth*, 422 U.S. at 499; *see also Newdow*, 542 U.S. at 15 & n.7 (case dismissed on prudential standing grounds where non-custodial parent's standing "derives entirely from his relationship with his daughter, but he lacks the right to litigate as her next friend"; "[t]here are good and sufficient reasons for th[e] prudential limitation on

---

clearly implicate *both* Article III and prudential considerations, *see, e.g., Warth v. Seldin*, 422 U.S. 490 (1975); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 218 (1975), or, in the very few cases decided solely on the basis of prudential standing, the Court has done so without resolving Article III standing. *See Newdow*, 542 U.S. at 17-18; *Kowalski v. Tesmer*, 543 U.S. 125, 128-29 (2004).

standing when rights of third parties are implicated – the avoidance of the adjudication of rights which those not before the Court may not wish to assert" (internal quotation omitted)); *Kowalski*, 543 U.S. at 128-29 (finding lack of prudential standing where plaintiff attorneys sought to "raise the rights of others").

Third, in cases predicated on a particular constitutional or statutory provision, the prudential standing issue is "whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth*, 422 U.S. at 500. In such cases, the Court inquires whether the "plaintiff's complaint fall[s] within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Valley Forge*, 454 U.S. at 475 (citing *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)).

None of those rationales for rejecting prudential standing applies here. Because the State Respondents are asserting a federal common law claim, there is no basis for inquiring whether the claim comes within the "zone of interests" of any particular constitutional or statutory provision. Nor is there any question as to whether the States are seeking to advance their own rights and interests in this litigation; rather, as *Massachusetts* makes plain, the State Respondents have an overriding sovereign "interest independent of and behind the titles of [their] citizens," as well as their own ownership interests in coastal areas threatened

by climate change. *Massachusetts*, 549 U.S. at 518 (internal quotation omitted).

As for whether the State Respondents are asserting merely a "generalized grievance," there is no basis in the Court's prudential standing precedents for holding that the kinds of injuries alleged by the States here fall in that category as it has previously been defined by the Court. Rather, as TVA acknowledges, *see* TVA Br. 21 n.7, when the Court has invoked this rationale for rejecting standing, it has done so in the context of an assertion of an "abstract" and "'generalized' interest of a taxpayer or citizen in having the government follow the law." *Id.*; *see also Schlesinger*, 418 U.S. at 217 (rejecting standing where the plaintiff asserted merely an "abstract" interest "shared by all citizens" in the government's compliance with the Incompatibility Clause). That is not even remotely comparable to the kinds of concrete and, indeed, devastating risks and injuries that the State Respondents assert here.

Accordingly, as TVA concedes, although TVA and Petitioners are employing the "generalized grievance" "terminology" from this Court's precedents, they are doing so in the service of a very different rationale for rejecting prudential standing than this Court has previously embraced, *see* TVA Br. 21 n.7 – *i.e.*, that global warming is an unprecedented problem that will invariably harm many landowners, as well as other "individuals, corporations, and governmental entities throughout the Nation and around the world," *id.* at 16, and that given the "complexity" of the

problem, "plaintiffs' concerns about climate change should be resolved by the representative branches, not federal courts," at least in the context of common law nuisance claims. *Id.* at 19, 20. Simply put, TVA's argument is that global warming is such an enormous problem that may harm so many people that the courts should be loath to resolve claims pertaining to it, at least in the absence of a specific citizen suit provision directing them to do so.

As noted, TVA candidly concedes that the Court has never previously invoked this type of rationale for dismissing a case on prudential (or, for that matter, Article III) standing grounds, *see* TVA Br. 21 n.7, and TVA's heavy reliance on *Newdow* underscores the extent to which TVA is asking the Court to plow new ground. *See* TVA Br. 14, 21, 23.[8] *Newdow* involved a non-custodial parent's effort to assert constitutional rights on behalf of a child whose interests were "not

---

[8] Indeed, the novel prudential standing theory on which TVA heavily relies is not just TVA's own invention, but it is a recent invention; it was not raised by either TVA or Petitioners during any of the extensive proceedings below. It would be especially inappropriate for the Court to make new standing pronouncements with potentially far-reaching implications in such circumstances. Rather, should the Court perceive any potential merit in these arguments, the proper course would be to remand so that the lower courts can take into account not only arguments advanced here for the first time, but also significant changes in the regulatory context – *i.e.*, the recent efforts by the executive branch to address greenhouse gas emissions through regulations and through a settlement that Respondents agree could moot the case.

parallel and, indeed, [were] potentially in conflict," 542 U.S. at 15; this not only triggered the well-entrenched "'prudential limitation on standing when rights of third parties are implicated,'" *id.* at 15 n.7 (quoting *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 80 (1978)), but also the Court's longstanding reluctance to resolve "family law" matters traditionally left to state courts. *Id.* at 17. However, *Newdow* involved such unusual facts, and such a concomitantly "narrow" rationale for dismissal on prudential standing grounds, that Chief Justice Rehnquist's separate opinion characterized the ruling as "the proverbial excursion ticket – good for this day only." *Id.* at 25 (Rehnquist, C.J., concurring).

In sum, TVA's new and amorphous prudential standing rationale is unsupported by this Court's standing precedents and contravenes the basic notion that the Court's "doctrine of prudential standing should be governed by general principles, rather than ad hoc improvisations." *Id.* (Rehnquist, C.J., concurring). This is especially so because the improvisation that TVA urges here is unnecessary to any legitimate interest in ensuring against a flood of lawsuits brought by an unconfined universe of plaintiffs against an unconfined universe of defendants.

Unlike the cases that gave rise to many of this Court's leading standing decisions, this case does not involve the question of whether to authorize a cause of action allowing citizens to enforce broadly drawn constitutional or statutory provisions. *See, e.g., Schlesinger,* 418 U.S. at 222; *United States v. Richardson,*

418 U.S. 166, 179, 188-89 (1974). Rather, this case involves a federal common law cause of action grounded in venerable common law nuisance principles. As Respondents have explained, the common law of nuisance contains its own distinctive requirements that limit who may sue, and when. *See, e.g.*, States Br. 26 (discussing requirements for public nuisance); Land Trusts Br. 18-19 (discussing "special injury" rule limiting class of plaintiffs who may bring suit for public nuisance). Furthermore, beyond the limiting principles inherent in the common law of nuisance, this Court and other federal courts have the authority to shape and confine the interstate federal common law cause of action in accordance with the paramount interests in providing remedies for interstate harms while maintaining interstate harmony. *Cf. Illinois v. City of Milwaukee, Wis.*, 406 U.S. 91, 108 (1972) ("informed judgment" and equitable principles govern); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 238-39 (1907) ("It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale"; finding that transboundary pollution had occurred on "so considerable a scale to the forests and vegetable life, if not to health, within the plaintiff state, as to make out a case within the requirements of *Missouri v. Illinois*, 200 U.S. 496 [1906].").

Accordingly, the concern cited by TVA and Petitioners that allowing the claim to proceed could provide "virtually every person" with "a claim against virtually every other person," TVA Br. 37; *see also*

Pet. Br. 2, 30, implausibly assumes an indiscriminate cause of action that has not been, and need not be, extended by any real-life system of substantive law. It overlooks both traditional limitations imposed by the common law of nuisance and it assumes away the authority of federal courts, acting in this area as common law courts, to shape the federal nuisance cause of action in light of reason, experience, and common sense. Especially in this legal context, there is no valid basis for erecting a novel prudential standing barrier that lacks solid mooring in this Court's decisions and could have untoward and unanticipated implications for future litigation extending beyond the common law nuisance claims asserted here.

CONCLUSION

For the foregoing reasons, the Court should hold that the State Respondents have Article III and prudential standing.

Respectfully submitted,

ERIC R. GLITZENSTEIN
Counsel of Record
WILLIAM S. EUBANKS II
SHRUTI SURESH
MEYER GLITZENSTEIN & CRYSTAL
1601 Connecticut Avenue, N.W.
Suite 700
Washington, D.C. 20009
(202) 588-5206

JASON C. RYLANDER
DEFENDERS OF WILDLIFE
1130 17th Street, N.W.
Washington, D.C. 20036
(202) 682-9400

SEAN H. DONAHUE
DONAHUE & GOLDBERG, LLP
2000 L Street, N.W.
Suite 808
Washington, D.C. 20036
(202) 277-7085

Counsel for Amici Curiae

AMICUS CURIAE BRIEF

FILED
FEB 7 - 2011
OFFICE OF THE CLERK

No. 10-174

IN THE

Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY INC., *et al.*,
Petitioners,

v.

STATE OF CONNECTICUT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* DRI—THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONERS

JOHN PARKER SWEENEY
T. SKY WOODWARD
KEVIN B. MATTINGLY
WOMBLE CARLYLE SANDRIDGE & RICE, PLLC
250 W. Pratt St., Suite 1300
Baltimore, MD 21201
(410) 545-5800

MICHAEL T. NILAN
PETER GRAY
CYNTHIA P. ARENDS
BENJAMIN J. ROLF
NILAN JOHNSON LEWIS P.A.
400 One Financial Plaza
120 South Sixth St.
Minneapolis, MN 55402
(612) 305-7500

R. MATTHEW CAIRNS
Counsel of Record
President
DRI—THE VOICE OF THE DEFENSE BAR
GALLAGHER CALLAHAN & GARTRELL PC
214 North Main St.
Concord, NH 03301
(603) 545-3622
cairns@gcglaw.com

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

41697 f 46

QUESTIONS PRESENTED

The court of appeals held that States and private plaintiffs may maintain actions under federal common law alleging that defendants—in this case, five electric utilities—have created a "public nuisance" by contributing to global warming, and may seek injunctive relief capping defendants' carbon dioxide emissions at judicially-determined levels. The questions presented are:

1. Whether States and private parties have standing to seek judicially-fashioned emissions caps on five utilities for their alleged contribution to harms claimed to arise from global climate change caused by more than a century of emissions by billions of independent sources.

2. Whether a cause of action to cap carbon dioxide emissions can be implied under federal common law where no statute creates such a cause of action, and the Clean Air Act speaks directly to the same subject matter and assigns federal responsibility for regulating such emissions to the Environmental Protection Agency.

3. Whether claims seeking to cap defendants' carbon dioxide emissions at "reasonable" levels, based on a court's weighing of the potential risks of climate change against the socioeconomic utility of defendants' conduct, would be governed by "judicially discoverable and manageable standards" or could be resolved without "initial policy determination[s] of a kind clearly for nonjudicial discretion." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. RESPONDENTS FAIL TO STATE A CLAIM UNDER FEDERAL COMMON LAW NUISANCE	4
A. While the Federal Common Law Public Nuisance Claim Exists to Fill Jurisdictional Interstices Where State Common Law Public Nuisance Cannot Lie, As a Matter of Substantive Law, the Federal Claim is No Different From its State Common Law Counterparts	4
B. The Parameters of a Common Law Public Nuisance Claim	6
1. Public nuisance requires a defendant's unreasonable interference with a public right	8
2. Defendant's conduct must proximately cause the nuisance and defendant must have control over the nuisance such that it can be abated.	10
3. The parameter of location	12

TABLE OF CONTENTS—Continued

Page

C. Respondents' Public Nuisance Allegations Do Not Satisfy Public Nuisance Parameters; Accordingly, Respondents Fail to State a Viable Federal Public Nuisance Claim 13

1. Respondents' allegations do not satisfy the requirements of causation and control 13

2. Respondents' allegations do not demonstrate unreasonable interference with a public right 18

II. RESPONDENTS MAY NOT PURSUE COMMON LAW PUBLIC NUISANCE CLAIMS AGAINST CERTAIN TARGETED DEFENDANTS FOR GENERALIZED INJURIES CAUSED IN LARGE PART BY ABSENT PARTIES.... 21

A. This Court Has Established Three Requirements That Must Be Satisfied to Obtain Article III Standing 22

B. The Constitutional Standing Requirements of Causation and Redressability Weigh Heavily Against Finding Article III Standing Here 22

III. RESPONDENTS SHOULD PURSUE THEIR POLICY CONCERNS BEFORE THE APPROPRIATE LEGISLATIVE AND REGULATORY BODIES 26

A. *Baker v. Carr* Sets Forth the Criteria for Determining Whether a Non-Justiciable Political Question Exists in a Given Case..... 27

TABLE OF CONTENTS—Continued

Page

B. The Second Circuit's Emphasis on the "Reasonableness" Standard of Public Nuisance Law Highlights the Problem of Courts Making Broad Policy Determinations Based on Narrow Notions of Reasonableness Under the Facts 28

C. Courts Cannot Adjudicate Respondents' Claims or Provide the Relief Requested Without Making Policy Trade-Offs Requiring Judgments Properly Reserved for the Legislative and Executive Branches 31

D. Ongoing Regulatory Efforts Underscore the Political Nature of These Claims 33

E. This Issue Presents Squarely a Likelihood of "Embarrassment" from Multifarious and Inconsistent Pronouncements from the Different Engaged Branches of Government 35

CONCLUSION 36

TABLE OF AUTHORITIES

CASES Page

Baker v. Carr, 369 U.S. 186 (1962) 27, 28

Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp., 273 F.3d 536 (3d Cir. 2001) 11

City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099 (Ill. 2005) 8, 10, 18

City of Manchester v. Nat'l Gypsum Co., 637 F. Supp. 646 (D.R.I. 1986) 11

City of Milwaukee v. Illinois, 451 U.S. 304 (1981) 4, 5, 7

City of Philadelphia v. Beretta U.S.A. Corp., 277 F.3d 415 (3d Cir. 2002) 11

City of St. Louis v. Benjamin Moore & Co., 226 S.W.3d 110 (Mo. 2007) 10, 11

Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009), *panel decision vacated by grant of en banc reh'g*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010), *pet. for writ of mandamus denied*, __ U.S. __, __ U.S.L.W. (Jan. 10, 2011) 28-29, 32

Connecticut v. Am. Elec. Power Co., Inc., 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *rev'd*, 582 F.3d 309 (2d Cir. 2009), *cert. granted*, 2010 WL 4922905 (U.S. Dec. 6, 2010) 31, 32, 35

TABLE OF AUTHORITIES—Continued

Page

Connecticut v. Am. Elec. Power Co., Inc., 582 F.3d 309 (2d Cir. 2009), *cert. granted*, 2010 WL 4922905 (U.S. Dec. 6, 2010) 14, 22-23, 28

County of Johnson v. United States Gypsum Co., 580 F. Supp. 284 (E.D. Tenn. 1984) ... 11

Detroit Bd. Of Educ. v. Celotex Corp., 493 N.W.2d 513 (Mich. Ct. App. 1992) 11

Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) 4, 16

Georgia v. Tennessee Copper Co., 237 U.S. 474 (1915) 16

Illinois v. Milwaukee, 406 U.S. 91 (1972) 4-5

In re Lead Paint Litigation, 924 A.2d 484 (N.J. 2007) 7, 8, 10, 11, 12

Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987) 30

Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221 (1986) 27

Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) 6

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 22

Massachusetts v. EPA, 549 U.S. 497 (2007) 26

Missouri v. Illinois, 180 U.S. 208 (1901) 4, 5

Missouri v. Illinois, 200 U.S. 496 (1906) 15

Native Village of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009) 24, 25, 29, 32

TABLE OF AUTHORITIES—Continued

Page

New Jersey v. City of New York, 283 U.S. 473 (1931) 16

New York v. New Jersey, 256 U.S. 296 (1921) 15, 20

North Carolina v. Tennessee Valley Authority, 615 F.3d 291 (4th Cir. 2010) ..... *passim*

North Dakota v. Minnesota, 263 U.S. 365 (1923) 4, 5, 15, 16

People ex rel. Spitzer v. Sturm, Ruger & Co., Inc., 761 N.Y.S.2d 192 (N.Y. App. Div. 2003) 10

Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc., 913 F.2d 64 (3d Cir. 1990) 23, 24

Sabater v. Lead Indus. Ass'n, Inc., 704 N.Y.S.2d 800 (N.Y. Sup. Ct. 2000) 9, 19

State v. Lead Indus. Ass'n, Inc., 951 A.2d 428 (R.I. 2008) ..... *passim*

Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co., 984 F.2d 915 (8th Cir. 1993) 11

Town of Hooksett Sch. Dist. v. W.R. Grace & Co., 617 F. Supp. 126 (D.N.H. 1984) 11

Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63 (1966) 4

Wheeldin v. Wheeler, 373 U.S. 647 (1963) ... 4

CONSTITUTION

U.S. CONST., art. III ..... *passim*

U.S. CONST., art. III, § 2, cl. 1 22

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741 (2003) 6, 7, 8, 9, 10, 12, 17, 18

Earl L. Hagström and Dennis E. Raglin, *Climate Change: The Next 'Hot' Topic in Product Liability Litigation*, FOR THE DEFENSE, Dec. 2008. 2

RESTATEMENT (SECOND) OF TORTS § 821B 8, 9, 30

William L. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399 (1942) 6, 7, 8, 9, 19

IN THE

Supreme Court of the United States

No. 10-174

AMERICAN ELECTRIC POWER COMPANY INC., *et al.*,
Petitioners,

v.

STATE OF CONNECTICUT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* DRI—THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI—the Voice of the Defense Bar is an international organization of more than 23,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness,

[1] Pursuant to Supreme Court Rule 37.6, DRI certifies that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from DRI, its members, and its counsel, made any monetary contribution toward the brief's preparation and submission. Counsel consented to the brief's filing in letters that are on file with the Clerk's office.

and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys, to promote the role of defense attorneys, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system more fair, efficient, and—when national issues are involved—consistent. To promote these objectives, DRI participates as *amicus curiae* in cases, like this one, that raise issues important to its membership, their clients, and the judicial system.

DRI members are widely experienced in litigating federal public nuisance cases and understand the issues raised by such cases in a wide variety of contexts. They also bring deep expertise in applying the Court's justiciability standards in public nuisance and similar cases.

DRI members are familiar with the burdens of defending such inchoate allegations as Respondents urge upon the courts here. DRI and its members seek to promote a level playing field and fundamental fairness for corporate business interests in civil litigation. Nothing could be more unfair than to be called to defend in federal court claims that do not belong in the courts at all. DRI members have demonstrated the inappropriateness of judicial resolution of such climate change tort claims in scholarly publications. *See, e.g.*, Earl L. Hagström and Dennis E. Raglin, *Climate Change: The Next 'Hot' Topic in Product Liability Litigation*, FOR THE DEFENSE, Dec. 2008, at 30-34, 78-79.

This Court should reverse the Second Circuit's judgment in order to bring fairness, consistency, and predictability to public nuisance litigation seeking to redress alleged climate change injuries.

SUMMARY OF ARGUMENT

Although Respondents' goal of reducing global climate change is laudable, pursuing a federal common law public nuisance action against a handful of arbitrarily-selected energy-generating targets is an improper use of the courts in achieving that end. If Respondents seek redress for their alleged injuries and urge establishment of standards governing greenhouse gas emissions, the more appropriate avenues are Congress and the EPA, not the federal courts, at least in the first instance. Four federal district courts faced with similar claims have found as much.

First, Respondents' complaint fails to state a claim for federal common law public nuisance because Respondents are unable to satisfy the tort's requirements, including the requirements of causation, control, location, and unreasonable interference with a public right, and because no court can order effective abatement of global warming, and no defendant or any number of defendants can perform such abatement.

Second, Respondents lack Article III standing to pursue their claims, failing to plead facts that demonstrate the well-established requirements of causation and redressability.

Third, Respondents' claims raise non-justiciable political questions for which the federal courts are ill-suited, as the courts lack judicially discoverable and manageable standards for evaluating Respondents' claims, would be forced to make impermissible initial policy determinations, and would inevitably create multifarious pronouncements leading to potential embarrassment.

ARGUMENT

I. RESPONDENTS FAIL TO STATE A CLAIM UNDER FEDERAL COMMON LAW NUISANCE.

A. While the Federal Common Law Public Nuisance Claim Exists to Fill Jurisdictional Interstices Where State Common Law Public Nuisance Cannot Lie, As a Matter of Substantive Law, the Federal Claim is No Different From its State Common Law Counterparts.

Federal common law exists "in a 'few and restricted' instances" where "Congress has not spoken to a particular issue" and there exists a "'significant conflict between some federal policy or interest and the use of state law,'" and it is therefore "necessary . . . to develop federal common law." *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981) ("*Milwaukee II*") (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966) and *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963)). One of these "few and restricted instances" is a federal common law public nuisance claim that applies in certain limited circumstances where a public nuisance condition is alleged to exist but no state can reach or remedy the nuisance condition through its own public nuisance laws, e.g., where an interstate nuisance condition implicates the rights of states. *See North Dakota v. Minnesota*, 263 U.S. 365, 373-74 (1923); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237-39 (1907) ("*Tennessee Copper I*"); *Missouri v. Illinois*, 180 U.S. 208, 241 (1901) ("*Missouri I*").

While the federal common law public nuisance claim originated in cases brought under the Court's original jurisdiction, in *Illinois v. Milwaukee*, 406

U.S. 91 (1972) ("*Milwaukee I*"), the Court determined that a state plaintiff could bring a federal common law public nuisance action in federal district court to abate the discharge of untreated sewage into Lake Michigan. *Id.* at 93, 104-07. But the federal common law public nuisance claim is viable only where, among other things, it fills jurisdictional interstices in which state nuisance law cannot lie. *See Milwaukee II*, 451 U.S. at 313 n.7 ("In this regard we note the inconsistency in Illinois' argument and the decision of the District Court that both federal and state nuisance law apply to this case. If state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used.").

Aside from this jurisdictional distinction, however, the elements of a federal common law public nuisance claim do not differ from those of its state common law public nuisance counterparts. Both state and federal common law public nuisance claims derive from the same ancient common law roots and are governed by the same common law principles. This is apparent from examination of the Court's early public nuisance cases, which cite to and build upon cases that were decided under state common law public nuisance principles. *See North Dakota*, 263 U.S. at 372-74; *Missouri I*, 180 U.S. at 243-47. Accordingly, a viable federal common law claim for public nuisance must fit within the substantive parameters of any other traditional common law public nuisance claim.

B. The Parameters of a Common Law Public Nuisance Claim.

Common law public nuisance is a widely misunderstood and frequently denigrated tort. *See* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 774 (2003) ("In torts, a field of law where vague definitions, rules, and doctrines abound, no other tort is as vaguely defined or poorly understood as public nuisance."). In an article, Dean Prosser famously labeled public nuisance as "a sort of legal garbage can" that has "been used to designate anything from an alarming advertisement to a cockroach baked in a pie." William L. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 410 (1942) (footnotes omitted).[2] In the same article, Prosser illustrated the wide variety of human activities that the common law had branded as being public nuisances:

> It might involve interference with the public health, as in the case of a hogpen, a malarial pond, the keeping of diseased animals, or the pollution of a watercourse; with the public safety, as in the case of the storage of explosives, or the shooting of fireworks in the streets; with public morals, as by houses of prostitution, gaming establishments, lotteries, endurance contests, the illegal sale of liquor, or public profanity; with the public peace, as by loud and disturbing noises; with the public comfort, as in the case of bad odors, smoke, dust, or vibration; with public

---

[2] *See also Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1055 (1992) ("[O]ne searches in vain, I think, for anything resembling a principle in the common law of nuisance.") (Blackmun, J., dissenting).

> convenience, as by obstructing a highway or a navigable stream, or creating conditions which make travel unsafe.

Id. at 411-12 (footnotes omitted). Given this seeming grab bag of disparate acts constituting public nuisances, it is hardly surprising that this Court described public nuisance concepts as being "vague and indeterminate." *Milwaukee II*, 451 U.S. at 317.

The tort of public nuisance nevertheless does have principled and definable parameters. *See State v. Lead Indus. Ass'n, Inc.* 951 A.2d 428, 446-52 (R.I. 2008) (identifying and discussing the "principal elements that are essential to establish public nuisance"); *In re Lead Paint Litigation,* 924 A.2d 484, 494 (N.J. 2007) ("By carefully examining the historical antecedents of public nuisance and by tracing its development through the centuries, clear and consistent parameters that define it as a cognizable theory of tort law become apparent."); Gifford, *supra*, 71 U. CIN. L. REV. at 790 ("[C]areful historical analysis of the nearly one-thousand year history of public nuisance in Anglo-American law helps to define the parameters of the tort—even when applied in the most contemporary contexts.").

These parameters are perhaps best understood by keeping in mind a public nuisance action's primary purpose. "The core concept behind public nuisance is the right of public authorities to *end defendant's conduct* that harms the public, through remedies of either injunctive relief or criminal prosecution." Gifford, *supra*, 71 U. CIN. L. REV. at 814 (emphasis added and footnote omitted). *See also Lead Indus.*, 951 A.2d at 449 ("[T]he principal remedy for the harm caused by the nuisance is abatement."); *In re Lead Paint Litigation*, 924 A.2d at 494-95 ("Originally,

public nuisance was created as a criminal offense, . . . which was used to allow public officials, acting in the place of the sovereign, to prosecute individuals or require abatement of activities considered to be harmful to the public[.]"). The activities itemized in the Prosser quotation *supra* all fit within this core concept. Each involved activity that was immediately harmful to the public, which could be effectively terminated by either an injunction of abatement against (or by criminal prosecution of) the defendant-source. The parameters and boundaries that courts have recognized in public nuisance actions all further this purpose of terminating conduct that is harmful to the public.

1. Public nuisance requires a defendant's unreasonable interference with a public right.

As an essential element, a public nuisance must implicate a right common to the *general public*. *See Lead Indus.*, 951 A.2d at 447; *In re Lead Paint Litigation*, 924 A.2d at 496-97; *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1113-16 (Ill. 2005); RESTATEMENT (SECOND) OF TORTS § 821B; Gifford, *supra*, 71 U. CIN. L. REV. at 814-15. This requirement flows naturally from public nuisance's core purpose of providing public authorities with a vehicle for ending conduct that harms the public. The right must be common to the public as a whole. As the Restatement explains:

> Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right. A public right is one common to all members of the general public. It is collective in

> nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured.

Id., cmt. g. Furthermore, in this context, the term "public right" is not coextensive with the concept of "public interest." *Lead Indus.*, 951 A.2d at 448. In the words of one commentator:

> That which might benefit (or harm) 'the public interest' is a far broader category than that which actually violates 'a public right.' For example, while promoting the economy may be in the public interest, there is no public right to a certain standard of living (or even a private right to hold a job).

Gifford, *supra*, 71 U. CIN. L. REV. at 815.

Furthermore, not all conduct that interferes with a public right is actionable in public nuisance. Much activity that ostensibly interferes with public rights is tolerated—even encouraged—because the activity bestows benefits and utility that outweigh the corresponding interference. This helps explain why public nuisance has historically been limited to use against activity that is either criminal or quasi-criminal in nature. As Dean Prosser categorically stated, in its origins, "public nuisance was always a common law crime." Prosser, *supra*, 20 TEX. L. REV. at 411. *See also Sabater v. Lead Indus. Ass'n, Inc.*, 704 N.Y.S.2d 800, 806 (N.Y. Sup. Ct. 2000) ("Public nuisance . . . at common law was always a crime and punishable as such."). While this is no longer a complete statement of the law as it exists today, nevertheless, "civil liability traditionally has been an incidental aspect of public nuisance." Gifford, *supra*, 71 U. CIN. L. REV. at 781.

Again, this is in keeping with "[t]he primary purpose of public nuisance [which] has been as a vehicle to enable public authorities to terminate conduct found to be harmful to the public health or welfare." *Id.* (footnote omitted). Consequently, "[c]riminal prosecutions against those maintaining public nuisances and injunctions brought by public authorities historically have been and remain the principal means of addressing public nuisances." *Id.* (footnotes omitted). The modern test for evaluating whether an interference is reasonable or unreasonable is an outgrowth of public nuisance's historic criminal/quasi-criminal roots and "will depend upon the activity in question and the magnitude of the interference it creates." *Lead Indus.*, 951 A.2d at 448.

2. Defendant's conduct must proximately cause the nuisance and defendant must have control over the nuisance such that it can be abated.

A defendant is not liable for public nuisance unless it proximately caused the nuisance condition. *Lead Indus.*, 951 A.2d at 450-51; *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 113-15 (Mo. 2007); *City of Chicago*, 821 N.E.2d at 1127-28; *People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 761 N.Y.S.2d 192, 201 (N.Y. App. Div. 2003). A distinct, but related, requirement is that the defendant have control over the nuisance-creating instrumentality or instrumentalities. *See, e.g., Lead Indus.*, 951 A.2d at 449 ("As an additional prerequisite to the imposition of liability for public nuisance, a defendant must have *control* over the instrumentality causing the alleged nuisance *at the time the damage occurs.*"); *In re Lead Paint Litigation*, 924 A.2d at 501 (rejecting plaintiffs' nuisance theory that "would separate

conduct and location and thus eliminate entirely the concept of control of the nuisance"); *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 539 (3d Cir. 2001) ("For the interference to be actionable, the defendant must exert a certain degree of control over its source.").

Linking public nuisance liability with defendant's "control" over the nuisance is sensibly premised upon the fact that "without control a defendant cannot abate the nuisance." *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993). *See also Lead Indus.*, 951 A.2d at 449 ("Indeed, control at the time the damage occurs is critical in public nuisance cases, especially because the principal remedy for the harm caused by the nuisance is abatement.").[3] Largely for this reason, courts have rejected the argument that liability for public nuisance can be premised upon a defendant's mere *contribution* to a condition that allegedly gives rise to a public nuisance. *See Lead Indus.*, 951 A.2d at 449-50; *City of St. Louis*, 226 S.W.3d at 115-16. These decisions simply recognize the obvious: a court cannot order a defendant to abate—*i.e.*, to end or

---

[3] Thus, courts routinely dismiss public nuisance claims brought against defendants who lack control over the instrumentality that allegedly gives rise to the nuisance. *See Lead Indus.*, 951 A.2d at 455; *In re Lead Paint Litigation*, 924 A.2d at 501; *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 422 (3d Cir. 2002); *Camden County Bd.*, 273 F.3d at 541; *Tioga*, 984 F.2d at 920; *Detroit Bd. Of Educ. v. Celotex Corp.*, 493 N.W.2d 513, 522 (Mich. Ct. App. 1992); *City of Manchester v. Nat'l Gypsum Co.*, 637 F. Supp. 646, 656 (D.R.I. 1986); *Town of Hooksett Sch. Dist. v. W.R. Grace & Co.*, 617 F. Supp. 126, 133 (D.N.H. 1984); *County of Johnson v. United States Gypsum Co.*, 580 F. Supp. 284, 294 (E.D. Tenn. 1984).

terminate—a public nuisance over which the defendant is, at most, a "contributor."

3. The parameter of location.

A final recognized parameter of a viable public nuisance claim is a recurring attribute of location. "A common feature of public nuisance is the occurrence of a dangerous condition at a specific location." *State v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428, 452 (R.I. 2008). *See also In re Lead Paint Litigation*, 924 A.2d at 495 ("[P]ublic nuisance has historically been tied to conduct on one's own land or property as it affects the rights of the general public."). As one commentator has explained:

> [A] finding of public nuisance historically involved the use of land. In most cases, the harm resulting from the public nuisance arose from the defendant's ownership, possession, or use of land and flows directly from the history of public nuisance law, and specifically the requirement that the defendant be in control of the instrumentality causing the harm. Again, the principal focus of public nuisance law generally has been to provide a means of abating or ending defendant's continuing conduct that is harming the public safety or welfare.

Gifford, *supra*, 71 U. CIN. L. REV. at 832 (footnotes omitted).

C. Respondents' Public Nuisance Allegations Do Not Satisfy Public Nuisance Parameters; Accordingly, Respondents Fail to State a Viable Federal Public Nuisance Claim.

Analyzed through these well-accepted public nuisance parameters, Respondents' global warming nuisance claim fails to state a claim on which relief can be granted.

1. Respondents' allegations do not satisfy the requirements of causation and control.

Petitioners cannot be liable for public nuisance under Respondents' global nuisance theory. By Respondents' own admission, Petitioners have not caused global warming. By Respondents' own admission, Petitioners do not control the instrumentalities that have caused global warming. Petitioners cannot successfully "abate" global warming. Nor can a federal district court order the successful abatement of global warming. Assuming *arguendo* that a district court granted the injunctive relief requested by Respondents, relief from the alleged harm would remain illusory. Unlike an agency and legislature, which have jurisdiction to address the problem further through later incremental steps, a court, which has control over the parties before it as litigants, would be impotent to solve the problem. The problem is simply too big for common law public nuisance to resolve.

In their complaints, Respondents cannot truthfully allege, and therefore do not allege, that Petitioners have proximately caused global warming. Instead, Respondents merely allege that Petitioners have

"contributed" to global warming. *See* J.A. 57, 118. According to Respondents, Petitioners "allegedly account for 2.5% of man-made carbon dioxide emissions." *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d 309, 347 (2d Cir. 2009), *cert. granted*, 2010 WL 4922905 (U.S. Dec. 6, 2010).[4] Stated otherwise, and viewing these allegations in the light most favorable to Respondents, Petitioners allegedly contribute 2.5 percent of all worldwide man-made carbon dioxide emissions, and have caused and can control *just 2.5 percent of the anthropomorphic instrumentalities that cause the purported global warming public nuisance.* Respondents do not identify the actors that have caused and exercise control over the remaining 97.5 percent of the alleged nuisance-creating instrumentalities.

As a matter of law, these allegations are insufficient to establish the causation element of a viable public nuisance claim. This point is illustrated by the legal authorities cited in Section I.B.3, *supra*. More importantly, this conclusion is dictated by the Court's own public nuisance cases. Repeatedly in cases arising under this Court's original jurisdiction,

---

[4] In their complaints, Respondents allege that electrical power plants located within the United States annually emit approximately 2.6 billion tons of carbon dioxide. *See* J.A. 85, 136. These emissions allegedly constitute "approximately forty percent of all carbon dioxide emitted by human activities in the United States and approximately ten percent of worldwide carbon dioxide emissions from human activities." *Id.* Petitioners, in turn, are alleged to annually emit "approximately 650 million tons of carbon dioxide," which "constitutes one quarter of the U.S. electric power sector's carbon dioxide emissions and approximately 10 percent of all anthropogenic [i.e., of or related to the influence of human beings] carbon dioxide emissions in the United States." *Id.* at 57, 84, 118, 136.

the Court has rejected public nuisance claims where the plaintiff could not demonstrate that the defendant's conduct caused the alleged nuisance. In *Missouri v. Illinois*, 200 U.S. 496 (1906) ("*Missouri II*"), the Court rejected Missouri's claim that Illinois' discharge of waste into the Mississippi River had caused an increase in the incidence of typhoid fever in the City of St. Louis. *Id.* at 522-23. The Court rejected this claim because the evidence as to the source of typhoid *bacilli* in the river was equivocal, with evidence pointing to Missouri as the source of much of the *bacilli*. *Id.* at 525-26.

Similarly, in *New York v. New Jersey*, 256 U.S. 296 (1921), the Court rejected the State of New York's claim that New Jersey threatened to create a public nuisance by its plan to discharge 120 million gallons of sewage per day into Upper New York Bay. *Id.* at 313. As in *Missouri v. Illinois*, the evidence of record demonstrated that New Jersey was far from the sole source of sewage contamination in New York Bay; indeed, New York City and its environs alone were responsible for the daily discharge into the bay of several hundred million gallons of sewage. *Id.* at 309-10. Faced with this evidence, the Court concluded that New York had not established that New Jersey's threatened sewage discharge would create an actionable public nuisance. *Id.* at 312-13.

Thereafter, in *North Dakota v. Minnesota*, 263 U.S. 365 (1923), the Court rejected North Dakota's claim that Minnesota had created a public nuisance "by constructing cut-off ditches and straightening [a local river]" which "increased the speed and volume of its flow into [a nearby lake], and thereby raised the level of the lake, causing its outlet [stream] . . . to overflow and greatly to injure a valuable farming area in

North Dakota." *Id.* at 371. Once again, the claim failed for want of causation, particularly given Minnesota's compelling evidence of heavy rainfalls as an alternative source of the complained-of flooding. *Id.* at 386-87.

By contrast, where the Court has found that a defendant's conduct caused a public nuisance, and ordered that the nuisance be abated, the evidence clearly established that the defendant was *the* source of the nuisance-causing instrumentality, and by enjoining the defendants' conduct the court could abate the nuisance. Thus, in the *Tennessee Copper* cases, the Court ordered abatement where the public nuisance could be solely traced to the defendants' conduct of "smelting copper ores in Polk county, East Tennessee, near the Georgia line." *Georgia v. Tennessee Copper Co.*, 237 U.S. 474, 475 (1915) ("*Tennessee Copper II*"). Likewise, in *New Jersey v. City of New York*, 283 U.S. 473 (1931), the Court enjoined the defendant from "dumping garbage into the ocean or waters of the United States off the coast of New Jersey and from otherwise polluting its waters and beaches." *Id.* at 476-77. In that case, the evidence established both that the defendant's dumped garbage was "driven and carried by winds and water to and upon the shores of the plaintiff, and constitute the objectionable materials thereon and in the adjacent water," and that "whatever garbage reaches the plaintiff's shores from vessels and other dumpings than those of the defendant was negligible in comparison with that constantly being dumped by the defendant." *Id.* at 480, 481.

Here, unlike the cases discussed above, there is no need to receive evidence as to whether Petitioners' emissions have proximately caused global warming

or whether global warming is a condition subject to Petitioners' control and power to abate. Respondents' own allegations establish that Petitioners have caused and exercise control over, at most, 2.5 percent of the anthropomorphic segment of the instrumentality that ostensibly creates the claimed global warming public nuisance. As a matter of law, this causation allegation is woefully and fatally insufficient.

Moreover, Respondents' global warming public nuisance theory is divorced from common law nuisance's historic nexus "to defendant's ownership, possession, or use of land." Gifford, *supra*, 71 U. CIN. L. REV. at 832. The carbon dioxide that results in global warming does not arise from a distinct location or even from an ascertainable number of different locations. Every automobile, aircraft, train, ship—indeed, every human being—on the planet is a source of carbon dioxide emissions. In the aggregate, these mobile sources emit massive amounts of carbon dioxide, and do so without being anchored to any particular location or locations.

Confronted with these fatal defects, Respondents do not allege that Petitioners are capable of abating the alleged global warming nuisance—at least as the term abatement has been historically understood as "ending defendant's continuing conduct that is harming the public safety or welfare." Gifford, *supra*, 71 U. CIN. L. REV. at 832. Instead, Respondents merely allege that "[r]eductions in the carbon dioxide emissions of [Petitioners] will contribute to a reduction in the risk and threat of injury to [Respondents] and their citizens and residents from global warming." *See* J.A. 102; *see also id.* at 145 ("Reducing carbon dioxide emissions is necessary to postpone, avert or reduce the injuries described above.")). Reduction

and postponement, however, do not equal abatement; thus, Respondents tacitly concede that the District Court cannot order the successful abatement of the alleged public nuisance. Nor, for that matter, could any court located anywhere on the planet.

2. Respondents' allegations do not demonstrate unreasonable interference with a public right.

In their complaints, Respondents allege that Petitioners have unreasonably interfered with Respondents' "right to public comfort and safety, the right to protection of vital natural resources and public property, and the right to use, enjoy, and preserve the aesthetic and ecological values of the natural world." *See* J.A. 103-04; *see also id.* at 146-47 ("the rights to use, enjoy, and preserve the aesthetic and ecological values of the natural world"). Whether these assertions sufficiently allege a right common to the general public is, at best, debatable; the claimed public rights sound suspiciously like public interests, which are not actionable. *See Lead Indus.*, 951 A.2d at 448; Gifford, *supra*, 71 U. CIN. L. REV. at 815. Courts have viewed with skepticism similarly vague and amorphous statements of purported public rights. *See Lead Indus.*, 951 A.2d at 453 (allegation that defendants have interfered with the "health, safety, peace, comfort or convenience of the residents of the [s]tate"); *City of Chicago*, 821 N.E.2d at 1114 ("a common right to be free from conduct that creates an unreasonable jeopardy to the public's health, welfare and safety, and to be free from conduct that creates a disturbance and reasonable apprehension of danger to person and property").

But even if it is assumed that Respondents have sufficiently alleged a public right, as a matter of law,

they have failed to allege that Petitioners have unreasonably interfered with that public right. As discussed earlier, public nuisance has historically targeted activity that is either criminal or quasi-criminal in nature. *Sabater*, 704 N.Y.S.2d at 806; Prosser, *supra*, 20 TEX. L. REV. at 411. Balancing the "activity in question and the magnitude of the interference it creates," *Lead Indus.*, 951 A.2d at 448, could a principled court deem Petitioners' conduct of providing bulk electric power the equivalent of the criminal and quasi-criminal activities that the common law of public nuisance has historically condemned? Can providing affordable electric power to hundreds of millions of people nationwide possibly be branded as an unreasonable interference with a public right?

Amicus curiae frames these as rhetorical questions because they are, indeed, rhetorical. Historically, common law public nuisance was never designed or intended to cover activities such as Petitioners' here. It does not cover Petitioners' conduct today.

Innumerable and insurmountable practical problems would result if Respondents' claims are permitted to proceed, underscoring Petitioners' contention that the tort of public nuisance should not be expanded as advocated by Respondents. Under Respondents' broad theory of liability for public nuisance claims based on climate change, defendants seeking to demonstrate their non-liability would be forced to undertake vast amounts of discovery, including, *inter alia*, (1) locating and deposing experts on global climate change from around the world at considerable expense, (2) examining the effect that other global emitters, which include every individual and business on Earth, have on climate change, and (3) obtaining

discovery materials regarding the global phenomena of climate change while world-wide scientific debate and international negotiations addressing the issue remain ongoing. In addition, the courts would be overwhelmed with both the number and complexity of the issues surrounding global climate change, such that expedient and fair adjudication of claims would be almost impossible. Finally, should claims such as Respondents' survive, every case will likely involve extensive counterclaim and third-party practice as defendants try to obtain offsetting redress from some or all of the contributors of the other 97.5% of climate change-causing carbon dioxide emissions. Thus, this Court must maintain and enforce the existing parameters of the tort of public nuisance, including causation, control, and location, against Respondents' proposed expansion and hold that Respondents have failed to state a claim for public nuisance in the present case.

In *New York v. New Jersey*, *supra*, this Court spoke in terms that are particularly salient in this case:

> We cannot withhold the suggestion, inspired by the consideration of this case, that the grave problem of sewage disposal presented by the large and growing populations living on the shores of New York Bay is one more likely to be wisely solved by co-operative study and by conference and mutual concession on the part of representatives of the states so vitally interested in it than by proceedings in any court however constituted.

256 U.S. at 313. While in so speaking, the Court was viewing the issue solely through the prism of the requisites of common law public nuisance, its admonition is apropos to the serious problems of

constitutional justiciability that are raised by Respondents' purported public nuisance claim. It is to these justiciability concerns that *amicus curiae* now turns.

II. RESPONDENTS MAY NOT PURSUE COMMON LAW PUBLIC NUISANCE CLAIMS AGAINST CERTAIN TARGETED DEFENDANTS FOR GENERALIZED INJURIES CAUSED IN LARGE PART BY ABSENT PARTIES.

If this Court determines that Respondents possess Article III standing, the federal courts will be flooded with endless litigation over injuries due to whatever weather issues can be alleged to be ascribed to global climate change against any alleged "contributor." To prevent overwhelming the federal courts with such inchoate litigation, and to insulate potential defendants, particularly American businesses, from having to mount costly and time-consuming defenses to these actions, this Court should enforce the well-established requirements of Article III standing and reject the Second Circuit's relaxed standing analysis for climate change public nuisance cases. Respondents are unable to satisfy at least two of this Court's traditional standing requirements, namely, causation and redressability.

The Second Circuit's curtailed standing requirement in this case provides a ready example of the mischief soon to follow upon anything but a rigorous application of the Court's standing criteria. Who among us would not have a cognizable injury under the Second Circuit's opinion? And when all share standing, will the truly injured even be able to be heard amidst the clamor of more motivated advocates?

A. This Court Has Established Three Requirements That Must Be Satisfied to Obtain Article III Standing.

Article III of the United States Constitution limits federal-court jurisdiction to "Cases" and "Controversies." U.S. CONST., art. III, § 2, cl. 1. The concept of standing "is an essential and unchanging part of th[is] case-or-controversy requirement." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

This Court has set out three constitutional requirements for Article III standing: (1) injury in fact, *i.e.*, "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical"; (2) causation, such that "the injury [is] fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party"; and (3) redressability, that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 560-61 (internal quotation marks and citations omitted). Respondents have failed to satisfy the causation and redressability prongs of this inquiry.

B. The Constitutional Standing Requirements of Causation and Redressability Weigh Heavily Against Finding Article III Standing Here.

To possess Article III standing, Respondents must demonstrate that their alleged injuries are "fairly traceable" to Petitioners' conduct. The Second Circuit below found sufficient to satisfy this requirement that "[Respondents] assert that [Petitioners'] continued emissions of carbon dioxide contribute to global warming, which harms them now and will harm

them in the future in specific ways." *Connecticut*, 582 F.3d at 345. In doing so, the Circuit Court relied heavily upon *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*, wherein the Third Circuit had set forth a three-part test to determine whether, under the Clean Water Act, an injury was "fairly traceable" to a defendant's discharge. 913 F.2d 64, 72 (3d Cir. 1990). That test requires that the defendant "1) discharged some pollutant in concentrations greater than allowed by its permit 2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that 3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs." *Id.*

Contrary to the Second Circuit's opinion, the *Powell Duffryn* test is inapplicable to the case at bar. On its face, the test requires that the defendant's discharge be greater than its permit allows; here, however, greenhouse gas emissions are not alleged to be limited through permitting at this time and, accordingly, there can be no allegation of exceeding of any permit limit. *Amicus curiae* submits that this fact negates inherently the applicability of the *Powell Duffryn* test in non-statutory tort contexts such as this, and asserts that the Second Circuit's excusing the first prong here was without persuasive justification. In addition, unlike in Clean Water Act cases such as *Powell Duffryn*, where the waterway has a defined geographic scope, climate change tort actions allege that the defendant's emissions are released into the air at large and react with incalculable other sources of emissions from across the globe and throughout past centuries to cause global climate change, such that a presumption of causation would be irrational. Finally, the *Powell Duffryn* court

recognized that causation requires a "'*substantial likelihood*' that defendant's conduct caused plaintiff's harm," 913 F.2d at 72 (emphasis in original), a showing absent here, as Respondents allege that Petitioners contribute less than three percent of anthropomorphic emissions. As such, the Second Circuit's reliance on the *Powell Duffryn* test is misplaced.

Although the District Court below did not address the standing issue, in *Native Village of Kivalina v. ExxonMobil Corp.*, the United States District Court for the Northern District of California, considering a damages claim theorizing that defendants' greenhouse gas emissions contributed to climate change that allegedly resulted in erosion of sea ice surrounding plaintiffs' village, rejected flatly the test of causation adopted by the Second Circuit below. 663 F. Supp. 2d 863, 879-80 (N.D. Cal. 2009). Specifically, the district court observed:

> There is a critical distinction between a statutory water pollution claim versus a common law nuisance claim. Under the Clean Water Act, the amount of effluent that may be legally discharged is strictly regulated . . . . [W]here the plaintiff shows that a defendant's discharge *exceeds* Congressionally-prescribed federal limits, it is presumed for purposes of standing that there is a 'substantial likelihood' that defendant's conduct caused plaintiffs' harm . . . . Only then is it permissible for the plaintiff to rely on the notion that the defendant "contributed" to plaintiff's injury . . . . In contrast, there are no federal standards limiting the discharge of greenhouse gases. As a result, no presumption arises that there is a substantial likelihood that any defendant's conduct harmed plaintiffs.

Id. (internal quotation marks and citations omitted) (emphasis in original); *see also id.* at 881 ("[I]t is not plausible to state which emissions—emitted by whom and at what time in the last several centuries and at what place in the world—'caused' Plaintiffs' alleged global warming related injuries.").

Adopting the Second Circuit's theory of causation would subject potentially every "contributor" to global climate change, *i.e.*, every individual, business, and other entity, to claims for injuries caused allegedly by climate change and essentially eliminate the necessity that plaintiffs demonstrate causation in such cases. Rather, this Court should adopt the reasoning in *Kivalina* and hold that Respondents failed to allege facts that could satisfy the causation requirement of Article III standing.

Similarly, Respondents did not plead facts that would support a conclusion that a favorable court decision would likely redress their alleged injuries. As noted *supra*, in their complaint, Respondents admit that Petitioners' emissions make only a small contribution to the alleged harm. The alleged effects of global climate change are, according to Respondents' claims, caused in large part by the independent actions of third parties worldwide, over which the federal courts may never obtain jurisdiction. As such, issuance of injunctions against Petitioners would not result in any demonstrable relief for Respondents because Petitioners do not have the power to abate the asserted "public nuisance" of global climate change.

For the foregoing reasons, Respondents fail to satisfy the causation and redressability prongs of the *Lujan* Article III standing inquiry.[5]

III. RESPONDENTS SHOULD PURSUE THEIR POLICY CONCERNS BEFORE THE APPROPRIATE LEGISLATIVE AND REGULATORY BODIES.

Determination of the appropriate "remedy" in response to global climate change is a political question, requiring a delicate balancing of vast competing environmental, social, and economic interests, which the federal courts are ill-equipped to address in the first instance. Rather, any potential remedy for Respondents' concerns, if one exists, should be sought first in the legislative and regulatory arenas of government, not the courts. These "political" branches of government are outfitted to design a comprehensive policy solution to the dynamic issue of climate change. Respondents' dissatisfaction with the current progress made in those branches on this issue does not negate the inherently political nature of the

---

[5] In concluding that Respondents possessed Article III standing, the Second Circuit relied on *Massachusetts v. EPA*, 549 U.S. 497 (2007). There, however, the Court considered Article III standing in the context of an EPA decision not to regulate greenhouse gas emissions—a decision the reversal of which, according to the claims of the petitioning parties in that case, could offer the possibility of some relief to those parties—coupled, critically, with an *express statutory grant of judicial review* in such cases. *Id.* at 516-18 (noting that the statutory right of review was "of critical importance to the standing inquiry," such that plaintiffs' claims could proceed "without meeting all the normal standards for redressability and immediacy" (internal quotation marks omitted)). Here, no such statutory grant justifies relaxation of the well-established constitutional standing requirements.

problem. That events in those other branches have moved apace during the pendency of this suit underscores the "political" nature of the questions sought to be addressed here.

Permitting Respondents to sue certain arbitrarily-selected defendants for their alleged contributions to global climate change would be unfair and unjust, particularly to American businesses, the most likely targets of any such future actions. In addition to the cost and time involved in mounting defenses, American businesses would be forced to navigate a confusing, and potentially conflicting, patchwork of emissions regulations handed down by various federal district courts. Such an outcome emphasizes the need for a political, rather than judicial, "solution" to global climate change issues. A number of federal district courts have reached this very conclusion, namely, that such claims simply are inappropriate for judicial resolution.

A. *Baker v. Carr* Sets Forth the Criteria for Determining Whether a Non-Justiciable Political Question Exists in a Given Case.

The political question doctrine is "primarily a function of the separation of powers," *Baker v. Carr*, 369 U.S. 186, 210 (1962), "exclud[ing] from judicial review those controversies which revolve around policy choices and vague determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch," *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

This Court has identified six indicators of non-justiciable political questions: (1) "a textually demonstrable constitutional commitment of the issue to a

coordinate political department"; (2) "a lack of judicially discoverable and manageable standards for resolving it"; (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"; (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government"; (5) "an unusual need for unquestioning adherence to a political decision already made"; and (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker*, 369 U.S. at 217. Three of these indicators—the lack of judicially discoverable and manageable standards, the impossibility of deciding without an initial policy determination, and the potential for embarrassment from multifarious pronouncements—are present in this case.

B. The Second Circuit's Emphasis on the "Reasonableness" Standard of Public Nuisance Law Highlights the Problem of Courts Making Broad Policy Determinations Based on Narrow Notions of Reasonableness Under the Facts.

In the Second Circuit's opinion, "[w]ell-settled principles of tort and public nuisance law provide appropriate guidance to the district court in assessing [Respondents'] claims." *Connecticut*, 582 F.3d at 329. *Amicus curiae* submits respectfully that the Second Circuit is mistaken in this regard.

At least three other federal courts, including two federal district courts on the front lines of such politically-sensitive issues, have concluded that courts lack judicially discoverable and manageable standards for evaluating climate change tort actions. For example, in *Comer v. Murphy Oil USA*, the United

States District Court for the Southern District of Mississippi considered a damages claim alleging that defendants' emissions contributed to global warming and added to the ferocity of Hurricane Katrina, which damaged plaintiffs' property. *See* 585 F.3d 855, 859 (5th Cir. 2009) (panel decision reversing the district court's holding that plaintiffs' complaint posed a non-justiciable political question), *panel decision vacated by grant of en banc reh'g*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010), *pet. for writ of mandamus denied*, __ U.S. __, __ U.S.L.W. (Jan. 10, 2011). The district court found that plaintiffs' claims concerned essentially the broader political debate regarding the appropriate response to global climate change, which "ha[d] no place in the court, until such time as Congress enacts legislation which sets appropriate standards by which this court can measure conduct." *Id.* at 860 n.2. Similarly, in *Kivalina*, the district court determined that general public nuisance law provided no guidance as to gauging the "reasonableness" of defendants' conduct with regard to "the energy-producing alternatives that were available in the past," such that the court was without standards to render a decision "that is principled, rational, and based upon reasoned distinctions." 663 F. Supp. 2d at 874-75. Finally, in *North Carolina v. Tennessee Valley Authority*, the Fourth Circuit reversed an injunction requiring immediate installation of emissions controls at four TVA electricity generating plants in response to plaintiffs' public nuisance claims, finding that the injunctions would "encourage courts to use vague public nuisance standards to scuttle the nation's carefully created system for accommodating the need for energy production and the need for clean air" and noting that, "while public nuisance law

doubtless encompasses environmental concerns, it does so at such a level of generality as to provide almost no standard of application." 615 F.3d 291, 296, 302 (4th Cir. 2010).

Despite the Second Circuit's confidence in the abilities of the federal district courts, the vague and undefined "reasonableness" standard of the Restatement (Second) of Torts, characterized by the Second Circuit as providing a sufficient standard upon which to determine what constitute "reasonable" emissions levels by Petitioners, provides no principled basis upon which to resolve Respondents' claims. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 496 (1987) (observing that "nuisance standards often are 'vague' and 'indeterminate'"). Determining a "reasonable" level of emissions requires policy considerations of the effects of global climate change, the ability of certain industries to lessen those effects through emissions limitations, and the social and economic impact of any such limitations. There is simply no "correct" resolution of those matters. Rather, emissions standards are designed and implemented by Congress and the EPA, which are equipped and authorized to balance all competing interests and create a broad regulatory scheme for reducing greenhouse gas emissions applicable to all regulated entities. This stands in stark contrast to courts that are permitted to adjudicate only the relative rights of the litigants in a pending suit before it. Only against those politically-created standards may a court gauge the "reasonableness" of a defendant's conduct. Circumventing legislative and regulatory authority by permitting cases such as this to proceed through the federal courts in the first instance would lead to the imposition of arbitrary emissions caps set by various district courts based upon each court's

independent resolution of the vague and indeterminate "reasonableness" standard of public nuisance law.

In sum, the lack of judicially discoverable and manageable standards as to the "reasonable" level of emissions renders the present case a non-justiciable political question.

C. Courts Cannot Adjudicate Respondents' Claims or Provide the Relief Requested Without Making Policy Trade-Offs Requiring Judgments Properly Reserved for the Legislative and Executive Branches.

Adjudication of the present dispute would require the District Court to make an "initial policy determination of a kind clearly reserved for non-judicial discretion," namely, a determination of the proper balance among competing environmental, social, and economic concerns related to the reduction of greenhouse gas emissions. As such, the present case presents a non-justiciable political question.

Observing the "transcendently legislative nature of this litigation," the District Court found that Respondents' claims "touch[] on . . . many areas of national and international policy." *Connecticut v. Am. Elec. Power Co., Inc.*, 406 F. Supp. 2d 265, 272 (S.D.N.Y. 2005), *rev'd*, 582 F.3d 309 (2d Cir. 2009), *cert. granted*, 2010 WL 4922905 (U.S. Dec. 6, 2010). Specifically, Respondents' requested relief would, at a minimum, require the court to "determine the appropriate level at which to cap the carbon dioxide emissions"; "determine the appropriate percentage reduction to impose"; "create a schedule to implement those reductions"; "determine and balance the implications of such relief on the United States' ongoing negotiations with other nations concerning global climate

change"; "assess and measure available alternative energy resources"; and "determine and balance the implications of such relief on the United States' energy sufficiency and thus its national security." *Id.* Thus, the District Court determined that Respondents' claims presented a non-justiciable political question requiring the court to make "an initial policy determination." *Id.* at 274.

Other federal district courts faced with similar claims have concurred with the District Court's opinion. For example, in *Comer*, the district court determined that plaintiffs' complaint asked the court to "balance economic, environmental, foreign policy, and national security interests and make an initial policy determination of a kind which is simply nonjudicial." 585 F.3d at 860 n.2. Similarly, in *Kivalina*, the district court observed that "resolution of Plaintiffs' nuisance claim require[d] balancing the social utility of Defendants' conduct with the harm it inflicts" and involved "a policy decision about *who* should bear the cost of global warming." 663 F. Supp. 2d at 876-77 (emphasis in original). The district court in that case found that "allocation of fault—and cost—of global warming is a matter appropriately left for determination by the executive or legislative branch in the first instance." *Id.* at 877.

The present case is no "ordinary tort action." At its heart, it concerns who should bear the expense of global climate change and how to balance the competing environmental, social, and economic interests surrounding reduction of greenhouse gas emissions. Such issues indisputably require the making of initial policy determinations reserved to the elected branches of government, which are able to consider the interests of all parties and formulate wide-ranging regulatory schemes. More importantly, these elected

officials are, unlike their judicial counterparts, politically accountable.

Respondents' dissatisfaction with the progress of policymakers cannot transform what is a complex policy matter into an action suitable for judicial adjudication. As resolution of the present matter would require the courts to make impermissibly "an initial policy determination," Respondents' claims present non-justiciable political questions.

D. Ongoing Regulatory Efforts Underscore the Political Nature of These Claims.

An extensive and comprehensive regulatory scheme already exists for the purpose of establishing environmental standards and responding to concerns regarding global climate change, obviating the necessity of emissions standards created by public nuisance lawsuits and emphasizing further the political nature of Respondents' claims.

In *TVA*, the Fourth Circuit described generally the overarching and extensive regulatory system governing air quality standards:

> Congress in the Clean Air Act opted rather emphatically for the benefits of agency expertise in setting standards of emissions controls, especially in comparison with the judicially managed nuisance decrees for which [plaintiff] argues. Indeed, the Act directs the EPA to ensure that its air quality standards "accurately reflect the latest scientific knowledge . . . ." The Clean Air Act's extensive coverage allows regulators with expertise in the relevant scientific fields to use their knowledge to create empirically-based emissions standards. The Act even requires the

> EPA to develop expertise so that it can provide states with information about available emissions controls, including "cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology" . . . .

615 F.3d at 304 (internal citations omitted). In addition, the court observed the potential pitfalls of supplementing the present regulatory scheme with a patchwork of judicial emissions decrees:

> The prospects of forum shopping and races to the courthouse, the chances of reversals on appeal, the need to revisit and modify equitable decrees in light of changing technologies or subsequent enactments, would most assuredly keep matters unsettled. Congress opted instead for an expert regulatory body, guided by and subject to congressional oversight, to implement, maintain, and modify emissions standards . . . .

Id. at 306.

Rather than rely on vague public nuisance standards of "reasonableness," the Fourth Circuit in *TVA* determined that the comprehensive regulatory scheme enacted by Congress and implemented by the EPA was the proper means for any potential redress of plaintiffs' alleged grievances in the first instance. The present case is no different. If Respondents are dissatisfied with the current status of greenhouse gas emissions standards, a carefully-crafted regulatory system is in place to address those concerns. That Congress elected not to have emissions standards designed by the federal courts on a case-by-case basis through public nuisance actions, opting rather for a comprehensive regulatory scheme, reinforces the

conclusion that such issues are political in nature and ill-suited to judicial resolution. *See Connecticut*, 406 F. Supp. 2d at 268-70. In truth, the present litigation "amounts to nothing more than a collateral attack on the system" with which Respondents are dissatisfied. *TVA*, 615 F.3d at 301 (internal quotation marks omitted).

E. This Issue Presents Squarely a Likelihood of "Embarrassment" from Multifarious and Inconsistent Pronouncements from the Different Engaged Branches of Government.

In *TVA*, the Fourth Circuit explained that granting the plaintiffs' requested relief would create "a balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike." *Id.* at 296. Similarly, the court noted that, "[i]f courts across the nation were to use the vagaries of public nuisance doctrine to overturn the carefully enacted rules governing airborne emissions, it would be increasingly difficult for anyone to determine what standards govern." *Id.* at 298. The Fourth Circuit's concerns in this regard are well-founded. Permitting claims such as Respondents' to proceed to adjudication would result in multifarious and inconsistent pronouncements as to what constitutes "reasonable" emissions standards.

Federal courts are incapable of "resolving" the problem of global climate change or redressing Respondents' alleged injuries—at most, the courts can target a discrete number of "contributors" and enforce against them judicially-created emissions restrictions based on amorphous "reasonableness" standards, with each "pronouncement" creating yet another square in the confusing nationwide pat-

chwork of fixes that defendants would have to navigate. Such a system presents a considerable likelihood of embarrassment, as varying district court emissions standards conflict inevitably, and as congressional and regulatory attempts to implement new standards governing greenhouse gas emissions run up against existing judicially-created standards. This likely scenario underscores the fact that global climate change requires a comprehensive political solution only Congress or the EPA can achieve. *See id.* at 305 (noting that administrative rulemaking "enables uniform application across industries, lessens the likelihood of distortions caused by the influence of individualized facts in cases, and also makes the resulting rules readily accessible in a single location"). For all of these reasons, adjudication of Respondents' claims would require the District Court to attempt impermissibly to answer inherently political questions.

CONCLUSION

Amicus curiae DRI—The Voice of the Defense Bar urges respectfully that this Court reverse the Second Circuit's judgment because Respondents fail to state a claim for federal common law public nuisance, lack Article III standing, and present non-justiciable political questions that are beyond the reach of judicial resolution.

Respectfully submitted,

JOHN PARKER SWEENEY
T. SKY WOODWARD
KEVIN B. MATTINGLY
WOMBLE CARLYLE
SANDRIDGE & RICE, PLLC
250 W. Pratt St., Suite 1300
Baltimore, MD 21201
(410) 545-5800

MICHAEL T. NILAN
PETER GRAY
CYNTHIA P. ARENDS
BENJAMIN J. ROLF
NILAN JOHNSON LEWIS P.A.
400 One Financial Plaza
120 South Sixth St.
Minneapolis, MN 55402
(612) 305-7500

R. MATTHEW CAIRNS
Counsel of Record
President
DRI—THE VOICE OF THE
DEFENSE BAR
GALLAGHER CALLAHAN &
GARTRELL PC
214 North Main St.
Concord, NH 03301
(603) 545-3622
cairns@gcglaw.com

Counsel for Amicus Curiae

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
FEB 7 - 2011
OFFICE OF THE CLERK

No. 10-174

IN THE
Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY INC., *et al.*,
Petitioners,

v.

STATE OF CONNECTICUT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE EDISON ELECTRIC INSTITUTE, AMERICAN PUBLIC POWER ASSOCIATION, AND NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

EDWARD H. COMER
Vice President and
General Counsel
WILLIAM L. FANG
EDISON ELECTRIC INSTITUTE
701 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 508-5615

CHRISTOPHER T. HANDMAN*
DOMINIC F. PERELLA
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5719
chris.handman@hoganlovells.com

*Counsel of Record

Counsel for Amici Curiae

(additional counsel listed on inside cover)

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

41535cl
39

Additional counsel:

SUSAN N. KELLY
Senior Vice President of Policy Analysis and
General Counsel
AMERICAN PUBLIC POWER ASSOCIATION
1875 Connecticut Avenue, N.W., Suite 1200
Washington, D.C. 20009-5715
(202) 467-2933

RAE E. CRONMILLER
Environmental Counsel
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION
4301 Wilson Boulevard
Arlington, VA 22203-1860
(703) 907-5500

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. "JUDICIAL REGULATION" OF GHG EMISSIONS IS BOTH UNNECESSARY AND UNWISE 5

A. The Political Branches Are Engaged In Comprehensive GHG Emissions Regulation 6

B. Judicial Regulation By Nuisance Suit Would Substantially Undermine The Existing Regulatory Scheme 14

II. PLAINTIFFS LACK STANDING 23

III. CONGRESS HAS DISPLACED ANY FEDERAL COMMON LAW IN THIS AREA 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Cases:

Alaska Dep't of Envtl. Conservation v. *EPA*, 540 U.S. 461 (2004) 11

Allen v. *Wright*, 468 U.S. 737 (1984) 4, 24

Angela R. by Hesselbein v. *Clinton*, 999 F.2d 320 (8th Cir. 1993) 22

City of Milwaukee v. *Illinois & Michigan*, 451 U.S. 304 (1981) 22, 26, 27

Elk Grove Unified Sch. Dist. v. *Newdow*, 542 U.S. 1 (2004) 4, 23, 24, 26

Entergy La., Inc. v. *Louisiana Pub. Serv. Comm'n*, 539 U.S. 39 (2003) 2

Illinois v. *City of Milwaukee*, 406 U.S. 91 (1972) 28

In re Gaston & Snow, 243 F.3d 599 (2d Cir. 2001) 29

Massachusetts v. *EPA*, 549 U.S. 497 (2007) 7, 10

New York v. *FERC*, 535 U.S. 1 (2002) 2

North Carolina ex rel. Cooper v. *Tennessee Valley Auth.*, 615 F.3d 291 (4th Cir. 2010) 15, 23

TABLE OF AUTHORITIES—Continued

Page

Sandin v. *Conner*,
515 U.S. 472 (1995) 22

Texas v. *Pankey*,
441 F.2d 236 (10th Cir. 1971) 28

Union Elec. Co. v. *EPA*,
427 U.S. 246 (1976) 11

Warth v. *Seldin*,
422 U.S. 490 (1975) 24, 25

Wisconsin Elec. Power Co. v. *Reilly*,
893 F.2d 901 (7th Cir. 1990) 11

Statutes:

5 U.S.C. § 706(2) 21

42 U.S.C. § 7408 6

42 U.S.C. § 7409 6

42 U.S.C. § 7410 6

42 U.S.C. § 7411(a) 9, 10

42 U.S.C. § 7411(b) 6

42 U.S.C. § 7411(c) 11

42 U.S.C. § 7411(d) 7, 9

42 U.S.C. § 7475(a)(4) 7, 8

42 U.S.C. § 7602(g) 6

42 U.S.C. § 7661 7

TABLE OF AUTHORITIES—Continued

Page

Ohio Rev. Code Ann. § 4928(B)-(C) 18

Legislative Materials:

Legislative Proposals to Reduce Greenhouse Gas Emissions: An Overview: Hearing Before the Subcomm. on Energy and Air Quality of the H. Comm. on Energy & Commerce, 110th Cong. (June 19, 2008) (statement of Edison Electric Inst. President Thomas R. Kuhn) 16, 20, 24

Rule:

S. Ct. R. 37.6 1

Regulatory Materials:

EPA Final Rule: *Prevention of Significant Deterioration & Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31514 (2010) 8, 10, 13

Final Order, *In re Application of Appalachian Power Co.*, No. PUE-2009-00030 (Va. S.C.C. July 15, 2010) 13

Order, *In re Application of Ky. Power Co. for Approval of Renewable Energy Purchase Agreement*, No. 2009-00545, 2010 WL 2640998 (Ky. P.S.C. June 28, 2010) 18

TABLE OF AUTHORITIES—Continued

Page

Other Authorities:

Carbon Control News, *FERC Faces Climate Challenge* (Oct. 28, 2008) 19

DOE, Energy Info. Admin., *Voluntary Reporting of Greenhouse Gases 2005* (Dec. 2006) 2

EEI, *Understanding EEI's Global Climate Change Points of Agreement* (Feb. 2009) 17

EPRI, *Modeling the Technology Mix* (2007) 19

EPRI, *The Power to Reduce CO_2 Emissions: The Full Portfolio* (2007) 17

EPA, *Air Quality Management—New Source Performance Standards* (Jan. 2010 ..... 9, 10, 18

EPA, *CAA National Enforcement Programs* (May 2010) 27

EPA, *DOT, EPA Set Aggressive National Standards for Fuel Economy & First Ever Greenhouse Gas Emission Levels for Passenger Cars & Light Trucks* (Apr. 1, 2010) 7

EPA, *EPA Proposes Rules on Clean Air Act Permitting for Greenhouse Gas Emissions* (Aug. 12, 2010) 11, 12

TABLE OF AUTHORITIES—Continued

Page

EPA, *EPA Sets Thresholds for Greenhouse Gas Permitting Requirements/Small Businesses & Farms Will Be Shielded* (May 13, 2010) 10

EPA, *Final Rule: Prevention of Significant Deterioration & Title V Greenhouse Gas Tailoring Rule, Fact Sheet* (May 13, 2010) 8

EPA, *The On-line State Implementation Plan Processing Manual—What's Not in a SIP* 9

EPA, *Understanding the Clean Air Act* (2008) 11, 12

FERC, *Renewable Portfolio Standards (RPS) & Goals* (updated Aug. 2010) 12

FireGrates R Us, *Fire Grate Frequently Asked Questions* 25

Institute for Elec. Efficiency, *State Electric Efficiency Regulatory Frameworks* (July 2010) 13

B. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 Geo. L.J. 257 (2001) 25

TABLE OF AUTHORITIES—Continued

Page

A. Lustgarten, *Climate Benefits of Natural Gas May be Overstated*, ProPublica (Jan. 25, 2011) 20

Pew Center on Global Climate Change, *Regional Initiatives* (updated July 2010) 12

Restatement (Second) of Torts § 821B(1) (1979) 21

E. Schor & S. Abruzzese, *Senate Dems Gear Up to Battle House GOP on EPA's Climate Regs*, NYTimes.com, Jan. 7, 2011 29

M. Wald, *EPA Says It Will Press on with Greenhouse Gas Regulation*, N.Y. Times, Dec. 23, 2010 8

IN THE

Supreme Court of the United States

No. 10-174

AMERICAN ELECTRIC POWER COMPANY INC., *et al.*,
Petitioners,

v.

STATE OF CONNECTICUT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE EDISON ELECTRIC INSTITUTE, AMERICAN PUBLIC POWER ASSOCIATION, AND NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST[1]

Edison Electric Institute ("EEI") is the national association of U.S. shareholder-owned electric utilities and their affiliates and industry associates

[1] Pursuant to Rule 37.6, counsel for *amici* certifies that no party, or counsel for a party, authored or paid for this brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amici*, their members, or their counsel made a monetary contribution to the brief. This brief is filed with the consent of all parties.

worldwide. Its members generate approximately three-quarters of all electricity produced by the nation's electric companies and serve about 70 percent of all retail customers in the nation. Organized in 1933, EEI represents its members' interests and advocates equitable policies in legislative and regulatory arenas.

The American Public Power Association ("APPA") represents the nation's more than 2,000 not-for-profit, publicly owned electric utilities, doing business in every state except Hawaii and serving more than 45 million Americans. APPA's members are units of state or local government.

The National Rural Electric Cooperative Association represents the nation's 930 not-for-profit, customer-owned rural electric cooperatives, which serve 42 million end users in 47 states.

Amici—whose member companies and utilities collectively serve 94 percent of the electric customers in the nation—appear regularly before this Court in cases presenting issues of great importance to the electric industry and the U.S. economy. *See, e.g.*, *Entergy La., Inc.* v. *Louisiana Pub. Serv. Comm'n*, 539 U.S. 39 (2003); *New York* v. *FERC*, 535 U.S. 1 (2002). This is such a case. *Amici*'s member companies recognize the growing concerns regarding the effects of climate change; indeed, the electric-utility industry leads all other sectors in reducing, avoiding, or sequestering greenhouse gas ("GHG") emissions. *See* Department of Energy, Energy Info. Admin., *Voluntary Reporting of Greenhouse Gases 2005* at 9 (Dec. 2006).[2] *Amici* and their members support well-

---

[2] *Available online at* http://www.eia.doe.gov/oiaf/1605/vrrpt/summary/pdf/0608(2005-s).pdf (last checked Jan. 31, 2011).

designed federal legislation and regulation intended to coordinate further reductions consistent with the ability to provide affordable, reliable electric service to customers. But because the problem at hand is *global* climate change, it is vital that GHG regulation be a *comprehensive* regime, undertaken with an eye toward all sources of GHG emissions and the most efficient, technologically feasible, and practical ways to reduce those emissions. Only a comprehensive approach can allow for sensible choices regarding (i) how to allocate emissions-reduction responsibilities across economic sectors, (ii) how to foster the technology necessary to facilitate reductions, and (iii) how to ensure that reductions do not saddle consumers with high energy prices and drive industries and jobs out of state or overseas.

Federal and state legislators and regulators have been working for years to implement these sorts of multifaceted emissions policies. The *ad hoc* adjudicatory approach approved by the Second Circuit would undermine those efforts. It is the antithesis of the comprehensive strategy the nation needs.

SUMMARY OF ARGUMENT

1. Plaintiffs essentially seek to have the federal courts regulate GHG emissions through case-by-case adjudication. Such a regulatory approach is as unnecessary as it is unwise. Electric utilities are already subjected to comprehensive regulation by the political branches. These legislators and expert agencies comprehensively consider the various ways to produce electricity and balance their costs—including environmental costs—against their benefits. And the essential attributes that allow them to craft effective and comprehensive GHG regulations—

subject-matter expertise, political accountability, and, most important, the ability to implement rules that apply across the board—are attributes the federal judiciary lacks. The Second Circuit's decision opens the door to extraordinarily fragmented, and costly, judicial regulation of GHG emissions. This Court should reject that approach.

2. Global climate change is an aggregative, global phenomenon: Every emission of carbon dioxide ("CO_2"), methane, and the four other major GHGs—which emanate not only from power plants, but also from motor vehicles, ruminant livestock, fireplaces, people, and billions of natural and anthropogenic sources—contribute proportionally.[3] And the solutions are complex; as already outlined, competent GHG emissions regulation necessarily involves a host of tradeoffs and requires detailed knowledge of how industry works. For both of those reasons, the claims plaintiffs advance are "'generalized grievances more appropriately addressed in the representative branches.'" *Elk Grove Unified School Dist.* v. *Newdow*, 542 U.S. 1, 12 (2004) (quoting *Allen* v. *Wright*, 468 U.S. 737, 751 (1984)). Plaintiffs lack prudential standing—as well as Article III standing—to maintain their suit.

---

[3] Each year, more than *6.1 million* domestic industrial, commercial, and other sources emit GHGs in excess of the Clean Air Act's general emission-tonnage applicability thresholds under the "new source review" program (100 or 250 tons per year, depending on the source category). And that does not even count all the sources that fall outside the Act, including international emissions sources. *See* EPA, *Prevention of Significant Deterioration & Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31514, 31540 (Table V-I) (June 3, 2010).

3. The bottom line is that GHG regulation is too consequential, and too complex, to address on a piecemeal basis. That is why Congress has already stepped in and displaced any federal common law that might exist in this area. Congress and the Environmental Protection Agency ("EPA") have taken actions—including significant steps since the decision below issued—that speak directly to the concerns plaintiffs seek to address through litigation. In the face of those actions, it is not the courts' place to fashion *ad hoc* rules through the largely standardless mechanism of public nuisance law. The decision below should be reversed.

ARGUMENT

I. "JUDICIAL REGULATION" OF GHG EMISSIONS IS BOTH UNNECESSARY AND UNWISE.

Adjudicating the plaintiffs' common-law tort claims—and those of similarly situated plaintiffs nationwide—is both unnecessary and unwise. It is unnecessary because the political branches are already regulating—extensively—the very same GHG emissions at issue in this common-law suit. And it is unwise because only the political branches have the tools needed to successfully regulate so diffuse a collection of activities leading to those emissions. Those political branches—Congress and EPA, buttressed at times by states working in conjunction with the federal government—have crafted laws and regulations that address emissions reductions. Specifically, Congress has enacted provisions in the Clean Air Act that authorize EPA to regulate GHGs where certain statutory prerequisites are met, and EPA has followed suit by adopting regulations

that impose emission-reduction obligations. And they have done so in a way that reflects an effort to tailor emissions requirements to the availability of technologies necessary to meet them, and to implement incentives designed to speed those technologies to market. To inject ad hoc "judicial regulation" of GHG emissions into this regulatory regime would sow confusion and burden industry with inordinately expensive regulatory uncertainty.

A. The Political Branches Are Engaged In Comprehensive GHG Emissions Regulation.

1. The principal federal actors in the GHG regulation field are Congress and EPA. Congress crafted the Clean Air Act as a comprehensive regime for regulating air pollutants. The Act broadly defines "air pollutants," *see* 42 U.S.C. § 7602(g), authorizes EPA to list pollutants that "endanger public health or welfare" where certain statutory prerequisites are satisfied, *id.* § 7408(a)(1), and requires states to regulate emissions of listed pollutants to prevent pollution from exceeding EPA standards. *Id.* §§ 7409-7410. But that is only the beginning of the wide-ranging regulatory regime the Act creates. It also authorizes EPA to list categories of "stationary sources"—*i.e.*, non-mobile emissions sources, such as power plants—that "cause[ ], or contribute[ ] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare," and to establish federal performance standards for new or modified sources that fall within the listed category. *Id.* § 7411(b)(1)(A), (B). It requires states to issue performance standards for existing stationary sources in some circumstances, subject to EPA-

promulgated guidelines. *Id.* § 7411(d). It requires that any major new or modified "emitting facility" obtain a permit to ensure prevention of significant deterioration ("PSD") of air quality and to certify that the facility will use "the best available control technology for each pollutant subject to regulation" under the Act. *Id.* § 7475(a)(4). And it requires operators of large stationary sources to apply for "Title V" operating permits that aggregate all of the Act's requirements. *Id.* § 7661.

In *Massachusetts* v. *EPA*, 549 U.S. 497, 532 (2007), this Court confirmed that CO_2, the principal GHG, is among the many air pollutants that the Clean Air Act authorizes EPA to regulate. Since *Massachusetts*, and particularly since the Second Circuit decision now on review, EPA has taken multiple steps to regulate GHG emissions. Indeed, in the months since the Court granted certiorari in this case, EPA has rolled out increasingly aggressive GHG regulatory plans—plans that render backdoor regulation of GHG emissions through federal common-law nuisance suits even more unnecessary and inappropriate than it was before.

In April 2010, EPA and the Department of Transportation "set the first-ever national greenhouse gas emissions standards * * * [for] all new passenger cars and light trucks sold in the United States." EPA, *DOT, EPA Set Aggressive National Standards for Fuel Economy & First Ever Greenhouse Gas Emission Levels for Passenger Cars & Light Trucks* (Apr. 1, 2010).[4] In June 2010, EPA turned its atten-

[4] *Available online at* http://yosemite.epa.gov/opa/admpress.nsf/8b770facf5edf6f185257359003fb69e/562b44f2588b871a852576f800544e01!OpenDocument (last checked Jan. 31, 2011).

tion to stationary sources like those at issue here: It adopted final "tailoring" rules providing that large GHG sources subject to the PSD and Title V programs must address GHG emissions in their permits, and setting a schedule for regulation of smaller sources. *See* EPA Final Rule: *Prevention of Significant Deterioration & Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31514 (June 3, 2010) ("*Tailoring Rule*"). Those rules, which took effect last month, apply to power plants. *Id.* at 31516. Thus, certain new and modified power plants that qualify as "[m]ajor emitting facilit[ies]" are now required to obtain permits certifying that they are "subject to the best available control technology" for GHGs. 42 U.S.C. § 7475(a)(4). And the agency has committed to undertake another rulemaking this year that will consider "additional step[s] for phasing in GHG permitting" and that may eventually result in similar permitting requirements for emissions sources as small as 50,000 tons per year. EPA, *Final Rule: Prevention of Significant Deterioration & Title V Greenhouse Gas Tailoring Rule, Fact Sheet* at 2-3 (May 13, 2010).[5]

Nor did EPA stop there. In December 2010—after the Court granted certiorari in this case—EPA expanded its GHG emissions oversight, announcing that before the end of this year it plans to propose GHG new source performance standards ("NSPS") applicable to new and modified fossil-fuel-fired electric power plants and petroleum refineries. *See* M. Wald, *EPA Says It Will Press on with Greenhouse*

---

[5] *Available online at* http://www.epa.gov/nsr/documents/20100413fs.pdf (last checked Jan. 31, 2011).

Gas Regulation, N.Y. Times, Dec. 23, 2010, at A16.[6] NSPS are "national emission standards that are progressively tightened over time to achieve a steady rate of air quality improvement without unreasonable economic disruption." EPA, *Air Quality Management—New Source Performance Standards* (Jan. 2010) ("*NSPS Summary*").[7] Under the NSPS program, EPA sets emissions standards of pollutants—here GHGs—for new and modified facilities in certain industry sectors, and the regulated facilities must install cost-effective, state-of-the-art emission controls to meet those standards. *See id.*; *see also* 42 U.S.C. § 7411(a)-(c). In the case of air pollutants that are not regulated under certain other provisions of the Clean Air Act, such as GHGs, the Act then "requires the States to determine appropriate control limits for *existing* sources for which there is an NSPS." EPA, *The On-line State Implementation Plan Processing Manual—What's Not in a SIP* (emphasis added); *see* 42 U.S.C. § 7411(d).[8] EPA's latest initiative thus moves well beyond permitting. It is designed to produce hard emissions standards for the very power plants plaintiffs want the federal courts to regulate.

2. Underscoring the political branches' flexibility to consider all forms of evidence bearing on the issues they seek to address, EPA has explained that its new

---

[6] *Available online at* http://www.nytimes.com/2010/12/24/science/earth/24epa.html?_r=1&scp=5&sq=greenhouse&st=cse (last checked Jan. 31, 2011).

[7] *Available online at* http://www.epa.gov/apti/course422/apc4c.html (last checked Jan. 31, 2011).

[8] *Available online at* http://icode.pes.com/sipman/mContent.cfm?chap=1&filePos=8 (last checked Jan. 31, 2011).

rules are the product of "extensive study, debate and hundreds of thousands of public comments." EPA, *EPA Sets Thresholds for Greenhouse Gas Permitting Requirements/Small Businesses & Farms Will Be Shielded* (May 13, 2010) (statement of EPA Administrator Lisa P. Jackson).[9] EPA also explained why it decided to take an incremental approach in the Tailoring Rule: " 'Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop;' * * * instead they may permissibly implement such regulatory programs over time, 'refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed.' " *Tailoring Rule*, 75 Fed. Reg. at 31544 (quoting *Massachusetts*, 549 U.S. at 524). And it stated that its goal was to "minimize[ ] economic burdens" by recognizing that the Clean Air Act requires permitting agencies to take "energy, environmental, and economic considerations into account" when determining the best available control technology for large sources to limit their emissions. *Id.* at 31590.

These sorts of considerations are built into the NSPS program too. Performance standards "are based on the best demonstrated technology (BDT)," which "refers to the best system of continuous emissions reduction that has been demonstrated to work in a given industry, considering economic costs and other factors, such as energy use." *NSPS Summary*, *supra*; *see* 42 U.S.C. § 7411(a)(1). Put another way, the NSPS system creates emissions standards, but it does not do so in a vacuum. Instead, it tailors re-

---

[9] *Available online at* http://yosemite.epa.gov/opa/admpress.nsf/0/EA1BF25579E541B1852577220055C20C (last checked Jan. 31, 2011).

quired emissions cuts to ensure that they can be achieved with existing technology—and that the expense of compliance does not drive the regulated industry to ruin. *See Wisconsin Elec. Power Co.* v. *Reilly*, 893 F.2d 901, 904 (7th Cir. 1990) (summarizing NSPS program's components).

3. Under the Clean Air Act, states have their own role to play in regulating GHG emissions. Indeed, one of the key components in the Act's regulatory scheme is Congress's deliberate choice to let state regulators "take the lead in carrying out the Clean Air Act" and "enforc[ing] Clean Air Act regulations." EPA, *Understanding the Clean Air Act* (2008).[10]

States will have primary responsibility through their "state implementation plans," or SIPs, for the GHG permitting contemplated by the Tailoring Rule. *See* EPA, *EPA Proposes Rules on Clean Air Act Permitting for Greenhouse Gas Emissions* (Aug. 12, 2010) ("*EPA SIP Statement*"). States also may—and do—choose to take the lead in enforcing NSPS using their own locally developed procedures and enforcement mechanisms. *See* 42 U.S.C. § 7411(c). "States have 'wide discretion' in formulating their plans," *Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 470 (2004) (quoting *Union Elec. Co.* v. *EPA*, 427 U.S. 246, 250 (1976)), though they must include certain EPA-specified measures.

Congress through the Clean Air Act chose to give states these leading roles because the state political branches are uniquely well suited to crafting "solutions for pollution problems that require special

---

[10] *Available online at* http://www.epa.gov/air/peg/understand.html (last checked Jan. 31, 2011).

understanding of local industries, geography, housing, and travel patterns, as well as other factors." *Understanding the Clean Air Act*, *supra*. And EPA has specifically recognized that states are "best-suited to issue permits to sources of GHG emissions," in part because states "have long-standing experience working together with industrial facilities" located in their jurisdictions. *EPA SIP Statement*, *supra*.

The states also engage in other GHG-related initiatives that complement the Clean Air Act's regulatory scheme. To take only a few examples: Thirty-three states participate in regional initiatives—including the Midwest Greenhouse Gas Reduction Accord, the Western Climate Initiative, and the Regional Greenhouse Gas Initiative ("RGGI")—that have as their goal limiting emissions through long-term reduction targets. *See* Pew Center on Global Climate Change, *Regional Initiatives* (updated Dec. 2010) ("*Pew Regional Map*").[11] At least 30 states impose renewable energy requirements—*i.e.*, requirements that by a certain date, a specified percentage of the state's electricity be produced using wind, hydroelectric, solar, or other power sources that do not generate greenhouse gases. *See* Federal Energy Regulatory Comm'n, *Renewable Portfolio Standards (RPS) & Goals* (updated Aug. 2010).[12] These requirements will reduce GHG emissions as electrical generation from renewable sources grows. Twenty-one states

---

[11] *Available online at* http://www.pewclimate.org/what_s_being_done/in_the_states/regional_initiatives.cfm (last checked Jan. 31, 2011).

[12] *Available online at* http://www.ferc.gov/market-oversight/othr-mkts/renew/othr-rnw-rps.pdf (last checked Jan. 31, 2011).

have adopted performance incentives to promote efficient electric-power end use. *See* Institute for Elec. Efficiency, *State Electric Efficiency Regulatory Frameworks* at 1 (July 2010).[13] And more than a dozen states have passed laws ensuring that utilities are not punished with lower cost recovery when their customers end up using less energy as a result of efficiency gains. *See id.* at 2-3.

Moreover, under traditional utility regulation (which applies to utilities serving two-thirds of the electric customers in the nation), state regulatory commissions approve utility rates. As part of that process, they rule directly on the relative economic, energy, and environmental considerations involved in different fuel and generation choices, including alternative energies and technologies. *See, e.g.*, Final Order, *In re Application of Appalachian Power Co.* at 19-21, No. PUE-2009-00030 (Va. S.C.C. July 15, 2010) (evaluating cost-effectiveness of utility's carbon-capture project).

4. The regulatory framework described above is the product of policy choices derived from deep knowledge of industry: How quickly should particular sectors be expected to reduce emissions? What technologies are available to make those cuts, and when will new technologies come online? What quantum of compliance costs can particular industries absorb without impairing competitiveness and driving jobs overseas? These are the sorts of decisions that legislatures, expert agencies, and commissions are well-qualified to make. *See Tailoring Rule*,

---

[13] *Available online at* http://www.edisonfoundation.net/IEE/issueBriefs/IEE_StateRegulatoryFrame_0710.pdf (last checked Jan. 31, 2011).

75 Fed. Reg. at 31548. And as we explain below, the complexities and policy judgments necessarily required in GHG regulation underscore the fact that judicial involvement is both unworkable and unnecessary.

B. Judicial Regulation By Nuisance Suit Would Substantially Undermine The Existing Regulatory Scheme.

For the reasons just described, the rule adopted by the Second Circuit would have federal courts elbowing their way into a crowded—and complex— legislative and regulatory field. And that is precisely why the federal courts should stay their hand. The key attributes that allow the political branches to effectively regulate GHG emissions—subject-matter expertise, political accountability, institutional consistency, and coordinated, comprehensive planning—are absent in the federal judiciary. A single federal district court judge, called upon to resolve a nuisance lawsuit brought by a single plaintiff against a subset of defendants, is simply unable to formulate the type of comprehensive GHG-emissions policy that would be necessary to meaningfully address the global, aggregative phenomenon at issue here.

1. When legislatures and agencies develop GHG regulations, they do so in light of detailed evidence; their regulations typically have broad application; and they can (and do) consider cost and competitiveness issues. GHG-regulation-by-nuisance-suit, in contrast, would be neither comprehensive nor rational. Different judges could impose completely different emissions constraints or caps, and different time frames for compliance, even within the same industry. Some industries could face stringent

mandates to cut their GHG emissions "by a specified percentage each year for at least a decade," Pet. App. 178, and others not. Indeed, portions of the same industry—or even the same emissions source—could face caps and others not, or could even face conflicting caps, depending on whom a given plaintiff chooses to sue and where. *See North Carolina ex rel. Cooper* v. *Tennessee Valley Auth.*, 615 F.3d 291, 302 (4th Cir. 2010) ("An EPA-sanctioned state permit may set one standard, a judge in a nearby state another, and a judge in another state a third. Which standard is the hapless source to follow?") And of course, subsets of an industry could face additional draconian punishments—including monetary damages and even plant-shutdown requirements—constrained only by individual judges' conceptions of what level of GHG emissions is "unreasonable."

It makes little sense to encourage a landscape in which Company *A* faces strict court-mandated CO_2 emissions limits and monetary outlays while Company *B* faces more finely calibrated regulation under the Clean Air Act, even though both are in the same industry, emit the same gases, and contribute to the same undifferentiated global concentration of atmospheric GHGs. That is just one of many reasons why the GHG issue is better addressed by regulation and best addressed by legislation.

2. Likewise, judges lack the institutional competence to link emissions targets to the new technologies that can facilitate GHG reductions at an acceptable cost.

a. Electric-power companies spend billions of dollars each year on new technologies and operational measures designed to protect the environment, and

the result has been steep cuts in air emissions. However, there is currently no feasible technology to reduce fossil-fuel power plants' CO_2 emissions, in contradistinction to the technologies available to control traditional air pollutants. *See Legislative Proposals to Reduce Greenhouse Gas Emissions: An Overview: Hearing Before the Subcomm. on Energy and Air Quality of the H. Comm. on Energy and Commerce*, 110th Cong. (June 19, 2008) (statement of EEI President Thomas R. Kuhn at 4, 33-36) ("Kuhn Testimony").

Thus rational GHG-emissions cuts—especially the sorts of sharp reductions that some contemplate in an effort to mitigate global climate change—cannot be instituted overnight. They will require the adoption of an array of advanced no- or low-carbon technologies, including increased use of wind, solar, incremental hydroelectric, and nuclear power. They will also depend on the development of cost-effective, commercially available carbon capture and geologic sequestration ("CCS") in the case of power plants that burn coal or natural gas. These technologies take years to develop and deploy commercially. Technologies such as wind and solar are relatively expensive and present grid integration issues due to their intermittency. *See* Kuhn Testimony at 29-30. Additional nuclear power requires substantial up-front investment and long lead times for construction. *See id.* at 32-33. All of these power sources will be subject to "transmission siting, building, and integration constraints." *Id.* at 30-31. And emissions-reducing approaches such as CCS are still in the demonstration stage; they will require billions of dollars, and long-term research, development, and

demonstration, before they are deployable at reasonable prices. *See id.* at 32-36.

A study by the Electric Power Research Institute ("EPRI") throws the connection between these new technologies and further GHG reductions into stark relief. The study concluded that "the aggressive development and deployment of several advanced technologies"—including water and solar power, advanced light-water nuclear reactors, and CCS—"could reduce U.S. electricity sector CO_2 emissions by roughly 45% by 2030," compared to 2007 figures. EPRI, *The Power to Reduce CO_2 Emissions: The Full Portfolio* at 2-3 (2007) ("*EPRI PRISM Study*").[14] But, the study warned, this sort of reduction will be possible only if industry and regulators work together to put in place an "expanded and multi-decade [research and development] program." *Id.* at 3-14. Without that coordinated public-private effort and investment, aggressive CO_2 cuts would be either impossible or exorbitantly expensive.

b. In short, "[f]or any carbon policy to reduce GHG emissions effectively * * * compliance timeframes must correspond to the availability of technologies needed to reduce emissions." EEI, *Understanding EEI's Global Climate Change Points of Agreement* at 2 (Feb. 2009).[15] Legislators and regulators possess the tools necessary to align reduction goals with technological reality in this way. For example, EPA's forthcoming NSPS regulations will be required to

---

[14] *Available online at* http://www.scribd.com/doc/6819599/US-Power-to-reduce-2007-CO2-emission (last checked Jan. 31, 2011).

[15] *Available online at* http://www.eei.org/ourissues/TheEnvironment/Climate/Documents/PointsofAgree-EEIcommunFINAL.pdf (last checked Jan. 31, 2011).

calibrate GHG performance standards to "the best demonstrated [emissions-control] technology" for the particular industry segment in order to avoid "unreasonable economic disruption." *NSPS Summary*, *supra*. Legislators and regulators also can (and do) design financial incentives to help new technology reach the market. And they can (and do) decide whether particular investments in no- or low-GHG-emitting energy technology are worthwhile given their costs to customers. *See, e.g.*, Order, *In re Application of Ky. Power Co. for Approval of Renewable Energy Purchase Agreement*, No. 2009-00545, 2010 WL 2640998 (Ky. P.S.C. June 28, 2010) (denying utility permission to use wind power on the ground that it would not produce the lowest cost for consumers); Ohio Rev. Code Ann. § 4928(B)-(C) (setting renewable-energy benchmarks for electrical utilities but creating limited "escape clauses" to avoid creating excessive expenses for consumers).

The judiciary, of course, lacks the institutional competence to take any of these crucial steps. If a single judge were to impose emissions mandates through an individual nuisance suit, those mandates would be formulated in a vacuum. They would be untethered from industry realities familiar to the regulators who grapple with these issues every day.

c. Dramatically reducing the nation's GHG emissions will be expensive no matter what the approach. But the cost may well be much higher if judges issue emissions-reduction mandates that are divorced from technological progress.

That is so in part because facilities in the electric-power industry (among others) could be forced to try to meet short-term emissions targets by switching from coal to natural gas, which is not a cost-effective long-term approach. As the then-chairman of the

Federal Energy Regulatory Commission ("FERC") warned two years ago, "poorly-designed" GHG rules that "exclude the role of coal and nuclear power * * * would undermine" regulators' ability to "ensure adequate electricity supplies at a reasonable price." *See* Carbon Control News, *FERC Faces Climate Challenge* (Oct. 28, 2008) (statement of Joseph T. Kelliher) (available upon request).

An EPRI study compared the cost of reaching aggressive long-term GHG-reduction targets under two scenarios: one in which the United States comprehensively encourages new technologies as part of its regulatory scheme, and another in which the nation is less effective in bringing these technologies to market. The study concluded that under the second scenario, "natural gas [would] become[ ] the dominant generation fuel by 2030, and CO_2 reduction policies [would] only be met through large reductions in electricity demand, placing severe constraints on economic growth." EPRI, *Modeling the Technology Mix* at 18 (2007).[16] It concluded that real electricity prices would rise nearly *six times* more by 2050 under the second scenario—260 percent, versus 45 percent. *Id.* at 19. That is because natural gas—the only fuel besides nuclear, hydropower, and coal that can provide the around-the-clock generation needed to serve the baseload needs of the nation's electric grid—is commonly assumed to produce about half as much CO_2 as coal does for an equivalent amount of energy.[17] This is too high an emissions rate to sat-

---

[16] *Available online at* http://mydocs.epri.com/docs/CorporateDocuments/EPRI_Journal/2007-Fall/1016127_ModelingtheTechMix.pdf (last checked Jan. 31, 2011).

[17] In fact, the CO_2 differential may be even smaller than that. A recent report indicates that when methane leakage is taken

isfy ambitious long-term GHG reduction goals. Thus the expenses involved in a "dash to gas"—including extensive capital investment in new natural-gas pipeline transportation and generating facilities—would be wasteful. The new facilities would have to be replaced or retrofitted long before the end of their useful lives by investments in even lower-emitting technologies (if commercially available) to achieve long-term reduction goals.

Judicial regulation, which by definition cannot tie emissions mandates to technological incentives, is tailor-made to produce the "astronomical[ly]" more expensive second scenario. Kuhn Testimony at 5. And the trickle-down effect of those costs could be severe: "[C]onsumers would be compelled to curtail their use of electricity dramatically, with resulting consequences to the economy and the standard of living." *Id.* [18]

---

into account, natural gas may produce as much as three-quarters the CO_2 that coal does. *See* A. Lustgarten, *Climate Benefits of Natural Gas May Be Overstated*, ProPublica (Jan. 25, 2011), *available online at* http://www.propublica.org/article/natural-gas-and-coal-pollution-gap-in-doubt (last checked Feb. 3, 2011). If that figure is confirmed, the wastefulness of a "dash to gas," and the likelihood of sharp price increases for electricity under such a scenario, would be all the more apparent.

[18] Judicial regulation could also produce added expense by opening the door to large monetary judgments against the electric industry (among others). Such judgments would be inequitable, for reasons already discussed. *See supra* at 15. But they would also raise costs further still, and would deplete the resources that businesses could otherwise invest in research, development, demonstration, and deployment of next-generation fuel technologies. These costs would ultimately be paid by electricity customers, affecting the entire economy.

3. Finally, even putting aside its practical flaws, GHG-regulation-by-nuisance-lawsuit is inappropriate from an institutional perspective for two reasons. First, it would place courts in the position of second-guessing the federal government and the states on how they balance the energy, environmental, economic, and technological considerations involved in producing electricity. Second, it would embroil the federal judiciary in decades-long oversight for which the courts are institutionally ill-suited.

a. Nuisance-suit regulation of GHG emissions necessarily requires judges to revisit, and potentially overrule, the considered policy decisions of the political branches. This lawsuit is a perfect example. The petitioning electric utilities face multiple layers of regulation—under the Clean Air Act; regional accords such as the RGGI, to which several of the plaintiffs here are parties; state climate laws; and state renewable portfolio standards. Through these laws and rules, the political branches are making judgments about which emissions cuts are required, when they are required, and—most importantly—what level of emissions is reasonable. But nuisance actions focus on just that question of reasonableness. *See* Pet. App. 80a (opinion of court below, defining public nuisance as "an *unreasonable* interference with a right common to the general public") (emphasis added); Restatement (Second) of Torts § 821B(1) (1979). The nuisance approach thus effectively requires judges to second-guess regulatory determinations that the political branches have already made. Judges should not be making such determinations in the first instance; instead, they should continue to review determinations crafted by expert agencies under the Administrative Procedure Act's

deferential standard of review. *See* 5 U.S.C. § 706(2). As this Court has emphasized, the federal courts' occasional prerogative to create common law does not mean "courts are better suited to develop national policy in areas governed by federal common law than they are in other areas, or that the usual and important concerns of an appropriate division of functions between the Congress and the federal judiciary are inapplicable." *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 313 (1981) ("*Milwaukee II*").

b. The Second Circuit's decision portends an unmanageable role for the federal courts. GHG reductions take time—the timeline for significant cuts is measured in decades—and any judicial mandates likely would have to be revisited over the years, much like a consent decree, as technologies advance, demand for electricity changes, new power plants are built, and the underlying regulatory scheme shifts. *See Angela R. by Hesselbein* v. *Clinton*, 999 F.2d 320, 326 (8th Cir. 1993) ("Although a consent decree may save federal judicial resources in the short term, its entry is often only the beginning of extended judicial involvement."). Moreover, the Second Circuit's decision, if left intact, no doubt will lead to more lawsuits against industries, and other entities with perceived deep pockets, that emit GHGs. The result: Multiple federal district courts could find themselves engaging in near-permanent, ongoing oversight of standing decrees—at least to the extent those courts see fit to impose liability.

This Court has expressed skepticism about legal theories that would embroil the federal courts in oversight minutiae, stating that they "often squander[ ] judicial resources with little offsetting benefit to anyone." *Sandin* v. *Conner*, 515 U.S. 472, 482

(1995). There is no reason to drain the judiciary's resources in this way, particularly given that legislators and regulators are already addressing GHG emissions nationally, in the states that are plaintiffs in this litigation, and in the states where defendants operate. *See Pew Regional Map* (highlighting GHG initiatives in Connecticut, New York, New Jersey, Rhode Island, Vermont, Wisconsin, Iowa, California, Colorado, Indiana, Michigan, Minnesota, New Mexico, Ohio, and South Dakota).

* * *

For all of these reasons, plaintiffs' attempt to deputize the federal courts as adjunct environmental regulators is as ill-considered as it is unnecessary. As Judge Wilkinson recently observed in a closely related context: "It ill behooves the judiciary to set aside a congressionally sanctioned scheme" that "reflects the extensive application of scientific expertise[.] * * * To replace [EPA] air quality standards with standards whose content must await the uncertain twists and turns of litigation will leave whole states and industries at sea and potentially expose them to a welter of conflicting court orders across the country." *North Carolina*, 615 F.3d at 301. Just so. The decision below should be reversed.

II. PLAINTIFFS LACK STANDING.

The considerations set forth above point to the threshold ground on which reversal is appropriate: As petitioners explain in their brief, plaintiffs lack both Article III and prudential standing to maintain suit. The following discussion addresses in greater detail why prudential standing is absent here.

1. The prudential standing doctrine "embodies 'judicially self-imposed limits on the exercise of federal jurisdiction.'" *Newdow*, 542 U.S. at 11 (quoting *Allen*, 468 U.S. at 751). The doctrine has three components. First, a litigant may not "rais[e] another person's legal rights." *Id.* at 12 (quoting *Allen*, 468 U.S. at 751). Second, litigants may not "'adjudicat[e] * * * generalized grievances more appropriately addressed in the representative branches.'" *Id.* (quoting *Allen*, 468 U.S. at 751). Third, the plaintiff's claim must "'fall within the zone of interests protected by the law invoked.'" *Id.* (quoting *Allen*, 468 U.S. at 751). These limitations help maintain the balance between the branches because without them "the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975).

2. Plaintiffs' complaint fails the prudential-standing test because it articulates "generalized grievances more appropriately addressed in the representative branches." *Newdow*, 542 U.S. at 12. A generalized grievance is one "shared in substantially equal measure by all or a large class of citizens." *Warth*, 422 U.S. at 499. That is an apt description of plaintiffs' claims. After all, GHGs are emitted everywhere, by practically every person and business; they emanate not just from power plants and other industrial facilities but also from cars, trucks, homes, and small businesses. *See supra* n. 3. And their effect is aggregative and undifferentiated. "[A] ton of GHGs is a ton of GHGs," Kuhn Testimony

at 12, and it accordingly "makes no difference where the [GHG] emissions occur, because emissions anywhere contribute equally to global harm[.]" B. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 Geo. L.J. 257, 281 (2001). Plaintiffs thus could just as easily sue any collection of businesses that comes to mind—or they could sue private citizens who drive gas-guzzlers, or burn leaves, or overuse their fireplaces. *See* FireGrates R Us, *Fire Grate Frequently Asked Questions* (recommending use of "un-split wood" for home fireplaces because "[t]ypical split-log fires are the cause of much [GHG] pollution").[19] Likewise, practically anyone—or at least any large landowner—could substitute for the current plaintiffs and advance similar claims. The alleged harm at issue thus plainly is "shared in substantially equal measure by all or a large class of citizens." *Warth*, 422 U.S. at 499.

Moreover, the GHG-emissions issue is the quintessential "question[ ] of wide public significance" that "other governmental institutions [are] more competent to address[.]" *Id.* at 500. That conclusion flows ineluctably from all the considerations set forth in Part I, *supra*. GHG emissions are caused by practically everyone. And measures to reduce emission levels (i) must be calibrated to available technology; (ii) must be undertaken with an eye on costs, environmental effects, and energy supplies; and (iii) require policy judgments regarding the relative burdens that different industries should bear. *See*

---

[19] *Available online at* http://www.radiantfiregrates.com/fire_faq.html (last checked Jan. 31, 2011).

supra at 14-21. Indeed, these considerations explain why Congress has given EPA—and EPA is exercising—authority to address regulation of GHG emissions in a way that takes these factors into account. There can be little serious question that the issues raised by this lawsuit are "more appropriately addressed in the representative branches." *Newdow*, 542 U.S. at 12. Plaintiffs lack prudential standing for this reason too.

III. CONGRESS HAS DISPLACED ANY FEDERAL COMMON LAW IN THIS AREA.

The comprehensive legal and regulatory regime discussed above thus counsels against judicial intervention and highlights the plaintiffs' standing deficiency. But it also underscores an additional legal error in the Second Circuit's opinion—namely, its conclusion that the federal courts have the authority to impose GHG mandates using the common law. They do not. Through the Clean Air Act, Congress chose to regulate GHGs and to delegate the details to EPA. *See supra* at 6-11. EPA is actively exercising that authority. Thus "Congress has not left the formulation of appropriate federal standards to the courts through the application of often vague and indeterminate nuisance concepts." *Milwaukee II*, 451 U.S. at 317. Instead, it has "spoke[n] directly to [the] question" of GHG regulation and has already "addressed the problem" plaintiffs now attempt to bring before the federal courts. *Id.* at 315.

As petitioners rightly point out, Br. 41-42, the authority Congress has exercised to regulate air pollution is sufficient to displace any federal common law under *Milwaukee II*. The court below admitted that the Clean Air Act is a "comprehensive legislative

scheme" to regulate air quality. Pet. App. 131a-132a; *cf. Milwaukee II*, 451 U.S. at 317 (Clean Water Act was a "comprehensive regulatory program" to regulate water quality). And "Congress' intent in enacting" the Clean Air Act "was clearly to establish an all-encompassing program of [air] pollution regulation." *Milwaukee II*, 451 U.S. at 317.

Rather than examine the Act, the Second Circuit focused on the fact that EPA's regulatory scheme remains a work in progress. *See* Pet. App. 135a-141a. But that misunderstands the issue. As petitioners correctly observe, Br. 45, the displacement inquiry turns primarily on Congress's decisions, not EPA's. And this Court has made clear that Congress, through the Clean Air Act, authorized EPA to consider and implement GHG-emissions standards subject to criteria in the statute. Indeed, among other things, the Act authorizes EPA to (i) "require[ ] new or modified sources to install state-of-the-art pollution controls," (ii) "pursue judicial and administrative enforcement actions for injunctive relief and civil penalties," and (iii) "establish Federal standards of performance" for new stationary sources of emissions. EPA, *CAA National Enforcement Programs* (May 2010).[20] Congress thus has given EPA substantial authority to regulate within the context of a comprehensive legislative scheme and has left it to the agency to oversee matters of implementation and enforcement. Any judicial attempt to impose emissions mandates would not be "filling a gap"; it would be overwriting the regulatory scheme the political branches have affirmatively chosen. *Milwaukee II*,

---

[20] *Available online at* http://www.epa.gov/oecaerth/civil/caa/caaenfprog.html (last checked Jan. 31, 2011).

451 U.S. at 324 n.18. That is precisely what the doctrine of displacement is designed to prevent.

Moreover, to the extent regulatory action under the Clean Air Act may be relevant to the displacement analysis,[21] the gaps the Second Circuit perceived in the regulatory scheme have vanished. EPA has taken final action under the Act to regulate GHG emissions from both mobile and stationary sources *since* the Second Circuit's decision issued in September 2009. *See supra* at 8-11. For instance, with respect to mobile sources, EPA's actions have created GHG emissions standards for new motor vehicles. With respect to stationary sources, EPA has subjected facilities in various industries, including the electric generating industry, to "new source review" preconstruction permitting requirements and associated Title V operating-permit requirements for these GHGs. *See supra* at 7-8. And EPA has announced plans to roll out, in the form of proposed NSPS, the sorts of emissions standards petitioners here seek through one-off judicial decisions. Thus the Second Circuit's pointed observations that EPA had made only "*proposed*" findings about the effect of GHG emissions, Pet. App. 140a (emphasis in original), that EPA "does not currently regulate carbon dioxide under the CAA," Pet. App. 135a, and that EPA might still "determine * * * that regulation of greenhouse gases is * * * inappropriate under the terms of the Act," *id.* at 140a-141a, are now wrong and outdated. And the conclusion the court reached on the basis of

---

[21] *See Illinois* v. *City of Milwaukee*, 406 U.S. 91, 107 (1972) (observing that "new federal laws *and new federal regulations* may in time pre-empt the field of federal common law of nuisance") (emphasis added); *Texas* v. *Pankey*, 441 F.2d 236, 241 (10th Cir. 1971). *See also* Br. for TVA at 44-45.

those observations—that "the CAA does not * * * regulate greenhouse gas emissions," *id.* at 144a—is inaccurate on its face. It is clear that EPA has the statutory power to regulate GHGs, and it is doing so.[22] There is no room for the federal courts to exercise their "severely limited" power to create common law. *In re Gaston & Snow*, 243 F.3d 599, 606 (2d Cir. 2001).

---

[22] Some members of Congress have announced legislative proposals to block or delay aspects of EPA's GHG regulations. Other members, who favor the EPA's regulatory approach, oppose those proposals. *See* E. Schor & S. Abruzzese, *Senate Dems Gear Up to Battle House GOP on EPA's Climate Regs*, NYTimes.com, Jan. 7, 2011, *available online at* http://www.nytimes.com/gwire/2011/01/07/07greenwire-senate-dems-gear-up-to-battle-house-gop-on-epa-22835.html (last checked Jan. 31, 2011). Even if Congress were to take action affecting EPA regulations, however, that would not change the outcome of the displacement analysis: Congress in any event has "spoke[n] directly to [the] question" of GHG regulation, thereby precluding application of federal common law. *Milwaukee II*, 451 U.S. at 315.

CONCLUSION

For the foregoing reasons, and those in the petitioners' opening brief, the judgment below should be reversed.

Respectfully submitted,

EDWARD H. COMER
Vice President and
General Counsel
WILLIAM L. FANG
EDISON ELECTRIC INSTITUTE
701 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 508-5615

CHRISTOPHER T. HANDMAN*
DOMINIC F. PERELLA
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5719
chris.handman@hoganlovells.com

SUSAN N. KELLY
Senior Vice President of
Policy Analysis and
General Counsel
AMERICAN PUBLIC POWER
ASSOCIATION
1875 Connecticut Ave., N.W.,
Suite 1200
Washington, D.C. 20009-5715
(202) 467-2933

RAE E. CRONMILLER
Environmental Counsel
NATIONAL RURAL ELECTRIC
COOPERATIVE ASSOCIATION
4301 Wilson Boulevard
Arlington, VA 22203-1860
(703) 907-5500

*Counsel of Record

Counsel for Amici Curiae

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
OFFICE OF THE CLERK

No. 10-174

IN THE

Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY, INC., ET AL.,

Petitioners,

v.

STATE OF CONNECTICUT, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF ENVIRONMENTAL LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

AMANDA C. LEITER
Counsel of Record
Associate Professor of Law
The Catholic University of America
Columbus School of Law
3600 John McCormack Rd. NE
Washington, DC 20064
leiter@law.edu
Tel: (202) 319-6755
Fax: (202) 319-4459

Mar. 18, 2011

(List Of Amici Curiae Continues On Inside Cover)

HOPE BABCOCK
Professor of Law
Georgetown University
Law Center
600 New Jersey Ave., NW
Washington, DC 20001
202-662-9000

ERIC BIBER
Acting Professor of Law
UC Berkeley School of
Law
215 Boalt Hall
Berkeley, CA 94720
510-642-1741

J. PETER BYRNE
Professor of Law
Georgetown University
Law Center
600 New Jersey Ave., NW
Washington, DC 20001
202-662-9000

HEATHER ELLIOTT
Assoc. Professor of Law
The University of
Alabama School of Law
Box 870382
101 Paul W. Bryant Dr. E
Tuscaloosa, AL 35487
205-348-9965

ERIC T. FREYFOGLE
Max L. Rowe Professor of
Law
University of Illinois
College of Law
504 E Pennsylvania Ave.
Champaign, IL 61820
217-333-8713

ROBERT GLICKSMAN
J. B. and Maurice C.
Shapiro Professor of
Environmental Law
The George Washington
University Law School
2000 H St., NW
Washington, DC 20052
202-994-4641

AMY J. WILDERMUTH
Professor of Law
University of Utah S.J.
Quinney College of Law
332 S. 1400 E.
Salt Lake City, UT 84112
801-585-9694

QUESTION PRESENTED

Can unexercised federal regulatory authority over a pollution source displace federal common law?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

IDENTITIES AND INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. FEDERAL LAW IMPOSES NO LIMITS ON GREENHOUSE GAS EMISSIONS FROM PETITIONERS' AND TVA'S EXISTING FACILITIES 4

II. UNEXERCISED FEDERAL REGULATORY AUTHORITY DOES NOT AND SHOULD NOT DISPLACE FEDERAL COMMON LAW 8

A. This Court's Displacement Precedent Requires A Careful Evaluation Of The State of Existing Statutory And Regulatory Law. 10

B. Petitioners' And TVA's Displacement Argument Ignores The Need For Uniform Federal Standards To Govern Interstate Pollution Disputes. 16

CONCLUSION 21

TABLE OF AUTHORITIES

CASES Page

City of Milwaukee v. Illinois, 451 U.S. 304 (1981) ("*Milwaukee II*") 4, 11, 12, 13 14, 15, 17, 19

County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) 4

Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008) 12, 13

Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) 18, 21

Illinois v. City of Milwaukee, 406 U.S. 91 (1972) ("*Milwaukee I*") 10, 11, 15, 17

International Paper Company v. Ouellette, 479 U.S. 481 (1987) 19, 20, 21

Massachusetts v. EPA, 549 U.S. 497 (2007) 4, 5, 8

Middlesex County Sewer Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981) 14

Missouri v. Illinois, 200 U.S. 496 (1906) 18

New York v. EPA, D.C. Circuit No. 06-1322 7

Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971) 17

STATUTES Page

Clean Air Act, 42 U.S.C. § 7401 *et seq.* ..... *passim*

§ 111, 42 U.S.C. § 7411 7

§ 116, 42 U.S.C. § 7416 20

§ 165, 42 U.S.C. § 7475 5

§ 169, 42 U.S.C. § 7479 5

§ 304(e), 42 U.S.C. 7604(e) 19

§§ 501-507, 42 U.S.C. §§ 7661-7661f 6

Clean Water Act § 505(e), 33 U.S.C. 1365(e) 19

Federal Water Pollution Control Act, 62 Stat. 1155, as amended, 33 U.S.C. § 1152, *et seq.* (1970) 10

33 U.S.C. § 1152 (1970) 11

33 U.S.C. § 1153 (1970) 11

Federal Water Pollution Control Act Amendments of 1972, Pub.L. 92-500, 86 Stat. 816 ..... 11, 12, 13, 14, 15

STATUTORY MATERIALS Page

Energy Tax Prevention Act of 2011, H.R. 910, 112th Cong. (introduced Mar. 3, 2011) 7

Full-Year Continuing Appropriations for Fiscal Year 2011, H.R. 1, 112th Cong., div. B, tit. VII, § 1746 (2011) 7

S. Rep. No. 92-414, p. 7 (1971) 11

REGULATIONS and
REGULATORY MATERIALS — Page

40 C.F.R. § 123.1 20

EPA, Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010) 5

EPA, Proposed Settlement of *New York v. EPA*, D.C. Cir. No. 06-1322, *http://www.epa.gov/airquality/pdfs/boilerghgsettlement.pdf* 7

OTHER MATERIALS — Page

Richard A. Epstein, *Federal Preemption, and Federal Common Law, in Nuisance Cases*, 102 Nw. U. L. Rev. 551 (2008) 17, 20, 21

Robert L. Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. Pa. L. Rev. 121 (1985) 17

Kenneth M. Murchison, *Interstate Pollution: The Need for Federal Common Law*, 6 Va. J. Nat. Res. Law 1 (1986) 18

Mary Ellen Ternes and Ross A. Macfarlane, *Negotiating Title V Operating Permits: A View from the Provinces*, 13-FALL Nat. Resources & Env't 417 (1998) 12

Deepa Varadarajan, Note, *Billboards and Big Utilities: Borrowing Land Use Concepts to Regulate 'Nonconforming' Sources Under the Clean Air Act*, 112 Yale L. J. 2553 (2003) 6

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

Amici law professors, listed below, teach and write in the areas of torts and environmental law and take a professional interest in the development of this Court's preemption jurisprudence. Amici file this brief as individuals and not on behalf of the institutions with which they are affiliated.[1]

Hope Babcock is a Professor of Law at Georgetown University Law Center. She teaches environmental and natural resources law and writes in the areas of environmental and natural resources law, administrative law, common law property doctrines, and federalism.

Eric Biber is an Assistant Professor at UC Berkeley School of Law. He is a specialist in conservation biology, land-use planning, and public lands law. His principal research interests include environmental and natural resources law, administrative law, and property.

J. Peter Byrne is a Professor of Law at Georgetown University Law Center, where he also directs the school's Environmental Law and Policy Program and its State-Federal Climate Resource Center. He teaches and writes in the areas of Property, Land Use, Historic Preservation, and Constitutional Law.

---

[1] The parties have consented to the filing of this brief in letters on file with the Clerk's office. Amici certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than Amici made a monetary contribution to the preparation or submission of the brief.

Heather Elliott is an Associate Professor at the University of Alabama School of Law, where she teaches civil procedure, land use law and planning, and water law. Her scholarship focuses on the role of courts and agencies in a democratic society.

Eric T. Freyfogle is the Max L. Rowe Professor of Law at the University of Illinois College of Law. He has long taught and written in the areas of natural resources, property, and environmental law and policy.

Robert Glicksman is the J. B. and Maurice C. Shapiro Professor of Environmental Law at George Washington University Law School and an internationally recognized expert on natural resources, environmental, and administrative law issues.

Amanda Cohen Leiter is an Associate Professor of Law at the Catholic University of America's Columbus School of Law. Her teaching and research interests include torts, administrative law and process, and environmental law and policy.

Amy J. Wildermuth is a Professor of Law at the University of Utah's S.J. Quinney College of Law. She teaches and writes in the areas of civil procedure, administrative law, natural resources and environmental law, property, and Supreme Court practice.

SUMMARY OF ARGUMENT

This Court has long recognized the vital role that federal law plays in interstate pollution disputes, providing uniform standards under which to evaluate the widely divergent interests of source states and affected states. Until Congress addresses an interstate pollution problem, federal common law supplies the required standards. Later, after Congress and the relevant federal agency have acted, the governing statutes and regulations provide those standards, and there is no longer need to resort to federal common law.

This case, however, falls in the gap between those time periods. The federal Clean Air Act delegates to the Environmental Protection Agency authority to regulate greenhouse gas emissions from Petitioners' and TVA's existing sources, but the agency has not yet acted on that authority, nor has it finally decided to postpone or forgo action. Consequently, no provision of federal statutory or regulatory law governs those emissions.

In this time period, federal statutory and regulatory law cannot help to resolve this dispute between sovereign state plaintiffs and the out-of-state companies whose conduct the states seek to abate. Under those circumstances, both first principles and this Court's jurisprudence dictate that the responsibility to fill the gap and supply the necessary uniform standards falls squarely on the federal courts. Connecticut and other sovereign state victims of interstate pollution deserve no less.

ARGUMENT

I. FEDERAL LAW IMPOSES NO LIMITS ON GREENHOUSE GAS EMISSIONS FROM PETITIONERS' AND TVA'S EXISTING FACILITIES.

The central issue in any displacement analysis is the coverage of existing federal statutory and regulatory law. *See County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 236-37 (1985) ("[T]he relevant inquiry [in a displacement case] is whether the statute '[s]peaks *directly* to [the] question' otherwise answered by federal common law." (quoting *City of Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981) ("*Milwaukee II*") (alterations and emphasis in *Oneida*))). Petitioners and TVA fill tens of pages in their opening briefs detailing the many things Congress, the President, and the Environmental Protection Agency (EPA) have done or could do to address greenhouse gas emissions in the United States. Pet. Br. at 5-10, 41-45; TVA Br. at 2-5, 46-52. Only one such fact is relevant to this case, however, and it fits in a single sentence: No federal statute or regulation now limits greenhouse gas emissions from Petitioners' and TVA's existing facilities.

To be sure, the Clean Air Act (CAA) grants EPA the authority to control greenhouse gas emissions, *see generally Massachusetts v. EPA*, 549 U.S. 497 (2007), and the agency has begun to act on that authority with respect to other types of emissions sources, *see* TVA Br. at 46-52 (detailing EPA's regulatory posture with respect to greenhouse gas emissions); Land Trust Br. at 47-50 (same). Thus far, however, EPA

has not limited greenhouse gas emissions from Petitioners' and TVA's existing facilities.

As Petitioners and TVA note, EPA has taken one action on greenhouse gases that relates indirectly to large stationary sources. In May 2010, pursuant to the *Massachusetts* decision, the agency commenced regulating greenhouse gas emissions from new motor vehicles. 75 Fed. Reg. 25,324. Under the arcane structure of the CAA, that regulation automatically triggered two separate CAA programs, though neither limits greenhouse gas emissions from Petitioners' and TVA's existing large and stationary facilities. *See generally* Land Trust Br. at 48 (describing the triggering mechanism).

First, the motor vehicle regulation triggered CAA § 165, 42 U.S.C. § 7475, which requires that large new and modified stationary sources of greenhouse gases must obtain a preconstruction permit that incorporates an emission limitation reflecting the best technology currently available to control greenhouse gas emissions. *See generally* TVA Br. at 47-50 & n.23 (explaining the so-called "PSD" program); Land Trust Br. at 48 (same). This requirement, however, applies only if and when Petitioners or TVA build a wholly new facility or undertake a major capital improvement project that significantly increases greenhouse gas emissions from an existing plant. *See* CAA § 165, 42 U.S.C. § 7475(a) (imposing PSD requirements on "major emitting facilit[ies] on which construction is commenced after August 7, 1977"); CAA § 169, 42 U.S.C. § 7479(2)(C) (defining "construction" to include "modification"). As a result, Petitioners and TVA may continue to operate their existing plants indefinitely without becoming subject to this preconstruction

permitting requirement. *See generally* Deepa Varadarajan, Note, *Billboards and Big Utilities: Borrowing Land Use Concepts to Regulate 'Nonconforming' Sources Under the Clean Air Act*, 112 Yale L. J. 2553, 2563 (2003) (discussing the PSD program's "dismal" record of controlling emissions from electric utility plants).

The second automatic consequence of EPA's motor vehicle regulations is that major stationary sources like Petitioners' and TVA's facilities now must incorporate any existing greenhouse gas emissions limits into the "operating permits" those sources have obtained under CAA Title V. CAA §§ 501-507, 42 U.S.C. §§ 7661-7661f. Contrary to their name, however, Title V permits are not true permits-to-emit, but are instead mere compilations of a source's existing legal obligations. In other words, somewhat like the explanatory tax booklets that the Internal Revenue Service (IRS) mails to taxpayers each year, a Title V operating permit simply aggregates preexisting regulatory obligations; the permit itself imposes no new emissions limits. In the absence of a substantive tax code, the IRS booklets would impose no obligation to send a check on April 15; in the absence of substantive greenhouse gas standards, Petitioners' and TVA's Title V permits likewise impose no obligation to limit greenhouse gas emissions.

Petitioners and TVA also identify a potential *future* EPA action with respect to greenhouse gases from large stationary facilities like Petitioners' and TVA's, but again, that still-unrealized action imposes no present limits on Petitioners' and TVA's greenhouse gas emissions. The agency has indicated that more than a year from now, in May 2012, it *may*

issue a final rule under Section 111 of the CAA. *See http://www.epa.gov/airquality/pdfs/boilerghgsettlement.pdf* at ¶3 (proposing, in settlement of *New York v. EPA*, D.C. Circuit No. 06-1322, to complete by May 2012 a rulemaking process under CAA § 111, 42 U.S.C. § 7411, to develop standards of performance for greenhouse gas emissions from electricity-generating units). If issued, that rule *might* limit greenhouse gas emissions from new and modified power plants, and it *might* also require—by a date in the still more distant future—that States impose similar limits on existing power plants. *See id.*; Pet. Br. at 9; TVA Br. at 50-51 & n.25 (explaining the implications of a Section 111 rule for states).

Again, however, no current Section 111 regulation imposes greenhouse gas emissions limits on Petitioners, TVA, or anyone else, and TVA's brief emphasizes that EPA has reserved the right not to impose any such limits at the end of the rulemaking. TVA Br. at 51 n.25 ("A commitment to complete a [Section 111] rulemaking will not mean that EPA has prejudged the question of what, if any, [greenhouse gas emissions standard] will be appropriate; *EPA could ultimately exercise its judgment to find the imposition of such standards inappropriate.*" (emphasis added)). Moreover, some members of the current Congress disapprove of the proposed settlement; they have made legislative proposals that, if enacted, would bar EPA from using funds to complete a Section 111 rulemaking or, more broadly, from regulating greenhouse gases. *See, e.g.*, Full-Year Continuing Appropriations for Fiscal Year 2011, H.R. 1, 112th Cong., div. B, tit. VII, § 1746, at 276-77 (2011) (barring use of funds); Energy Tax Prevention Act of 2011, H.R. 910, 112th Cong. (introduced Mar. 3, 2011) (barring regulation of greenhouse gases).

In conclusion, although the CAA grants EPA the authority to regulate greenhouse gas emissions from Petitioners' and TVA's existing facilities, *Massachusetts v. EPA*, 549 U.S. at 528-29; Pet. Br. at 8-9, the agency has not yet done so. Further, EPA has not finally decided *not* to act on its Section 111 regulatory authority with respect to greenhouse gases; the agency is merely considering what action to take. TVA Br. at 51 n.25 (preserving EPA's discretion). In sum, therefore, EPA has neither regulated nor rejected regulating greenhouse gas emissions from Petitioners' and TVA's existing facilities.

II. UNEXERCISED FEDERAL REGULATORY AUTHORITY DOES NOT AND SHOULD NOT DISPLACE FEDERAL COMMON LAW.

The fact that there are neither federal statutory nor federal regulatory limits on greenhouse gas emissions from Petitioners' and TVA's existing facilities casts in a different light the displacement standard articulated in TVA's opening brief. As TVA explains:

> Federal common law is displaced when an administrative agency takes regulatory action, under the authority of a comprehensive statutory program, to address the issue raised in a putative common-law action. Such displacement can occur when a plaintiff seeks relief that would address the same issue, but in a manner different in character or extent from what the regulatory program provides.

TVA Br. at 44 (citations omitted).

Having accurately characterized the standard, TVA fails in its application of law to fact. This is not a case in which "a plaintiff seeks relief that would address the same issue, but in a manner different in character or extent from what the regulatory program provides." *Id.* Rather, Respondents seek to abate tortious conduct that is not yet addressed by the relevant regulatory program—namely, the uncontrolled emission of large quantities of greenhouse gases from Petitioners' and TVA's existing stationary sources.

TVA alternatively suggests that displacement can "occur[] when an agency ... decides to postpone or even forgo the imposition of regulatory standards, where the decision is made ... on the basis of a weighing of relevant considerations under the statutory scheme." *Id.* at 44-45. Notably, TVA cites no caselaw or other authority to support the proposition that an agency's decision *not* to regulate an interstate pollution problem displaces the federal courts' common law authority to grant relief to states harmed by the pollution. Moreover, even if a final regulatory decision not to act could displace federal common law, that is not this case. EPA has not decided "to postpone or even forgo the imposition of regulatory standards." *Id.* at 44. Here, although the CAA grants EPA authority to regulate greenhouse gases from Petitioners' and TVA's existing facilities, the agency has neither decided to impose emissions standards, nor decided against imposing them. The agency, by its own description, is still figuring out what to do. TVA Br. at 51 n.25.

In short, this is a case in which affected states and other entities seek to abate an interstate nuisance that could someday be, *but has not yet been*,

addressed by federal regulatory authorities. Petitioners' and TVA's argument that the Clean Air Act somehow displaces this action therefore amounts to a claim that latent federal regulatory authority over tortious conduct can, without more, displace federal common law remedies for that conduct. That premise cannot withstand careful scrutiny for two key reasons.

A. This Court's Displacement Precedent Requires A Careful Evaluation Of The State Of Existing Statutory And Regulatory Law.

First, this Court has never suggested that the mere fact that Congress has lifted its pen to acknowledge a significant interstate pollution problem displaces the federal courts' authority to address the same problem. On the contrary, in *Illinois v. City of Milwaukee* ("*Milwaukee I*"), this Court recognized a role for "federal common law to abate a public nuisance in interstate or navigable waters" despite the existence of "numerous [federal] laws touching on interstate waters." 406 U.S. 91, 101, 104 (1972). As of 1972, when that case was decided, those relevant laws included "the Federal Water Pollution Control Act, 62 Stat. 1155, as amended, 33 U.S.C. § 1152, [which] tighten[ed] control over discharges into navigable waters so as not to lower applicable water quality standards." *Milwaukee I*, 406 U.S. at 101. Among other things, the Federal Water Pollution Control Act (FWPCA) created a Federal Water Quality Administration (FWQA, now EPA), and charged the FWQA Administrator with "prepar[ing] or develop[ing] comprehensive programs for eliminating or reducing the pollution of interstate

waters and tributaries thereof." 33 U.S.C. §§ 1152, 1153(a) (1970). True, Congress ultimately deemed the pre-1972 version of the FWPCA, at issue in *Milwaukee I*, "inadequate in every vital aspect," S. Rep. No. 92-414, p.7 (1971), but the inadequacy concerned the FWQA's seeming inability to implement the law in a meaningful way, not the agency's lack of regulatory authority.

In other words, the federal common law recognized by the *Milwaukee I* Court filled a regulatory void, not a statutory one. Federal statutes that addressed water pollution "exist[ed]" at the time, and they granted ample authority to the relevant regulatory agency (FWQA), but that agency had not yet "appli[ed]" the statutes to Milwaukee's alleged pollution of Lake Michigan. *Milwaukee II*, 451 U.S. at 401. It was this regulatory void that necessitated Illinois' appeal to the federal courts.

No such regulatory void existed when the case returned to this Court almost nine years later, in *Milwaukee II*. 451 U.S. 304 (1981). By that time, Congress had enacted the Federal Water Pollution Control Act Amendments of 1972 (1972 Amendments). Pub.L. 92-500, 86 Stat. 816. The 1972 Amendments made it "illegal for anyone to discharge pollutants into the Nation's waters except pursuant to a permit." *Milwaukee II*, 451 U.S. at 310-11. Under the Amendments, the City of Milwaukee had to obtain so-called "National Pollution Discharge Elimination System" or "NPDES" permits for its sewer systems, giving EPA and its state delegate, the Wisconsin Department of Natural Resources (WDNR), the opportunity and obligation to impose effluent limitations and otherwise oversee "the

completion of planning and additional construction to control sewage overflows." *Id.* at 311.

Importantly, the NPDES permitting program differs markedly from the CAA Title V program that is now applicable to Petitioners' and TVA's greenhouse gas emissions. The NPDES program "clearly authorize[s], and in many cases ... require[s]" state environmental agencies "to establish substantive [emissions] limits based on specific technology and the condition of the receiving water." Mary Ellen Ternes and Ross A. Macfarlane, *Negotiating Title V Operating Permits: A View from the Provinces*, 13-FALL Nat. Resources & Env't 417, 417 (1998). By contrast, in the Title V program, "Congress clearly made the policy judgment that permits should only implement and enforce existing applicable requirements, not create new ones." *Id.*

As the *Milwaukee II* Court noted, the City of Milwaukee dutifully obtained the NPDES permits required by the 1972 Amendments: by 1981, when that case was decided, Milwaukee and other petitioners in the case were "operat[ing] their sewer systems and discharg[ing] effluent under [NPDES] permits," *Milwaukee II*, 451 U.S. at 311—permits that imposed substantive effluent limitations and other operating requirements. As a result, in the Court's view, there was no longer cause to resort to federal common law. Congress had not "left the formulation of appropriate federal standards to the courts through application of ... nuisance concepts, but rather ha[d] occupied the field through the establishment of a comprehensive regulatory program supervised by an expert agency." *Id.* at 317; *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489 n.7 (2008) (characterizing *Milwaukee II* as a case in

which "plaintiffs' common law nuisance claims amounted to arguments for effluent-discharge standards different from those provided by the [Clean Water Act (CWA)]").

The *Milwaukee II* Court reached this displacement conclusion, however, only after carefully evaluating the statutory *and regulatory* law applicable to Milwaukee's sewage overflows. Indeed, the Court repeatedly emphasized the pervasive administrative regulation of Milwaukee's effluent. The majority noted, for example, that under the 1972 Amendments *every* "point source discharge is prohibited unless covered by a permit, *which directly subjects the discharger to the administrative apparatus* established by Congress to achieve its goals"; that "the problem of effluent limitations has been thoroughly addressed *through the administrative scheme* established by Congress"; and later that "there is no basis for a federal court to impose more stringent limitations than those *imposed under the regulatory regime*." *Milwaukee II*, 451 U.S. at 318, 319, 320 (emphasis added). In each instance, the Court focused not on the coverage of the 1972 Amendments alone, but instead on the coverage of the overall legal regime established by the Amendments and implemented by EPA.

Two sentences in the middle of the *Milwaukee II* majority opinion make this point pellucid: "It is quite clear from the foregoing [discussion] that the state agency duly authorized by the EPA to issue discharge permits under the Act has addressed the problem of overflows from petitioners' sewer system. ... There is no 'interstice here to be filled by federal common law: overflows are covered by the Act *and have been addressed by the regulatory regime established by the*

Act." *Id.* at 323 (emphasis added). In other words, the Court found dispositive the fact that Milwaukee's emissions were well regulated, not just by the 1972 Amendments, but by those Amendments as implemented by "the agency charged by Congress with administering this comprehensive scheme." *Id.* at 320.

A dispute between the majority and dissent in *Milwaukee II* further underlines the importance of thoroughly evaluating the regulations applicable to the alleged nuisance. At one point, the dissent accuses the majority of "assum[ing] that as soon as Congress addresses a question previously governed by federal common law," the common law remedy is "automatic[ally] displace[d]." *Id.* at 333-34 (Blackmun, J., dissenting) (internal quotation marks omitted). Not true, says the majority, the analysis is not automatic but nuanced, and it requires a detailed "assessment" of the state of the law. *Milwaukee II*, 451 U.S. at 315 n.8. Displacement does *not* occur as soon as Congress has spoken, but instead when the overall regulatory "scheme established by Congress addresses the problem formerly governed by federal common law." *Id.*; *see also Middlesex County Sewer Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 22 (1981) (finding federal common law displaced in the context of ocean dumping, in part because the relevant federal statute, the Marine Protection, Research and Sanctuaries Act (MPRSA), creates a "*regulatory scheme* ... no less comprehensive, with respect to ocean dumping, than" the CWA's scheme with respect to point sources (emphasis added)); *id.* at 12 (noting that the MPRSA "requires a permit for any dumping into ocean waters").

True, plaintiffs cannot resort to federal common law merely because the federal statutory and regulatory regime fails to address their problem in the way they would prefer. "Demanding *specific* regulations of general applicability before concluding that Congress has addressed the problem to the exclusion of federal common law" is inappropriate, *Milwaukee II*, 451 U.S. at 324 (emphasis added), because federal courts have authority only to "'fill[] gap[s]'" in a federal regulatory scheme, not to "provid[e] a different regulatory scheme," *id.* at 324 n.18. But where the relevant regulatory scheme does nothing to address a sovereign state plaintiff's interstate pollution problem, *Milwaukee I* establishes that the federal law does not leave the affected state without recourse; there is ample room for federal courts to fill the gap.

In this case, a careful assessment of the CAA regulatory scheme admits of only one conclusion: the Act and its implementing regulations do not address the problem of greenhouse gas emissions from Petitioners' and TVA's existing sources. The Act grants EPA authority to limit those emissions, but existing regulations do not yet do so. The 1972 Amendments at issue in *Milwaukee II* differ from the CAA in this key respect: under the amended CWA, "*[e]very* point source discharge [of water pollution] is prohibited unless covered by [an administrative] permit," *Milwaukee II*, 451 U.S. at 318 (emphasis in original), whereas the CAA leaves existing point sources of air pollution unregulated unless and until EPA acts, Pet. App. at 143a (contrasting the CWA with the CAA, under which "the states and the EPA are not required to control effluents from every source, but only from those sources which are found

... to threaten national ambient air quality standards" (internal quotations omitted)).

Moreover, even if TVA is correct in its unsupported claim that federal common law could be displaced "when an agency ... decides to postpone or even forgo" regulation of the nuisance, TVA Br. at 44, that has not occurred in this case. The regulatory void here results not from an administrative decision to eschew regulation or to leave Petitioners' and TVA's greenhouse gas emissions unregulated, but from EPA's confusion about the scope of its own authority. TVA Br. at 2 ("When this case began [EPA] took the view that the [CAA] did not authorize it to issue mandatory regulations to address global climate change."). Once EPA has taken some final and reviewable action with respect to Petitioners' and TVA's greenhouse gas emissions, the courts can assess whether that action alters the landscape for common law plaintiffs. Until that time, however, the federal courts have ample authority to abate the serious and unaddressed interstate nuisance to which Petitioners' and TVA's emissions contribute.

B. Petitioners' And TVA's Displacement Argument Ignores The Need For Uniform Federal Standards To Govern Interstate Pollution Disputes.

The second reason that *unexercised* federal regulatory authority over a pollution source cannot displace federal common law relates to the central role that federal standards play--and should play in the resolution of interstate pollution disputes. This Court has repeatedly recognized the need for uniform federal standards to govern interstate pollution. For example, the Court has explained that until Congress

and regulatory agencies act to address an interstate nuisance, affected downwind or downstream states are entitled to the protections of "'[f]ederal common law and not the varying common law of the individual States.'" *Milwaukee I*, 406 U.S. at 107 n.9 (quoting *Texas v. Pankey*, 441 F.2d 236, 241-42 (10th Cir. 1971)).

The Court has also emphasized the importance of uniform federal standards during a later time period, when Congress and the relevant agency have addressed the nuisance. At that point, affected states enjoy the protections of the federal statutory regime, *Milwaukee II*, 451 U.S. at 313-15 (focusing the displacement inquiry on the question whether federal statutory and regulatory law—as opposed to state law—"addresses a question previously governed by a decision rested on federal common law"), and they may even have the ability to help shape the contours of that regime, *id.* at 325-26 (itemizing the various actions "a State affected by decisions of a neighboring State's [NPDES] permit-granting agency" can take "to seek redress" under the CWA).

Both before Congress has legislated and after a federal statutory regime is in place and fully implemented, therefore, federal law serves to protect affected states from self-dealing by source states—that is, from the risk that source states will "tilt[] the [regulatory] table in the state sovereign's direction." Richard A. Epstein, *Federal Preemption, and Federal Common Law, in Nuisance Cases*, 102 Nw. U. L. Rev. 551, 568 (2008); *see generally* Robert L. Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. Pa. L. Rev. 121, 203-04 (1985) (recognizing that source states and affected states often have very different views about how strictly to

regulate a polluting industry); Kenneth M. Murchison, *Interstate Pollution: The Need for Federal Common Law*, 6 Va. J. Nat. Res. Law 1, 29-30 (1986) (same). During both time periods, federal law guarantees an even playing field for affected states—first via common law, and then via federally prescribed emissions standards.

This case, however, falls into a gap. Congress has delegated to EPA regulatory authority over greenhouse gas emissions from stationary sources, but the agency has not yet used that authority to regulate those emissions. As a result, those emissions remain unregulated by federal statutory and regulatory law. Petitioners and TVA suggest that during this period—which can last for decades, as this case illustrates—the protections of federal law fall away. Pet. Br. at 40-46; TVA Br. at 44-53. That outcome would show insufficient regard for Connecticut and other sovereign states' interest in abating the tortious conduct of large out-of-state emitters of greenhouse gases. *Cf. Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907) ("When the states by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court."); *see also Missouri v. Illinois*, 200 U.S. 496, 520-21 (1906) (describing one state's pollution of a river as a "casus belli for a State lower down"). Indeed, that outcome would leave affected states with fewer federal rights and protections *after* the passage of federal pollution statutes than they enjoyed before such statutes were enacted.

International Paper Company v. Ouellette, 479 U.S. 481 (1987), is not to the contrary. To fully comprehend the important distinction between this case and *Ouellette*, one must understand both the contours of the *Ouellette* decision and the workings of the CAA's and CWA's "virtually identical" savings clauses, *Milwaukee II*, 451 U.S. at 328 (comparing CWA § 505(e), 33 U.S.C. 1365(e), with CAA § 304(e), 42 U.S.C. 7604(e)).

Ouellette concerned a Vermont landowner's attempt to wield Vermont nuisance law against a paper company located in New York. The defendant in the case had "discharge[d] a variety of effluents into [Lake Champlain]," allegedly making the waters of the lake "foul, unhealthy, smelly, and ... unfit for recreational use." *Ouellette*, 479 U.S. at 484. This Court began its analysis by recognizing the earlier decision in *Milwaukee II*, under which "federal legislation now occupied the field of [water pollution regulation], pre-empting all *federal* common law." *Id.* at 489 (emphasis in original). The Court then recognized that the CWA's "saving clause negates the inference that Congress 'left no room' for state causes of action." *Id.* at 492. Finally, the Court determined that the only state common law so preserved is that of the *source* state. *Id.* at 497. Overall, therefore, the Court concluded that the CWA prevented Ouellette and his fellow tort plaintiffs from pursuing their claims under federal or Vermont common law, but that "nothing in the Act bar[red]" them from "bringing a nuisance claim pursuant to the law of" New York. *Id.*

In reaching that conclusion, the *Ouellette* majority focused in part on an aspect of the CWA that the CAA shares: both statutory regimes allow source

states to "require discharge limitations *more stringent than* those required by the Federal Government." *Ouellette*, 479 U.S. at 490 (emphasis added); 40 C.F.R. § 123.1(i) (relevant CWA implementing regulation); 42 U.S.C. § 7416 (relevant section of the CAA). In other words, both the CWA and the CAA impose a regulatory floor. Source states may "impose standards ... stricter" than federal law provides, but they may never ratchet control *down* from what the federal regime requires. *Ouellette*, 479 U.S. at 499.

This federal floor figured prominently in *Ouellette*'s reasoning. After the Court observed that its decision did not "leave respondents without a remedy" because they could pursue their claims under New York common law, it hastened to add that New York's emissions standards might prove even stricter than relevant federal standards. *Id.* at 497 ("By its terms the CWA allows States such as New York to impose higher standards on their own point sources, and ... this authority may include the right to impose higher common-law as well as higher statutory restrictions."). In other words, the Court suggested that consigning victims of interstate pollution to the common law of the source state is fair because source state emissions standards cannot be weaker than—and may be stricter than—applicable federal standards.

In this case, however, there is no federal floor because, as noted above, no provision of federal statutory or regulatory law limits Petitioners' and TVA's greenhouse gas emissions. As a result, there is absolutely nothing to prevent Petitioners' and TVA's home states from "tilt[ing] the [regulatory] table in [their] direction[s]." Epstein, *Federal Preemption*, 102

Nw. U. L. Rev. at 568. Unlike in *Ouellette*, therefore, a displacement holding here would leave the victims of unregulated interstate greenhouse gas pollution—including Connecticut and the other sovereign state victims—entirely at the mercy of source states. This Court has never shown so little regard for states' "reasonable demands on the ground of their still remaining quasi-sovereign interests." *Georgia v. Tennessee Copper Co.*, 206 U.S. at 237.

CONCLUSION

This is neither a case in which "a plaintiff seeks relief that would address the same issue, but in a manner different in character or extent from what the regulatory program provides," nor a case in which "an agency [has] decide[d] to postpone or even forgo the imposition of regulatory standards." TVA Br. at 44. Rather, this case involves a federal pollution statute that EPA has not yet implemented in a way that addresses the serious interstate pollution problem of which Respondents complain. In this context, a finding that federal common law is displaced would leave Respondents with no remedy beyond that provided under the varying common law of Petitioners' and TVA's home states, and with no guarantee that those states' common law meets a minimum, uniform, and federally-approved standard of stringency. Sovereign state and other victims of interstate pollution merit greater protections than such a rule can possibly provide.

Respectfully submitted,

AMANDA C. LEITER
Counsel of Record
Associate Professor of Law
The Catholic University of America
Columbus School of Law
3600 John McCormack Rd. NE
Washington, DC 20064
Tel: (202) 319-6755
Fax: (202) 319-4459

March 18, 2011

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
FEB 7 / 2011
OFFICE OF THE CLERK

No. 10-174

IN THE

Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY, INC., *et al.*,
Petitioners,

v.

STATE OF CONNECTICUT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE STATES OF INDIANA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, FLORIDA, GEORGIA, IDAHO, KANSAS, KENTUCKY, LOUISIANA, MISSOURI, NEBRASKA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, WEST VIRGINIA, AND WYOMING, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

*Counsel of Record

GREGORY F. ZOELLER
Attorney General
THOMAS M. FISHER*
Solicitor General
HEATHER HAGAN MCVEIGH
ASHLEY TATMAN HARWEL
Deputy Attorneys General

Counsel for Amici *States*

(Additional counsel listed inside cover)

41694 C
40

ADDITIONAL COUNSEL

LUTHER STRANGE
Attorney General
State of Alabama

JOHN J. BURNS
Attorney General
State of Alaska

THOMAS C. HORNE
Attorney General
State of Arizona

DUSTIN MCDANIEL
Attorney General
State of Arkansas

JOHN W. SUTHERS
Attorney General
State of Colorado

PAMELA JO BONDI
Attorney General
State of Florida

SAMUEL S. OLENS
Attorney General
State of Georgia

LAWRENCE G. WASDEN
Attorney General
State of Idaho

DEREK SCHMIDT
Attorney General
State of Kansas

JACK CONWAY
Attorney General
State of Kentucky

JAMES D. "BUDDY" CALDWELL
Attorney General
State of Louisiana

CHRIS KOSTER
Attorney General
State of Missouri

JON BRUNING
Attorney General
State of Nebraska

WAYNE STENEHJEM
Attorney General
State of North Dakota

MICHAEL DEWINE
Attorney General
State of Ohio

E. SCOTT PRUITT
Attorney General
State of Oklahoma

ADDITIONAL COUNSEL (cont'd)

WILLIAM H. RYAN, JR.
Acting Attorney General
State of Pennsylvania

ALAN WILSON
Attorney General
State of South Carolina

MARTY JACKLEY
Attorney General
State of South Dakota

MARK L. SHURTLEFF
Attorney General
State of Utah

DARRELL V. MCGRAW, JR.
Attorney General
State of West Virginia

BRUCE A. SALZBURG
Attorney General
State of Wyoming

QUESTION PRESENTED

The court of appeals held that States and private plaintiffs may maintain actions under federal common law alleging that defendants—in this case, five electric utilities—have created a "public nuisance" by contributing to global warming, and may seek injunctive relief capping defendants' carbon dioxide emissions at judicially-determined levels.

The question presented that the *Amici* States address is:

Whether claims seeking to cap defendants' carbon dioxide emissions at "reasonable" levels, based on a court's weighing of the potential risks of climate change against the socioeconomic utility of defendants' conduct, would be governed by "judicially discoverable and manageable standards" or could be resolved without "initial policy determination[s] of a kind clearly for nonjudicial discretion." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI* STATES 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 4

I. Nonjusticiable Political Questions Arise In Any Case Not "Fit For The Wrangling of Lawyers" 4

II. Whether And How To Address Climate Change Is Not A Matter "Fit For The Wrangling Of Lawyers" In Federal Court 12

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

Baker v. Carr,
369 U.S. 186 (1962) 7, 10, 23

Chicago & S. Airlines, Inc. v. Waterman S.S. Corp.,
333 U.S. 103 (1948) 9, 10

Coalition for Responsible Regulation v. EPA,
No. 09-1322 (D.C. Cir.) 15

Coalition for Responsible Regulation v. EPA,
No. 10-1073 (D.C. Cir.) 15

Coalition for Responsible Regulation, et al. v. EPA,
No. 10-1092 (D.C. Cir.) 15

Colegrove v. Green,
328 U.S. 549 (1946) 9

Coleman v. Miller,
307 U.S. 433 (1939) 9

Gilligan v. Morgan,
413 U.S. 1 (1973) 10, 11

Luther v. Borden,
48 U.S. 1 (1849) 8

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 4, 12

CASES (CONT'D)

Massachusetts v. EPA,
549 U.S. 497 (2007) 14

Nixon v. United States,
506 U.S. 224 (1993) 11

Pacific States Telephone & Telegraph Co. v. Oregon,
223 U.S. 118 (1912) 8

State of Texas v. EPA,
No. 10-1425 (D.C. Cir. 2010) 17

State of Texas v. EPA,
No. 10-60961 (5th Cir. 2010) 17

Vieth v. Jubelirer,
541 U.S. 267 (2004) 11

STATUTES

42 U.S.C. § 7410(a) 13

42 U.S.C. § 7416 13

42 U.S.C. § 7401 *et seq.* 13

OTHER AUTHORITIES

74 Fed. Reg. (2009):

p. 66,496 14

p. 66,497 14

p. 66,498 15

OTHER AUTHORITIES (CONT'D)

p. 66,510-12 15

p. 66,514-16 ..... 15, 16

p. 66,522-35 ..... 15, 16

75 Fed. Reg. (2010):

p. 17,004 15

p. 25,324 15

p. 31,514 15

pp. 31,595-31,610 15

p. 77,698 16

p. 77,705 ..... 16, 17

pp. 77,708-77,712 ..... 16, 17

p. 81,874 17

p. 82,246 17

p. 82,430 17

76 Fed. Reg. (2011):

p. 2,581 17

p. 2,591 17

Alaska Climate Change Sub-Cabinet, http://www climatechange.alaska.gov/ (last visited Jan. 27, 2011) 21

OTHER AUTHORITIES (CONT'D)

Alexander M. Bickel, *The Least Dangerous Branch* (2d ed. 1986) 6, 7, 16, 27

California Air Res. Bd., *Climate Change* http://www.arb.ca.gov/cc/cc.htm (last visited Jan. 27, 2011) 20, 21

Climate and Energy Legislation, N.Y. Times Dec. 17, 2010, http://topics.nytimes.com/top/news/business/energy-environment/climate-and-energylegislation/index.html 26

Copenhagen Accord, UNFCCC, Dec. 7-19, Decision 2/CP.15, 15th sess. (2010) 25, 26

Elisabeth Rosenthal, *Obama's Backing Raises Hopes for Climate Pact*, N.Y. Times, March 1, 2009, at A1 26

Energy Efficiency – Electricity and Gas, http://www.cc.state.az.us/divisons/administration/energyefficiency.asp (last visited Jan. 27, 2011) 20

Holly Doremus & W. Michael Hanemann, *Of Babies and Bathwater: Why the Clean Air Act's Cooperative Federalism Framework is Useful for Addressing Global Warming*, 50 Ariz. L. Rev. 799 (2008) 13

Kentucky Climate Action Plan Council, *Kentucky Climate Change Action Group*, http://www.kyclimatechange.us (last visited Jan. 27, 2011) 21

OTHER AUTHORITIES (CONT'D)

Kyoto Protocol to the UNFCCC, 37 I.L.M. 22 (1998), Dec. 10, 1997 25

Marrakesh Accords of 2005, UNFCCC, Oct. 29-Nov. 10, Decision 11/CP.7, 7th sess. (2005) 25

Michael Weisslitz, *Rethinking the Equitable Principle of Common but Differentiated Responsibility: Differential Versus Absolute Norms of Compliance and Contribution in the Global Climate Change Context*, 13 Colo. J. Int'l Envtl. L. & Pol'y 473 (2002) 26

Midwestern Greenhouse Gas Reduction Accord, *Midwestern Greenhouse Gas Reduction Accord*, http://midwestern accord.org (last visited Jan. 27, 2011) 19

Nebraska Carbon Sequestration Adv. Comm'n, *Carbon Sequestration*, http://www.carbon.unl.edu/index.htm (last visited Jan. 27, 2011) 20

North Carolina Climate Action Plan Advisory Group, *CAPAG Final Report* (2008), *available at* http://www.ncclimate change.us/capag.cfm 22

North Carolina Climate Action Plan Advisory Group, http://www.nc climatechange.us (last visited Jan. 27, 2011) 21, 22

OTHER AUTHORITIES (CONT'D)

Pennsylvania Dep't of Env. Prot., *Climate Change Advisory Committee*, http://www.portal.state.pa.us/portal/server.pt/community/climate_change_advisory_comittee/10412 (last visited Jan. 27, 2011) 22

Pew Center on Global Climate Change, *U.S. States and Regions*, http://www.pewclimate.org/states-regions (last visited Jan. 27, 2011) 20

Phillip Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. Rev. 663 (2001) 13

Regional Greenhouse Gas Initiative, *Regional Greenhouse Gas Initiative (RGGI) CO_2 Budget Trading Program – Welcome*, http://www.rggi.org/home (last visited Jan. 27, 2011) 19

Renewable Energy Standard & Tariff, http://www.cc.state.az.us/divisions/utilities/electric/environmental.asp (last visited Jan. 27, 2011) 21

Richard A. Posner, *Economic Analysis of Law* 70 (5th ed. 1998) 2

Speech of the Honorable John Marshall (Mar. 7, 1800), 18 U.S. (5 Wheat.) app. note I (1820) 5

Status of Ratification of the Kyoto Protocol, http://unfccc.int/ (last visited Jan. 27, 2011) ... 25

OTHER AUTHORITIES (CONT'D)

United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, S. Treaty Doc. No. 102-38 (entered into force Mar. 21, 1994) 24

United Nations Framework Convention on Climate Change, *Meetings Archive*, http://unfccc.int/meetings/archive/items/2749.php (last visited Jan. 27, 2011). 25

United Nations Framework Convention on Climate Change, *Status of Ratification*, http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php (last visited Jan. 27, 2011) 24

Virginia Governor's Comm'n on Climate Change, *Climate Change*, http://www.deq.state.va.us/info/climatechange.html (last visited Jan. 27, 2011) 21

Vermont Agency of Transportation, *VTrans Climate Change Action Plan*, http://www.aot.state.vt.us/TechServices/EnvPermit/NewEnvirHomepage.htm (last visited Jan. 27, 2011). 21

Walter Dellinger & H. Jefferson Powell, *Marshall's Questions*, 2 Green Bag 2d 367 (1999) 6

Western Climate Initiative, *A Comprehensive Initiative*, http://www.westernclimateinitiative.org/designing-the-program (last visited Jan. 27, 2011) 19

INTEREST OF THE *AMICI* STATES

The justiciability of climate change lawsuits under federal common law is an issue of extraordinary importance to the 22 *Amici* States. To permit federal adjudication of claims seeking damages for past emissions and injunctions curtailing future emissions would disrupt carefully calibrated state regulatory schemes devised by politically accountable officials. Federal courts should not use the common law to confound the political branches' legislative and administrative processes by establishing emissions policy (more likely, multiple *conflicting* policies) on a piecemeal, *ad hoc*, case-by-case basis under the aegis of federal common law.

States have an especially strong interest in this case because the list of potential defendants is limitless. Plaintiffs' theory of liability involves nothing more specific than prosecuting the emission of carbon dioxide ("CO_2"). As utility owners, power plant operators, and generally significant CO_2 emitters (through facilities, vehicle fleets and highway construction, among other functions), states and their political subdivisions could be future defendants in similar actions.

SUMMARY OF THE ARGUMENT

Respondents invoke the power and prestige of federal courts to remedy global climate change. They assert that several power plants, by emitting too much CO_2, have broken the law. Not law enacted by a legislature, promulgated by a

government agency, or negotiated by a President, however. Rather, the law Respondents invoke is the common law—vague, consensus-presuming, case-by-case common law. They say that excessive CO_2 emissions by six particular electric power companies sufficiently contribute to global warming as to constitute a "public nuisance" that the federal judiciary should enjoin. They invoke public nuisance law despite the fact that, as Judge Posner has put it, "no one thinks that nuisance law has ever had a big impact on pollution." Richard A. Posner, *Economic Analysis of Law* 70 (5th ed. 1998). The unsurprising inefficacy of the common law in this regard led to "the enactment of extensive statutory regulation of pollution" that "has displaced the nuisance remedy in the major areas of pollution controversy." *Id.*

Respondents' claims thus seek to roll back the administrative state and exalt the courts in terms of how society regulates emissions, as if some judicially enforceable public consensus existed on that subject. The political question doctrine, however, shields federal courts and the rest of the country from exactly this sort of politics-by-other-means lawsuit. It arises from the irrefutable proposition that there are some disputes unsuitable for judicial resolution, where the arguments of lawyers simply cannot lead to legitimate resolution. Where a court cannot reasonably identify useful, neutral principles to apply, where it faces an impossible task in terms of gathering sufficient information to make a decision, and where any decision it renders necessarily makes policy choices, the question before it is political and off limits.

Cooperative federalism and international treaty-making in the environmental policy arena underscore the political nature of emission control regulation. Each defendant utility operates under state-issued pollution control permits, as do all power plants and large pollution emitters (except to the extent the facility is in one of the few areas of the country not covered by a state permitting program approved by the U.S. Environmental Protection Agency). Meanwhile, succeeding presidents and congresses have undertaken varying commitments in international agreements respecting greenhouse gas emissions.

This lawsuit urges a court to cap CO_2 emissions that federal and state law would otherwise permit (either because the law has not heretofore defined CO_2 as an endangering pollutant or because future emission limits will be set higher than a federal court's common law standard). It would undermine the entire state-federal regulatory scheme, not to mention the trade-offs incorporated into relevant international political obligations. State political branches have struck balances between economic development and environmental protection that exist within national and international regulatory frameworks, all of which demonstrate the political nature of the emissions regulation, and all of which deserve respect in federal court. The adversarial legal system is ill-equipped for this most political of debates.

ARGUMENT

I. Nonjusticiable Political Questions Arise In Any Case Not "Fit For The Wrangling Of Lawyers"

While the Court has had only a handful of occasions to apply the political question doctrine, its origins lie within the American tradition of judicial review itself. The doctrine carries out the Constitution's structural requirement of judicial modesty and restraint. It reflects an abiding concern for practical limits on courts in terms of gathering information about complex public policy issues, appreciating long-term consequences that might flow from nearly immutable judicial decisions, and the lack of accountability for judges who make decisions based on something other than neutral principles. These concerns all arise in this case and command judicial forbearance.

1. The political question doctrine received its judicial imprimatur in the very case that establishes the power of judicial review. In *Marbury v. Madison*, Chief Justice Marshall stated that "[q]uestions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." 5 U.S. (1 Cranch) 137, 170 (1803). These questions, Marshall wrote, "respect the nation, not individual rights . . . ." *Id.* at 166.

Even before *Marbury*, Marshall espoused the virtues of judicial restraint concerning political issues as a member of the House of Representatives.

In a speech before the House, Marshall explained that "[b]y extending the judicial power to all cases in law and equity, the constitution had never been understood to confer on that department any political power whatever." Speech of the Honorable John Marshall (Mar. 7, 1800), in 18 U.S. (5 Wheat.) app. note I, at 17 (1820). Indeed, "[i]f the judicial power extended to every question under the constitution, it would involve almost every subject proper for legislative discussion and decision." *Id.* at 16. At such point, "[t]he division of power . . . could exist no longer, and the other departments would be swallowed up by the judiciary." *Id.*

Marshall also enumerated political questions that would be unfit for judicial resolution. For example, a court could not determine the boundary line between the American and British dominions, whether to extradite a fugitive under a treaty with Britain, or whether a vessel was legally captured. *Id.* at 17, 25-26, 28. For reasons of institutional competence, Marshall stated, these issues were fit only for resolution by the executive, not the judiciary. With respect to the extradition issue, for example, Marshall stated that the executive is the "department whose duty it is to understand precisely the state of the political intercourse and connection between the United States and foreign nations, to understand the manner in which the particular stipulation is explained and performed by foreign nations, and to understand completely the state of the Union." *Id.* at 28.

On such questions, the federal courts, by contrast, lack the information necessary to make

sound judgments about the national interest, lack the power to enforce such decisions effectively, and lack the political accountability necessary to speak on behalf of the nation. Walter Dellinger & H. Jefferson Powell, *Marshall's Questions*, 2 Green Bag 2d 367, 372 (1999).

Thus, Marshall, the original champion of judicial review, was equally concerned with ensuring that courts avoid issues beyond their institutional competence.

Marshall's basic respect for the limits of meaningful and practical judicial authority remains at the heart of the matter. More than 150 years after *Marbury*, Alexander Bickel echoed the Great Chief Justice's concerns when he described the political question doctrine as founded on "the Court's sense of lack of capacity." Alexander M. Bickel, *The Least Dangerous Branch* 184 (2d ed. 1986). Bickel's observation proceeds from the premise that federal courts provide the institution that "stands altogether aside from the current clash of interests, and which, insofar as is humanly possible, is concerned with principle." *Id.* at 25. The "sense of lack of capacity" that Bickel identified at the center of the doctrine relates to the Court's need to identify neutral principles for its decisions, and, as Bickel describes it, is "compounded in equal parts" of the following:

> (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be

> ignored, as that perhaps it should but will not be; (d) finally . . . the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.

Id. at 184.

To be sure, some measure of "strangeness," "momentousness," "anxiety," and "self doubt" may arise in many cases of unquestioned justiciability. Yet, said Bickel, "the differences of degree can on occasion be satisfyingly conclusive." *Id.* Thus, "it is quite plain that some questions are held to be political pursuant to a decision on principle that *there ought to be discretion free of principled rules.*" *Id.* at 186 (emphasis added). That is, there are some areas where "no principled judgment circumscribing a desirable area of discretionary power is possible." *Id.* at 187. At bottom, the question becomes whether the issue before the Court is "fit for the wrangling of lawyers." *Id.* at 185 (internal quotation omitted).

2. The Court's political question precedents bear out this assessment. The early political question decisions are grounded both in constitutional text and in concerns about whether judicial intervention without a clearly delineated rule to apply would be prudential. Even after *Baker v. Carr*, considerations of practical limits on judicial power and the inconsistency between unlimited policy discretion and the judicial role have continued to be central to the Court's analysis.

In *Luther v. Borden*, 48 U.S. 1, 42-43 (1849), the Court relied on both practical and textual considerations in holding that only Congress was in a position to interpret the Guarantee Clause and recognize one of two competing claims to the governance of Rhode Island. Foremost in the Court's mind was the practical effect of a judicial decision bestowing sovereign power. Such a decision would have far reaching practical consequences, such as invalidating the laws and taxes of the illegitimate sovereign and nullifying its courts' judgments. *Id.* at 38-40. "When the decisions of this court might lead to such results, it becomes its duty to examine very carefully its own powers before it undertakes to exercise jurisdiction." *Id.* at 39.

In *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118, 137 (1912), the Court refused to decide whether Oregon lacked a republican government because its constitution allowed citizens to legislate by initiative and referendum. The Court again pondered the vast, essentially unknowable consequences of such a decision, noting that it would open the door for every citizen to challenge taxes by questioning in court the legitimacy of the state while also absolving citizens from any obligation to support or obey the laws of established state government. *Id.* at 141-42. Moreover, the Court stated, "as a consequence of the existence of such judicial authority a power in the judiciary must be implied, unless it be that anarchy is to ensue, to build by judicial action upon the ruins of the previously established government a new one . . . ." *Id.* at 142. Faced with the prospect of having to build an entirely new state government from the ground up,

the Court concluded that it had no authority to decide the question presented.

Concern for the practical limits of judicial decisionmaking remained vital in *Coleman v. Miller*, 307 U.S. 433 (1939), where the Court eschewed the question whether there is a limited "reasonable" time period for states to ratify constitutional amendments. A plurality took an absolutist approach, stating that the amendment process is "not subject to judicial guidance, control or interference at any point." *Id.* at 459. Writing for himself and two other justices, however, Chief Justice Hughes disclaimed judicial involvement in part because it would require "an appraisal of a great variety of relevant conditions, political, social, and economic." *Id.* at 453-54.

Over the next decade, the Court employed the political question doctrine both out of concern for its practical ability to divine "standards of fairness for a representative system," *Colegrove v. Green*, 328 U.S. 549, 553 (1946), and to make decisions about foreign affairs "without the relevant information" that has been "properly held secret," *Chicago & S. Airlines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). Here, again, doctrinal strains related to the limited practical competencies of the judiciary prompted the Court to forbear.

The *Chicago and Southern Airlines* case also impelled the Court to comment on its limited capacity to make proper decisions in political contexts, even assuming access to sufficient information. "[T]he very nature of executive

decisions about foreign policy is political, not judicial. Such decisions . . . are delicate, complex, and involve large elements of prophecy." *Id.* Thus, "[t]hey are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Id.*

The Court refined the political question doctrine in *Baker v. Carr*, 369 U.S. 186 (1962), where it disavowed the outcome in *Colegrove* by finding a state unequal-apportionment claim justiciable, but nonetheless reaffirmed six basic practical and textual considerations that underlay the political question precedents. The factors articulated in *Baker* most salient to this case are "a lack of judicially discoverable or manageable standards for resolving" the issue, and "the impossibility of deciding [the issue] without an initial policy determination of a kind clearly for nonjudicial discretion." *Id.* at 217.

Using the *Baker* formulation, the Court in *Gilligan v. Morgan*, 413 U.S. 1 (1973), rejected an invitation to "assume continuing regulatory jurisdiction over the activities of the Ohio National Guard," which would have included a nearly unlimited role in "establish[ing] standards for the training, kind of weapons and scope and kind of orders to control the actions of the National Guard." *Id.* at 5-6. The Court dismissed the lawsuit both for reasons of constitutional text and because "[t]he complex subtle, and professional decisions as to the composition, training, equipping, and control of a

military force are essentially professional military judgments . . . ." *Id.* at 10. *See also id.* at 14 (Blackmun, J., concurring) ("[t]he relief sought by respondents . . . is beyond the province of the judiciary [because] judicially manageable standards are lacking."). In short, military regulation is not what judges do.

The lack of judicially enforceable standards also underlay the decision in *Vieth v. Jubelirer*, 541 U.S. 267, 305-06 (2004) (plurality opinion), where the Court rejected a political gerrymandering claim as nonjusticiable because no discernible and manageable standards for addressing that claim existed. *See id.* at 305-06. *See also id.* at 306-07 (Kennedy, J., concurring) (stating that gerrymandering claims suffer from a "lack [of] comprehensive and neutral principles" for judicial resolution and the "absence of rules to limit and confine judicial intervention."); *Nixon v. United States*, 506 U.S. 224, 226, 228-29 (1993) (rejecting a collateral attack on impeachment proceedings while observing "the lack of judicially manageable standards," a factor that "may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch").

The Court's long-time concerns for lack of judicially enforceable standards, unfettered policymaking and inability to know or control practical consequences flowing from judicial intervention are particularly relevant here. There are no judicially enforceable common law nuisance standards that can apply here, or any practical limitation on the policymaking role courts would

have to assume in this case. Federal judges are not in a position to master the science and economics of ubiquitous industrial and human CO_2 emissions, nor, without guidance from Congress or the EPA, is pollution regulation what judges do.

II. Whether And How To Address Climate Change Is Not A Matter "Fit For The Wrangling Of Lawyers" In Federal Court

Chief Justice Marshall said that nonjusticiable political questions "respect the nation, not individual rights." *Marbury*, 5 U.S. at 166. It is difficult to conceive of a case having less to do with individual rights and more to do with the nation than one seeking to fashion national emissions policy from the common law of nuisance. The issues wrapped up in this case have been the subject of acute political battles for decades, both across the country and around the world. And if political debates related to global climate change seem intractable, that should tell the Court all it needs to know about the lack of neutral principles available to resolve the legal issue Respondents bring to the table.

1. Perhaps the most definitive proof that emissions regulation is a matter reserved for political wrangling rather than judicial directive is that it has been subsumed within the broad rubric of "cooperative federalism," a regulatory approach that maximizes the participation of politically accountable public officials. Cooperative federalism refers to a style of regulation that has grown increasingly common since the 1970s, in which the federal government creates federal standards and

leaves the implementation of these standards to the states. *See* Phillip Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. Rev. 663, 668-70 (2001). It allows states significant discretion and power and, as a consequence, encourages multiple levels of political debate, negotiation, and resolution. *See id.* at 671-73.

This style of regulation is especially valuable when economic trade-offs and regional variation are important, as with environmental law. *See generally, e.g.*, Holly Doremus & W. Michael Hanemann, *Of Babies and Bathwater: Why the Clean Air Act's Cooperative Federalism Framework is Useful for Addressing Global Warming*, 50 Ariz. L. Rev. 799 (2008). The most significant political instrument to address the consequences of air emissions, the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, requires the United States Environmental Protection Agency ("EPA") to establish national health-based air quality standards to protect against common environmental pollutants, but assigns states a significant role in implementing and enforcing them. States adopt their own State Implementation Plans for compliance with National Ambient Air Quality Standards within three years of EPA promulgation of such standards. *See* 42 U.S.C. § 7410(a). While such plans must meet basic requirements and are subject to EPA approval, they are adopted with public input and thereby adapted to the particular circumstances of each state. *Id.* States choose how to meet federal requirements and may impose more stringent standards than the basic federal mandate. *See* 42 U.S.C. § 7416. As a

consequence, no State Implementation Plans are identical.

The Clean Air Act showcases cooperative federalism's politics-maximizing benefits and on many levels shows how regulation of CO_2 emissions is an inherently political undertaking. Succeeding administrations took different positions as to whether the Clean Air Act defines CO_2 as an air pollutant. When in 2003 the Bush administration said it did not, a group of states (EPA's partners in Clean Air Act enforcement) sued to force EPA to consider designating CO_2 a pollutant. In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Court concluded that Congress, as part of its political solution to emissions control problems, allowed EPA to review whether CO_2 qualified as an endangering pollutant, and it remanded for EPA to consider the issue.

EPA's resulting 2009 "endangerment finding," while problematic under the standards and review requirements of the Clear Air Act, itself reveals many of the policy considerations that inherently arise when any government body undertakes to address climate issues. *See* 74 Fed. Reg. 66,496, 66,497 (2009).[1] The endangerment finding, though

---

[1] In addition to the endangerment finding and the "tailoring rule" (referred to in text *infra*), EPA issued greenhouse gas emission standards for light-duty vehicles and interpreted this action as requiring stationary sources, such as electric generating and industrial facilities, to comply with the Clean Air Act's prevention of significant deterioration ("PSD") and Title V permitting programs with respect to their greenhouse gas emissions.

presented as purely scientific, of necessity confronts the possible effects, as characterized by EPA, of greenhouse gas emissions on public health and welfare, resource availability, and the national economy. *See id.* at 66,498, 66,510-12, 66,515-16, 66,523-35; *see also* 75 Fed. Reg. 31,514, 31,595-31,610 (2010).

For example, EPA claims that it has, pursuant to congressional authorization, weighed the possibility of benefits resulting from greenhouse gas emissions against the possibility of harms from such emissions. *See* 74 Fed. Reg. at 66,498, 66,525, 66,527-28. EPA's

---

See 75 Fed. Reg. 17,004, 25,324 (2010) (interpreting light duty vehicle emission standards as triggering PSD and Title V requirements for stationary sources). These actions have generated legal challenges from states (including *Amici* States Alaska, Florida, Indiana, Kentucky, Louisiana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, and Utah), industry groups, and independent organizations. *See Coalition for Responsible Regulation, et al. v. EPA*, No. 10-1092 (and consolidated cases) (D.C. Cir.) (consolidating 16 separate challenges to the new light-duty vehicle standards); *Coalition for Responsible Regulation v. EPA*, No. 10-1073 (and consolidated cases) (D.C. Cir.) (consolidating 43 separate challenges to the tailoring rule and EPA's action on its interpretation that regulation of greenhouse gas emissions from motor vehicles triggers regulation of greenhouse gas emissions from stationary sources under the PSD and Title V programs); *Coalition for Responsible Regulation v. EPA*, No. 09-1322 (and consolidated cases) (D.C. Cir.) (consolidating 26 challenges to the greenhouse gas endangerment finding and EPA's denial of petitions for reconsideration of that finding).

endangerment finding thus identifies a host of policy issues.

Addressing issues related to climate change requires determining what limits on emissions, and for how long, are appropriate, which in turn demands examination of competing scientific and economic data. *See id.* at 66,514-16, 66,522-23. While judges may properly evaluate whether an EPA decision is supported by science (as required by statute), judges have no particular ability to make scientific determinations themselves or to balance costs and benefits of various courses of action suggested by scientific findings. *Cf. id.* at 66,514-16. Judges, being "electorally irresponsible," Bickel, *supra*, at 184, do not possess the right to make such complex and disputed cost-benefit assessments for society.

EPA's actions since publishing its endangerment finding (and related rules) further highlight the political nature of this debate. First, EPA decided that 13 states' Clean Air Act implementation plans were non-compliant with the new greenhouse gas rules.[2] *See* 75 Fed. Reg. 77,698, 77,705 (2010). EPA advised these states that, if they did not revise their plans before the greenhouse gas rule took effect on January 2, 2011, EPA would institute a construction

---

[2] These states are: Arizona (excluding Maricopa County, Pima County, and Indian Country), Arkansas, California (Sacramento Metropolitan AQMD), Connecticut, Florida, Idaho, Kansas, Kentucky, Nebraska, Nevada (Clark County), Oregon, Texas, and Wyoming. *See* 75 Fed. Reg. 77,698, 77,708-12 (2010).

moratorium because the non-compliant states would be unable to issue valid permits under the Clean Air Act. *See generally, e.g., id.* at 77,708-12. EPA allowed each of these states between three weeks and 12 months to become compliant, informing them that, if they did not do so, EPA would take over implementation of the Clean Air Act for that state. *See, e.g., id.* at 77,705. The State of Texas initiated litigation seeking to overturn EPA's December 13, 2010, finding of non-compliance, and challenging the threatened moratorium, the requirement of plan revisions, and EPA's attempts to impose its own implementation plan. *State of Texas v. EPA*, No. 10-60961 (5th Cir. 2010); *see also State of Texas v. EPA*, No. 10-1425 (D.C. Cir. 2010) (challenging a separate but related EPA "interim final rule" specifically for Texas that imposes a federal implementation plan for that state immediately (75 Fed. Reg. 82,430 (2010))).

The seven states with the shortest deadline (December 22, 2010) did not submit revised plans by that date. *See* 75 Fed. Reg. 81,874 (2010). EPA judged these states to have failed to comply with the Clean Air Act and followed this judgment immediately with its own federal implementation plan. *See id.* at 82,246. When the next jurisdiction did not meet its deadline, EPA issued a new plan on the same day it determined failure. *See* 76 Fed. Reg. 2,581, 2,591 (2011).

What this history demonstrates is a series of policy judgments following political battles fought in Congress, before EPA, and in the States. Federal court litigation has followed, to be sure, but that

litigation exists in the context of interpreting the law as produced by political branch conflicts. It does not ask the judiciary itself to decide optimal policy trade-offs or to declare the law independent of political-branch decisions.

Simply put, Congress's grant of authority to EPA and similar agencies to regulate certain subjects is a political decision. Those agencies then exercise that authority through the rule-making process, which is also, in part, political. Then, and only then, does the federal judiciary enter the scene and ensure that throughout this political process, Congress and the regulating agency follow the law in making their political decisions. If a challenge reaches the judiciary prior to action by the political branches, the Administrative Procedures Act requires remand to allow such action.

Here, Respondents ask the Court to circumvent that careful process and substitute its policy judgment for that of the political branches. However, examining emissions regulation in the context of a public nuisance lawsuit would render pointless the process of interpreting and applying the political resolution of policy disputes over emissions. This is an area of law that demands "discretion free of principled rules," as Bickel put it, and as such must necessarily be left for the political branches, notwithstanding legal disputes that arise regarding what those branches have decided.

2. The cooperative federalist model has also produced various regional compacts entered into by groups of states, each of which tailors its response to

the perceived threat of climate change to the affected region and its members. These compacts—each the result of yet more politics—further demonstrate the unsuitability of judicially fashioned CO_2 regulation.

Each compact varies in its emission reduction target. For example, the Regional Greenhouse Gas Initiative ("RGGI") aims to reduce CO_2 emissions from 2009 levels by 10% by the year 2018, whereas the Midwestern Greenhouse Gas Reduction Accord ("MWGGRA") seeks to reduce emissions by 20% from 2005 levels by the year 2020. *Compare Regional Greenhouse Gas Initiative*, http://www.rggi.org, *with Midwestern Greenhouse Gas Reduction Accord*, http://midwesternaccord.org. Another compact, the Western Climate Initiative ("WCI"), has targeted a 15% reduction from 2005 levels by the year 2020. *See Western Climate Initiative*, http://westernclimate initiative.org.

These programs share a "cap and trade" methodology, combined with technology investments and offsets, in order to allow regional economic growth while pursuing environmental goals. *Compare RGGI, with MWGGRA, and with WCI.* Despite this similarity, each differs in its particular implementation based on the aggregate conditions—both economic and ecologic—of the region.

Thus, some compacts place mandatory requirements on their member states; compliance with others is strictly voluntary. *Compare RGGI, with MWGGRA* ("The recommendations are from the advisory group only, and have not been endorsed or approved by any state. States' views may vary on

individual aspects of the recommendations."). This variance also works to adapt each compact to the needs of its members and region.

This is not to say that such policies are implemented solely on federal and regional levels. At least 21 states have designed individual regulations addressing those sources of greenhouse gases of greatest concern, in a way consistent with their local priorities. *See Pew Center on Global Climate Change*, http://www.pewclimate.org/states-regions (providing a dynamic map of state and regional activities in the United States). California has its own cap and trade program, requires power companies to acquire 33% of their electricity from renewable sources, and requires greenhouse gas emission reporting, among other regulations. *See California Air Res. Bd.*, http://www.arb.ca.gov/cc/cc.htm. In contrast, Nebraska invests in research on the effectiveness of using agricultural land for carbon sequestration. *See, e.g., Nebraska Carbon Sequestration Adv. Comm'n*, http://www.carbon.unl.edu/index.htm. Virginia has committed to a 30% reduction in greenhouse gas emissions from 2007 levels by 2025, driven by energy conservation and renewable energy usage. *Virginia Governor's Comm'n on Climate Change*, http://www.deq.state.va.us/info/climatechange.html. Arizona has adopted energy efficiency standards that are among the most aggressive in the nation, requiring public utilities to achieve annual energy savings of at least 22% by 2020. *See Energy Efficiency – Electricity and Gas*, http://www.cc.state.az.us/divisons/administration/energyefficiency.asp. Additionally, Arizona requires regulated utilities to generate 15% of their energy

from renewable sources by 2021, creating market demand for clean, renewable and efficient energy supplies while reducing emissions of greenhouse gases. *See Renewable Energy Standard & Tariff*, http://www.cc.state.az.us/divisions/utilities/electric/environmental.asp. Each state's decision implicitly reflects a balancing of the costs of climate change regulation weighed against the benefits likely to accrue from it.

For some states, a large part of this regulation consists of limiting motor vehicle greenhouse gas emissions in particular. California adopted regulations with even stricter limits than EPA's federal vehicle regulations. *See California Air Res. Bd.*, http://www.arb.ca.gov/cc/ccms/ccms.htm. Other states, such as Vermont, also adopted these standards. Vermont Agency of Transportation, *VTrans Climate Change Action Plan*, http://www.aot.state.vt.us/TechServices/EnvPermit/NewEnvirHomepage.htm. Each of these states pursues these efficiencies differently. *Compare id.* (bio-fuels, vehicle efficiency, and improved public transit), *with California Air Res. Bd.* (investing in research toward "zero emission" vehicles and fuel efficiency).

At least six other states are engaged in administrative or legislative inquiries into possible additional greenhouse-gas regulation. *See, e.g.*, *Alaska Climate Change Sub-Cabinet*, http://www.climatechange.alaska.gov/; *Kentucky Climate Action Plan Council*, http://www.kyclimatechange.us; *North Carolina Climate Action Plan Advisory Group*, http://www.ncclimatechange.us/; *Pennsylvania Dep't*

of Env. Prot., http://www.portal.state.pa.us/portal/server.pt/community/climate_change_advisory_committee/10412. These commissions examine the approaches taken to climate change in other states and recent scientific data in the context of the particular circumstances of the inquiring state.

In some states, inquiries of this sort result in "action plans," which contain policy recommendations for the state governor and legislature. *See, e.g.*, North Carolina Climate Action Plan Advisory Group, *CAPAG Final Report* (2008), *available at* http://www.ncclimatechange.us/capag.cfm. Though these reports do not have the force of law, they provide a foundation upon which the state can make judgments about whether and how to develop legislation or regulations on the issue.

Thus, through the cooperative federalism model, states use their political bodies to secure environmental benefits for their citizens without sacrificing their livelihoods, and each does so in a different fashion—a natural result of the social, political, environmental, and economic diversity that exists among states. A plan to modify greenhouse gas emissions that is acceptable to California and Vermont may be unacceptable to Indiana, Georgia, Ohio, or Nebraska, for example.

Respondents' public nuisance claims dismiss this state and regional diversity and the differing results of political skirmishes across the country. By asking a federal judge in New York to impose emission limits on defendant companies, each of which is presumably compliant with the regulations of each

state in which it operates, Respondents are attempting to export their preferred environmental policies, and those policies' economic effects, to other states. Allowing them to do so would be detrimental to state innovation and regional approaches that have prevailed to date through the actions of political branches of government.

In fact, one of the most glaring flaws of Respondents' lawsuit is its lack of respect for the sovereignty of the states in which the defendant companies are based. The decision below is effectively an invitation for federal courts to undertake collateral review of state environmental policies that have followed from Congress's own policy decisions on the subject. This lawsuit invokes a legal tradition (the common law) that depends for legitimacy upon wide consensus, yet invites judges to decide the case irrespective of environmental policies that the people, through the political processes, have managed to agree upon. This case simultaneously epitomizes both "a lack of judicially discoverable or manageable standards for resolving" the nuisance issue, and "the impossibility of deciding [the issue] without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217.

3. If these multi-level domestic approaches to air-emissions policy were not enough to demonstrate the political nature of this case, the very description of the problem Respondents seek to address surely resolves any remaining doubt. Respondents are worried not about *national* warming, but about *global* warming. *See* Br. Opp. Cert. 1 ("respondents .

. . sued petitioners . . . alleging that carbon dioxide emissions from petitioners' and TVA's power plants had contributed to global warming, creating a public nuisance . . . ."). And, indeed, the global nature of concerns over anthropogenic climate change has spawned a variety of treaties and other international initiatives aimed at addressing air emissions. This activity has been multifaceted, balancing a variety of economic, social, geographic, and political factors and emphasizing multiparty action rather than arbitrarily focusing on a single entity or small group of entities.

The United Nations has responded to concerns about the possibility of climate change by creating the United Nations Framework Convention on Climate Change (UNFCCC). This treaty has been joined by 193 nations and 1 regional development group. *See* United Nations Framework Convention on Climate Change, *Status of Ratification*, http://unfccc.int/. The UNFCCC is mostly aspirational, with provisions suggesting that parties "should" attempt to "anticipate, prevent, or mitigate" climate change. *See generally* United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, S. Treaty Doc No. 102-38 (entered into force March 21, 1994). A number of provisions also focus on technology transfers from developed to developing nations and the economic sustainability of environmental policies. *See id.* Countries retain discretion to set their individual policies in pursuit of these goals on the basis of their specific conditions. *See id.* at art. 3, ¶3.

These commitments implicate delicate matters of national and international policy, including relationships between "developing nations" and "developed nations;" the transfer of technology and skills between nations; education; methods of containing climate change; and the timetables involved in doing so. *See id.* at art. 4. Because of the complex nature of these commitments, the member countries of the UNFCCC have met quarterly since 1996 to discuss implementation. *See* United Nations Framework Convention on Climate Change, *Meetings Archive*, http://unfccc.int/. At these quarterly meetings, the attendees discuss implementation of the aspirational commitments contained within the UNFCCC and recent scientific developments. *See generally id.*

Numerous ancillary agreements have resulted, including the Kyoto Protocol to the UNFCCC, 37 I.L.M. 22 (1998), Dec. 10, 1997; the Marrakesh Accords of 2005, UNFCCC, Oct. 29-Nov. 10, Decision 11/CP.7, 7th sess. (2005); and the Copenhagen Accord, UNFCCC, Dec. 7-19, Decision 2/CP.15, 15th sess. (2010). These agreements, unlike the UNFCCC, often have entailed members' assumption of binding commitments. *See, e.g., Kyoto Protocol.*

Notably, President Clinton signed the Kyoto Protocol, which required emission reductions by "developed nations" but not "developing nations," though the United States ultimately did not ratify the treaty. *See Status of Ratification of the Kyoto Protocol*, http://unfccc.int/. Explaining the United States' decision not to ratify the Protocol, President Bush observed that it exempted from its limitations

80% of the world, including India and China, and that he believed it would harm the United States' economy. *See, e.g.*, Michael Weisslitz, *Rethinking the Equitable Principle of Common but Differentiated Responsibility: Differential Versus Absolute Norms of Compliance and Contribution in the Global Climate Change Context*, 13 Colo. J. Int'l Envtl. L. & Pol'y 473, 507-08 (2002).

President Obama placed the United States at the forefront of Copenhagen Accord talks in 2009, with the hope that it would ameliorate the flaws of the Kyoto Protocol. *See, e.g.*, Elisabeth Rosenthal, *Obama's Backing Raises Hopes for Climate Pact*, N.Y. Times, March 1, 2009, at A1. The United States has "commit[ted] to implement" the Accord's "quantified economy-wide emissions targets for 2020." *See Copenhagen Accord* at ¶ 4.

The past fourteen years have thus seen three presidencies with widely divergent views of what the United States' foreign policy on climate change and greenhouse gas emissions should be. And the debate on the proper policy of the United States continues at the ballot box. The prospect of a national "cap and trade" system was popular with some in the last Congress, but was not enacted. *See, e.g., Climate and Energy Legislation*, N.Y. Times, Dec. 17, 2010, http://topics.nytimes.com/top/news/business/energy-environment/climate-and-energylegislation/index.html.

Resolving the perceived threat of global climate change is surely a "strange" and "momentous" issue for the federal judiciary—one that ought provoke the

sort of institutional anxiety of which Alexander Bickel wrote nearly 50 years ago. *See* Bickel, *supra*, at 184. A judicial determination inserting the common law of public nuisance into the state, regional, national, and international debates on climate-change policy would be governmentally untenable. It would render moot the results of political debate up to this point and irrevocably define the terms of future debate. Policy determinations of this sort—*i.e.*, ones "intractab[le] to principled resolution," to use Bickel's phrase—must be made by the political branches, by representatives elected to carry out popular will, precisely because popular will is so highly susceptible to change. With "no earth to draw strength from" in this forum, the response to the perceived threat of global climate change is not a matter "fit for the wrangling of lawyers" in federal court.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 West Washington St.
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

**Counsel of Record*

GREGORY F. ZOELLER
Attorney General
THOMAS M. FISHER*
Solicitor General
HEATHER HAGAN MCVEIGH
ASHLEY TATMAN HARWEL
Deputy Attorneys General

Counsel for Amici *States*

Dated: February 7, 2011

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
FEB 7 - 2011
OFFICE OF THE CLERK

No. 10-174

In The
Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY INC., *et al.*,

Petitioners,

v.

STATE OF CONNECTICUT, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICUS CURIAE* NICHOLAS JOHNSON IN SUPPORT OF PETITIONERS

JOHN P. KRILL, JR.
(*Counsel of Record*)
STEPHEN J. MATZURA
K&L GATES LLP
17 North Second Street
Harrisburg, Pennsylvania 17101
(717) 231-4505
john.krill@klgates.com

CHRISTOPHER D. KRATOVIL
K&L GATES LLP
1717 Main Street
Suite 2800
Dallas, Texas 75201
(214) 939-5817

Counsel for Amicus Curiae

FEBRUARY 7, 2011

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

41701 J

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE FEDERAL COURTS LACK JURISDICTION OVER THE CAUSE OF ACTION ASSERTED UNDER 28 U.S.C. § 1331, BECAUSE THE TERM "LAWS" IN THAT SECTION DOES NOT INCLUDE FEDERAL COMMON LAW 3

II. READING § 1331 TO INCORPORATE FEDERAL COMMON LAW INTO THE TERM "LAWS" WOULD VIOLATE SEPARATION OF POWERS BY GIVING THE FEDERAL JUDICIARY UNBOUNDED LEGISLATIVE AUTHORITY 11

III. DISCLAIMING THE POWER TO CREATE COMMON-LAW CAUSES OF ACTION WOULD NOT IMPEDE THE FEDERAL JUDICIARY FROM USING FEDERAL COMMON LAW AS A RULE OF DECISION, IN CASES ARISING UNDER THE CONSTITUTION, FEDERAL STATUTES AND TREATIES, WHERE STATE LAW DOES NOT APPLY 16

A. State-Versus-State Cases 16

B. Post-*Erie* Cases Using Federal Common Law as a Rule of Decision 18

TABLE OF CONTENTS – Continued

Page

C. Indian Tribe Cases 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) 13

Albright v. Teas, 106 U.S. (16 Otto) 613 (1883) 9

Alexander v. Sandoval, 532 U.S. 275 (2001) 11

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) 13

City of Milwaukee v. Illinois, 451 U.S. 304 (1981) 7

Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) 18

Connecticut v. American Electric Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005) 3

Connecticut v. American Electric Power Co., 582 F.3d 309 (2d Cir. 2009) 3, 4

Cort v. Ash, 422 U.S. 66 (1975) 20

County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) 19, 20

Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677 (2006) 19

Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) 10, 18

Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) 17

Healy v. Ratta, 292 U.S. 263 (1934) 9

Illinois v. City of Milwaukee, 406 U.S. 91 (1972) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

International Paper Co. v. Ouellette, 479 U.S. 481 (1987) 18

Inyo County v. Paiute-Shoshone Indians, 538 U.S. 701 (2003) 20

Kansas v. Colorado, 185 U.S. 125 (1902) 16

Kokkonen v. Guardian Life Insurance Co., 511 U.S. 375 (1994) 11

Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan, 111 U.S. 379 (1884) 8

Missouri v. Illinois, 180 U.S. 208 (1901) 16, 17

Missouri v. Jenkins, 515 U.S. 70 (1995) 14

Morton v. Mancari, 417 U.S. 535 (1974) 19

National Farmers Union Insurance Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985) 6, 19

Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77 (1981) 11

Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971) 5

Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) 19

Oneida Indian Nation v. County of Oneida, 719 F.2d 525 (2d Cir. 1983) 20

Romero v. International Terminal Operating Co., 358 U.S. 354 (1959) ..... *passim*

R.R. Co. v. Mississippi, 102 U.S. (12 Otto) 135 (1880) 9

TABLE OF AUTHORITIES – Continued

Page

Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) 18

United States v. Morrison, 529 U.S. 598 (2000) 12, 15

CONSTITUTIONAL PROVISIONS

U.S. CONST. art. I, § 1 11

U.S. CONST. art. III, § 2 ..... 13, 14, 16, 18

STATUTES

28 U.S.C. § 1251 16

28 U.S.C. § 1331 ..... *passim*

28 U.S.C. § 1337 3

28 U.S.C. § 1367 3

COURT DOCUMENTS

Joint Appendix 3, 4, 13

INTEREST OF *AMICUS CURIAE*[1]

Nicholas Johnson is Professor of Law at Fordham University School of Law, where he teaches environmental law. Professor Johnson has published numerous articles, and is the author of two forthcoming books on topics of constitutional law, environmental law and federalism. Through teaching and scholarship, he has devoted substantial attention to legal doctrine and principles that maintain government power within constitutional boundaries. He received a J.D. from Harvard Law School in 1984.

Professor Johnson is concerned about the development of case law in these fields and about the role of the judiciary in public policy. He is highly concerned about the instant case, because of its potential to shift a serious public policy debate into the forum of the federal judiciary, making narrow disputes between litigants the vehicle for sweeping economic, policy and social changes.

The views expressed in this brief are those of *amicus curiae* and not necessarily of any organization with which he is affiliated.

---

[1] No counsel for a party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or his counsel made a monetary contribution for the preparation or submission of this brief. The parties have filed consents to the filing of briefs by *amici*.

SUMMARY OF ARGUMENT

There is no basis for the federal courts to take jurisdiction under 28 U.S.C. § 1331 of a federal-common-law nuisance claim, because the term "laws" in that section does not include federal common law as a cause of action. To the extent *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee I*") holds otherwise, it should be overruled. *Milwaukee I* could and should have been resolved under the long-arm jurisdiction of the forum state, pursuant to state law. Treating § 1331 as giving the federal judiciary the authority to create common-law causes of action would violate separation of powers and the principle of a national government of limited, enumerated powers. Disclaiming the power to create common-law causes of action would not impede the federal judiciary from using federal common law as a rule of decision, in cases arising under the Constitution, federal statutes and treaties, where state law does not apply.

ARGUMENT

I. THE FEDERAL COURTS LACK JURISDICTION OVER THE CAUSE OF ACTION ASSERTED UNDER 28 U.S.C. § 1331, BECAUSE THE TERM "LAWS" IN THAT SECTION DOES NOT INCLUDE FEDERAL COMMON LAW

In two complaints filed in the United States District Court for the Southern District of New York, eight states, the City of New York and three land trusts have sued six electric power companies in tort, seeking abatement of emissions alleged to be contributing to global warming. Joint Appendix, at 56-59, 117-19. The court dismissed the case for failure to state a claim as a nonjusticiable political question, which divested the court of jurisdiction under 28 U.S.C. § 1331. *Connecticut v. American Electric Power Co.*, 406 F. Supp. 2d 265, 270, 274 (S.D.N.Y. 2005) ("*American Electric I*"). On appeal, the United States Court of Appeals for the Second Circuit held, among other things, that the complaint stated a claim under the federal common law of nuisance, which was encompassed by § 1331 jurisdiction. *See Connecticut v. American Electric Power Co.*, 582 F.3d 309, 392-93 (2d Cir. 2009) ("*American Electric II*").[2]

---

[2] This brief does not address jurisdiction related to the claims against the Tennessee Valley Authority under 28 U.S.C. § 1337 or the state-law claims under 28 U.S.C. § 1367. *See* Joint Appendix, at 67, 126.

Subject-matter jurisdiction over such a claim must be based, if at all, on § 1331, which gives the district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." The Respondents have relied solely on a federal common law of nuisance as being within the "laws" of the United States to obtain § 1331 jurisdiction in federal district court. Joint Appendix, at 67, 126.

The Second Circuit's decision follows *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee I*"). *See American Electric II*, 582 F.3d at 392-93. In *Milwaukee I*, the State of Illinois filed a public nuisance action against cities and municipal commissions in Wisconsin to stop them from polluting Lake Michigan with sewage. *Milwaukee I*, 406 U.S. at 93. *Milwaukee I* turned on the question of "whether pollution of interstate or navigable waters creates actions arising under the 'laws' of the United States within the meaning of § 1331." *Id.* at 99.

The *Milwaukee I* Court held that it did. *Id.* at 99-101. However, the Court did not rely on any act of Congress creating such a cause of action. Instead, the Court quoted a dissenting (in part) opinion in *Romero v. International Terminal Operating Co.*, which would have held that "laws" within the meaning of § 1331 "embraced claims founded on federal common law." *Id.* at 99 (quoting *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 393 (1959) (Brennan, J., dissenting and concurring)).

The problem with the *Milwaukee I* Court's reliance on the dissent in *Romero* is that the majority holding in *Romero* was directly to the contrary.[3] The majority opinion in *Romero*, by Justice Frankfurter, rejected the contention that the word "laws" in § 1331 included a federal-common-law cause of action for a seaman's injury.[4]

---

[3] *Milwaukee I* could and should have been decided in state court under long-arm jurisdiction, applying the public nuisance law of the forum state. Just a year earlier the Court decided *Ohio v. Wyandotte Chemicals Corp.*, in which the State of Ohio sought leave to file a complaint in the Court's original jurisdiction to enjoin out-of-state companies from introducing mercury into streams that drain into Lake Erie. *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 494-95 (1971). The Court declined jurisdiction, finding "no necessity" to decide and that the "issues bottomed on local law" posed "no serious issues of federal law." *Id.* at 497-98. Instead, the Court pointed to state long-arm jurisdiction as the proper course: "The simultaneous development of 'long-arm jurisdiction' means, in most instances, that no necessity impels us to perform such a role." *Id.* at 497. The Court said that the cause of action raised no federal question sufficient to invoke a district court's jurisdiction under § 1331. *Id.* at 499 n.3.

Milwaukee I should have gone the way of *Wyandotte*. Long-arm jurisdiction would have given the courts of Illinois jurisdiction over the entities in Wisconsin that were polluting Illinois's waters of Lake Michigan. The case would have been decided under Illinois's law of public nuisance.

[4] *See Romero*, 358 U.S. at 359-80. In *Romero*, the petitioner apparently wanted to establish a cause of action under § 1331, so that he could have a jury trial "on the law side" of the district court, instead of having a nonjury trial in admiralty jurisdiction. *Id.* at 356.

The *Milwaukee I* Court did not even mention Justice Frankfurter's learned exegesis of § 1331 for the majority in *Romero*. Nor did the Court explicitly overrule *Romero*, instead leaving many unanswered questions. Does *Romero* still stand and is it in conflict with *Milwaukee I*? If *Milwaukee I* tacitly overruled *Romero*, are claims that would otherwise go to admiralty now free to be brought in district courts for jury trials? Or if *Milwaukee I* impliedly only partially overruled *Romero*, which part did it overrule? As applied by the Second Circuit in this case, *Milwaukee I* raises the question of what other new federal-common-law torts are waiting to be discovered as part of the "laws" of the United States.

The flawed premise of *Milwaukee I* has never been examined by this Court.[5] This is, perhaps, because its holding has been overshadowed by the

---

[5] *Obiter dictum* in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians* merely cites *Milwaukee I* for the proposition that "[i]t is well settled that [§ 1331] 'will support claims founded upon federal common law as well as those of a statutory origin.'" *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985) (quoting *Milwaukee I*, 406 U.S. at 100). The holding in *National Farmers* was that an Indian tribal court should have the first say over whether it is exceeding its jurisdiction, before a federal district court addresses the issue. *Id.* at 857. Statutory jurisdiction is not a common-law issue.

Court's subsequent focus on "displacement" of federal common law by federal statutes.[6]

In the years since *Milwaukee I,* Congress enacted numerous environmental statutes that address impacts on water, air and land and that regulate the production, use and disposal of toxic and hazardous substances. Under the "displacement" doctrine, these statutes and their explicit remedies have obviated any expansion of the concept of a federal common law of nuisance.

Now, however, the instant case presents an opportunity for the Court to consider the unexamined jurisdictional premise of *Milwaukee I,* before the lower courts are launched into a vast new field of litigation that has the potential to ensnare every business, every governmental unit, and indeed every carbon-based organism, human and nonhuman, in the United States and even extraterritorially.

---

[6] The *Milwaukee I* Court stated: "It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance." *Milwaukee I,* 406 U.S. at 107. The Court later granted *certiorari* in *City of Milwaukee v. Illinois* ("*Milwaukee II*") only "to consider the effect of [the Federal Water Pollution Control Act Amendments of 1972] on the *previously recognized cause of action*" to abate nuisance under federal common law in *Milwaukee I. Milwaukee II,* 451 U.S. 304, 307 (1981) (emphasis added) (citation omitted). The *Milwaukee II* Court said that "the issue before us is simply whether federal legislation has supplanted federal common law." *Id.* at 310 n.4.

Although the parties have not directly raised the issue, the Court should examine it *sua sponte* because the question of a cause of action under § 1331 goes to the subject-matter jurisdiction of the federal courts. This Court is obligated to resolve the threshold jurisdictional questions of whether federal common law of nuisance is a valid cause of action and, if so, whether it qualifies as "laws" under § 1331. *See Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884)

The Court should apply the holding in *Romero* to this case and should decline to find subject-matter jurisdiction under § 1331 over federal-common-law torts. It should overrule the decision in *Milwaukee I* that relied only upon the dissent in *Romero*.

Justice Frankfurter's majority opinion in *Romero* stressed the importance of refraining from broad interpretations of jurisdictional statutes. *Romero*, 358 U.S. at 379-80. Regarding the legislation enacting § 1331, Justice Frankfurter said:

> The Act of 1875 is broadly phrased, but it has been continuously construed and limited in the light of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy which have emerged from the Act's function as a provision in the mosaic of federal judiciary legislation. It is a statute, not a Constitution, we are expounding.

Id. at 379 (footnote omitted). In rejecting incorporation of maritime common law into § 1331, the *Romero*

majority stressed that courts must refrain from broad interpretations of the statute:

> The considerations of history and policy which investigation has illuminated are powerfully reinforced by the deeply felt and traditional reluctance of this Court to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes. A reluctance which must be even more forcefully felt when the expansion is proposed, for the first time, eighty-three years after the jurisdiction has been conferred. Mr. Justice Stone, speaking of the Act of 1875, pointed out that "the policy of the statute calls for its strict construction. . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined."

Id. at 379-80 (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)).[7]

In contrast, the dissent in *Romero* assumed that the federal courts are as capable of "lawmaking" as state courts:

> In another context, that of state law, this Court has recognized that the statutory word

---

[7] In the removal context, the Court, just after the Judiciary Act of 1875, said that "laws" are those that "grow out of" legislation. *See Albright v. Teas*, 106 U.S. (16 Otto) 613, 618 (1883); *R.R. Co. v. Mississippi*, 102 U.S. (12 Otto) 135, 141 (1880).

> "laws" includes court decisions. *Erie* [*R.R.*] *Co. v. Tompkins*, 304 U.S. 64 [(1938)]. The converse situation is presented here in that federal courts have an extensive responsibility of fashioning rules of substantive law in maritime cases. . . . These rules are as fully "laws" of the United States as if they had been enacted by Congress.

Id. at 393 (Brennan, J., dissenting and concurring) (footnote and citations omitted). The premise of the dissent was flawed in two respects.

First, the *Romero* dissent conflated federal common law created and used as rules of decision with a common-law cause of action.

Second, the *Romero* dissent misperceived *Erie*, which was founded on the view that the state courts are in fact different than federal courts. In *Erie*, the Court explained:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law.

Erie, 304 U.S. at 78.

The federal courts are inherently different than state courts. State courts have the competence as courts of general jurisdiction to make common law, while "federal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been

vested with open-ended lawmaking powers." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 (1981) (citation omitted). As courts of limited jurisdiction, federal courts merely enjoy power authorized either by the Constitution or by statute, and this power cannot be expanded by judicial interpretation or decree. *Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375, 377 (1994) (citations omitted).

Overruling *Milwaukee I* would give effect to what the Court has said more recently: "'Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.'" *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (holding that neither Title VI nor agency regulations pursuant to Title VI imply a private cause of action to enforce the regulations pursuant to § 601) (citation omitted).

II. READING § 1331 TO INCORPORATE FEDERAL COMMON LAW INTO THE TERM "LAWS" WOULD VIOLATE SEPARATION OF POWERS BY GIVING THE FEDERAL JUDICIARY UNBOUNDED LEGISLATIVE AUTHORITY

The Constitution gives Congress alone the lawmaking power granted to the United States: "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ." U.S. CONST. art. I, § 1.

If the term "laws" in § 1331 includes causes of action that are judicially created by the federal courts as federal common law, then § 1331 is essentially an unbounded grant of lawmaking power to the federal judiciary. Even if the courts observed self-imposed bounds, such an unlimited grant of lawmaking authority in § 1331 would still be unconstitutional as an abridgment of the doctrine of separation of powers. Construing § 1331 as granting the federal courts the power to cut new federal-common-law causes of action from whole cloth would create a boundless legislative power in the federal courts.

For example, could the federal courts create a tort action under § 1331 for cases of gender-motivated violence? In *United States v. Morrison*, the Court struck down a provision of the Violence Against Women Act as unconstitutional because Congress' attempt to provide victims of gender-motivated violence with a federal tort remedy could not be sustained under the Commerce Clause or the Fourteenth Amendment. *United States v. Morrison*, 529 U.S. 598, 627 (2000).

Yet, because Congress perceived a national need and expressed a policy preference for federal action to deal with gender violence, can the federal judiciary now fill the gap by creating a common-law cause of action? Obviously not since, if Congress lacks authority under Article I or the Fourteenth Amendment to legislate in the area, it cannot lateral a ball it does not possess to the federal judiciary by means of § 1331.

A less expansive argument might be that the federal-common-law causes of action included in § 1331 are limited to matters that would fall within the legitimate legislative power of the United States. Here, for example, the alleged global warming is claimed to be an indirect effect of economic activities by the Petitioners and others. Joint Appendix, at 84-86, 136-37. Economic activity is ostensibly within the scope of regulation under the Commerce Clause (*cf. Morrison*) and, therefore, Congress could validly authorize, through § 1331, the federal judiciary to superintend such activity by entertaining actions at common-law arising from it. This argument, though, would change the judiciary from the neutral adjudicator of causes of action created by Congress to a quasi-legislative organ that decides how to exercise the Commerce Power vested in Congress.[8] There is, moreover, a notable absence of standards in § 1331 to support such a delegation.[9]

---

[8] This would be quite different than enforcing the dormant aspect of the Commerce Clause, a violation of which presents a case "arising under" the Constitution itself. *See* U.S. CONST. art. III, § 2. It is also different than crafting a remedy for a violation of the Constitution as the Court did in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 390-97 (1971).

[9] The delegation doctrine, however attenuated, is still with us and still important. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), which has never been overruled.

It might also be argued that federal-common-law torts are included within the meaning of "the Laws of the United States" in Article III, section 2 of the Constitution and are, therefore, likewise within the scope of § 1331. This would be a radical proposition that would flout the very notion of a government of limited, enumerated powers that has been accepted since the Constitution's ratification. It would turn out that the anti-federalist Brutus was right in his critique of the inherent power of the federal judiciary:

> [The] Anti-Federalist, Brutus, argued that the equity power would allow federal courts to "explain the constitution according to the reasoning spirit of it, without being confined to the words or letter." . . . This, predicted Brutus, would result in the growth of federal power and the "entire subversion of the legislative, executive and judicial powers of the individual states."

Missouri v. Jenkins, 515 U.S. 70, 128-29 (1995) (Thomas, J., concurring) (citations omitted).

It might be argued here, on policy grounds, that using § 1331 to support a federal-common-law nuisance suit is a better and more effective alternative to varied, inconsistent state-law nuisance standards.[10]

---

[10] Uniformity, however, is not a positive value in a federal system, which by its nature values diversity. Of course, within each jurisdiction there must be uniformity in applying the law, even while there is diversity among jurisdictions in the substance of the law.

In *Morrison,* for example, the dissent argued that the Violence Against Women Act created an appropriate federal forum for "a federal civil rights remedy . . . as an alternative to the generic state tort causes of action found to be poor tools of action." *Morrison,* 529 U.S. at 653-54 (Souter, J., dissenting) (citation omitted). To justify Congress' creation of a federal action, the petitioners had argued that state courts perpetuated gender bias and prevented an effective state remedy. *Id.* at 619-20 (majority opinion).

In *Morrison*, the dissent was justifying an act of Congress that had a "mountain of data" to support it. *Id.* at 628-29. (Souter, J., dissenting). Here, without congressional enactment of a remedy, the creation of a federal-common-law cause of action cannot possibly be justified merely because it may be perceived as a better alternative to state law. This is true despite any perceived shortcomings in state law and potential bias within any state forum. Instead, as the Court in *Morrison* held, "under our federal system" such a civil remedy "must be provided by the [states]." *Id.* at 627 (majority opinion). Or by Congress. Or not at all. There is no constitutional basis for thinking that the lack of sufficient state remedies causes a federal-common-law cause of action to spring into being.

III. DISCLAIMING THE POWER TO CREATE COMMON-LAW CAUSES OF ACTION WOULD NOT IMPEDE THE FEDERAL JUDICIARY FROM USING FEDERAL COMMON LAW AS A RULE OF DECISION, IN CASES ARISING UNDER THE CONSTITUTION, FEDERAL STATUTES AND TREATIES, WHERE STATE LAW DOES NOT APPLY

A. State-Versus-State Cases

The Court has original jurisdiction over controversies between states. U.S. CONST. art. III, § 2.[11] In these state-versus-state cases, the Court has out of necessity fashioned its own rules of decision because adopting one state's laws over another's would create partiality when determining their respective rights. In other words, state-versus-state cases constitute a unique realm wherein federal common law is necessary as a rule of decision. Water-allocation controversies often present this problem. *See, e.g.*, *Kansas v. Colorado*, 185 U.S. 125, 142-43 (1902).

In the Court's jurisprudence of state-versus-state controversies, *Missouri v. Illinois* ("*Missouri I*") is an aberration because the Court misperceived it as a state-versus-state case when it was really a case of a state versus a citizen of another state. *Missouri I*, 180 U.S. 208, 241-42 (1901). In *Missouri I*, the State of Missouri filed a complaint based on nuisance under

[11] This jurisdiction is made exclusive by 28 U.S.C. § 1251(a).

the original jurisdiction of the Court against Illinois and the Sanitary District of Chicago, a municipal corporation created under Illinois law, to enjoin them from diverting sewage toward the tributaries of the Mississippi River. *See id.* at 218-19, 240-43. The Court erroneously held that joinder of Illinois as a defendant was proper by reasoning that the Sanitary District of Chicago was "an agency of the State" which was responsible for the alleged nuisance because its "existence and operations [were] wholly within the control of the State." *Id.* at 241-42. As the Court later recognized in *Milwaukee I*, and in many other cases since then, municipal entities are not the "state." *Milwaukee I*, 406 U.S. at 98. However, proceeding from its flawed premise, the Court in *Missouri I* believed that, having exclusive jurisdiction, it had to create neutral federal common law to resolve a dispute between states. *See Missouri I*, 180 U.S. at 249-50 (Fuller, J., dissenting).

This mistake laid the foundation for a later misstep in *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907). This was plainly no state-versus-state case. It was another case of transboundary pollution. *Id.* at 236-37.

Missouri I and *Tennessee Copper* have no vitality now. They should have been handled just as the Court did in its 1971 decision in *Wyandotte*.[12]

---

[12] Today, of course, the choice of law in *Wyandotte* would be governed by subsequently enacted federal statutory law.

(Continued on following page)

B. Post-*Erie* Cases Using Federal Common Law as a Rule of Decision

Erie held that there is no such thing as federal *general* common law. *Erie*, 304 U.S. at 78. *Erie* restricted the use of federal common law to rules of decision that interpret the Constitution, federal statutes, and treaties. Admiralty and maritime law are also explicitly, under Article III, section 2, within the scope of federal judicial power and, therefore, are proper subjects for a body of federal-judge-made precedent that may be considered federal common law.

It is not inconsistent with *Erie* for federal courts to create a body of federal precedent when federal governmental activity is in question, such as in the issuance of commercial paper by the government. *Clearfield Trust Co. v. United States*, 318 U.S. 363, 364-70 (1943). The Court may also create a body of federal common law when interpreting and applying a federal statute. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 449-57 (1957).

In contrast to creating federal common law as rules of decision in federal-question cases, the Court has refused to create federal-common-law causes of action, sometimes even when a federal statute is at issue but when the case does not "arise under" the statute. For example, the Court recently held that § 1331 did not support jurisdiction when an insurer

---

See International Paper Co. v. Ouellette, 479 U.S. 481, 500 (1987).

did not have a federal cause of action to obtain reimbursement from a beneficiary, even though the funds were paid out under the Federal Employees Health Benefits Act. *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 684-701 (2006). In *Empire*, the Court distinguished cases in which it determined federal jurisdiction through the character of the parties or based on constitutional and federal statutory rights. *Id.* at 690-701. The Court did not conflate federal common law as a rule of decision with federal common law as a cause of action. Nor did it create a cause of action. *Cf. id.* at 706 (Breyer, J., dissenting) (relying on *Milwaukee I* and the *dictum* in *National Farmers*).

C. Indian Tribe Cases

"The decisions of this Court emphasize 'Congress' unique obligation toward the Indians.'" *County of Oneida v. Oneida Indian Nation* ("*Oneida II*"), 470 U.S. 226, 253 (1985) (quoting *Morton v. Mancari*, 417 U.S. 535, 555 (1974)). This emphasis has made the case law regarding Indian tribes both unique and complex.

In *Oneida Indian Nation v. County of Oneida* ("*Oneida I*"), the Court held that the Oneida Indian Nation's claim to possession of alleged tribal land stated a federal cause of action sufficient to invoke § 1331 jurisdiction. *Oneida I*, 414 U.S. 661, 675-78 (1974). The claim arose from federal treaties and the Nonintercourse Acts. *Id.* at 676-78. The Court in *Oneida I* did not explicitly determine whether the cause of action arose under a specific treaty or

statute, but held only generally that it met § 1331 and remanded it for further proceedings. *Id.* at 682.

Later, the Second Circuit performed an analysis under *Cort v. Ash,* 422 U.S. 66 (1975), to determine whether the statute created a right of action for the Indians. *Oneida Indian Nation v. County of Oneida*, 719 F.2d 525, 532-37 (2d Cir. 1983). The Second Circuit held that it did. *Id.* at 537.

On *certiorari* for a second time, the Court in *Oneida II* opined that "*Oneida I* implicitly assumed" a cause of action at federal common law. *Oneida II*, 470 U.S. at 236. *Oneida II* did not address the Second Circuit's finding of a statutory cause of action. Nor did *Oneida II* analyze § 1331. Instead, *Oneida II* adverted to cases that "implicitly" recognized that Indians have a federal-common-law right to sue. *Id.* at 234-36. *Oneida II* then invoked *Milwaukee I* for the proposition that there was a federal-common-law cause of action. *Id.* at 237-40 & n.7.

Oneida II avoided the question here, and in *Romero,* of whether § 1331 jurisdiction can be based on federal common law. It leapt to a conclusion that was unnecessary in light of the Second Circuit's determination. The Court has not recognized whether a general federal-common-law cause of action for matters affecting Indian tribes independently constitutes "laws" under § 1331. *See Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701, 712 (2003) (remanding the case for the jurisdictional question).

CONCLUSION

Amicus curiae requests that this Court reverse the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

JOHN P. KRILL, JR.
(*Counsel of Record*)
CHRISTOPHER D. KRATOVIL
STEPHEN J. MATZURA

AMICUS CURIAE BRIEF

No. 10-174

Supreme Court, U.S.
FILED
FEB 7 / 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

AMERICAN ELECTRIC
POWER COMPANY INC., et al.,

Petitioners,

v.

STATE OF CONNECTICUT, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

DAVID B. RIVKIN, JR.
Counsel of Record
LEE A CASEY
MARK W. DELAQUIL
ANDREW M. GROSSMAN
BAKER & HOSTETLER LLP
1050 Connecticut Avenue, N.W.
Washington Square, Suite 1100
Washington, D.C. 20036
drivkin@bakerlaw.com
(202) 861-1500

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

417060
48

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 7

I. Respondents Lack Standing To Assert Nuisance Claims Against Emitters Of Greenhouse Gases 7

A. Respondents Have Not Established Fair Traceability 9

B. Respondents Have Not Established Redressability 13

C. Respondents' Claims Implicate Serious Separation-Of-Powers Concerns 16

II. Respondents' Claims Present A Non-Justiciable Political Question 18

A. The Political Question Doctrine Is A Core Aspect Of The Judicial Power 19

B. The Court Below Improperly Made Non-Judicial Initial Policy Determinations 21

C. There Are No Judicially Manageable Standards For Deciding Respondents' Claims 26

III. The Court Should Not Recognize A Federal Common Law Public Nuisance Cause Of Action For Greenhouse Gas Emissions 29

TABLE OF CONTENTS – Continued

Page

A. The Clean Air Act Displaced Any Federal Common Law Of Public Nuisance For Greenhouse Gas Emissions 30

B. The Court Should Not Recognize A Federal Common Law Public Nuisance For Greenhouse Gas Emissions 32

C. Recognizing A Federal Common Law Public Nuisance For Greenhouse Gas Emissions Allows Gaming Of Judicial Recusals 36

CONCLUSION 38

TABLE OF AUTHORITIES

Page

CASES

Allen v. Wright, 468 U.S. 737 (1984).....5, 7, 8, 10, 14

Am. Isuzu Motors, Inc. v. Ntsebeza, 553 U.S. 1028 (2008).....37

Am. Petr. Inst. v. EPA, No. 08-1277 (D.C. Cir. filed Aug. 21, 2008).....32

Antolok v. United States, 873 F.2d 369 (D.C. Cir. 1989).....22

ASARCO Inc. v. Kadish, 490 U.S. 605 (1989).....11

Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).....9

Baker v. Carr, 369 U.S. 186 (1962).....*passim*

Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888 (1988).....26

Bennett v. Spear, 520 U.S. 154 (1997).....10

Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).....33

Broadrick v. Oklahoma, 413 U.S. 601 (1973).....18

Brown v. Board of Ed. of Topeka, Shawnee County, Kan., 344 U.S. 1 (1952).....12

California v. Gen. Motors Corp., No. C06-05755 MJJ, 2007 U.S. Dist. LEXIS 68547 (N.D. Cal. Sept. 17, 2007).....4, 5, 12, 28

Carmichael v. Kellogg, Brown & Root Servs., Inc., 572 F.3d 1271 (11th Cir. 2009).....22

Chaser Shipping Corp. v. United States, 649 F. Supp. 736 (S.D.N.Y. 1986).....23

TABLE OF AUTHORITIES – Continued

Page

Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948) 27

City of Milwaukee v. Illinois, 451 U.S. 304 (1981) 7, 30, 32

Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009) 1

Comer v. Murphy Oil USA, 607 F.3d 1049 (5th Cir. 2010) 4, 5, 12, 37

Correctional Servs. Corp. v. Malesko, 534 U.S. 61 (2001) 33

Corrie v. Caterpillar, Inc., 503 F.3d 974 (9th Cir. 2007) 22

DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006) 6, 15, 17, 19

Erie Railroad v. Tompkins, 304 U.S. 64 (1938) 33

Georgia v. Tennessee Copper, 206 U.S. 230 (1907) 28, 34

Goldwater v. Carter, 444 U.S. 996 (1979) 20

Illinois v. Milwaukee, 406 U.S. 91 (1972) 33

INS v. Chadha, 462 U.S. 919 (1983) 21

Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221 (1986) 21

Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375 (1994) 19

TABLE OF AUTHORITIES – Continued

Page

Korsinsky v. EPA, No. 05-cv-859 (NRB), 2005 U.S. Dist. LEXIS 21778 (S.D.N.Y. Sept. 29, 2005) 4

Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) 28

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) ..... *passim*

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 20, 32

Massachusetts v. EPA, 549 U.S. 497 (2007) ..... *passim*

Missouri v. Illinois, 200 U.S. 496 (1906) 34

Mistretta v. United States, 488 U.S. 361 (1989) 17

Muskrat v. United States, 219 U.S. 346 (1911) 20

Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009) ..... *passim*

New Jersey v. New York, 283 U.S. 473 (1931) 35

New York v. EPA, No. 06-1322 (D.C. Cir. filed Sept. 13, 2006) 32

Nixon v. United States, 506 U.S. 224 (1993) 23, 29

North Carolina v. TVA, 615 F.3d 291 (4th Cir. 2010) 1, 3, 27, 28

Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77 (1981) 26

O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994) 26, 32

TABLE OF AUTHORITIES – Continued

Page

Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petrol., 577 F.2d 1196 (5th Cir. 1978) 22

Ohio v. Wyandotte Chems. Corp., 401 U.S. 493 (1971) 35

Powell v. McCormack, 395 U.S. 486 (1969) 19

Ramirez-Lebron v. Int'l Shipping Agency, Inc., 593 F.3d 124 (1st Cir. 2010) 9

Rasul v. Bush, 542 U.S. 466 (2004) 19

Selevan v. N.Y. Thruway Auth., 584 F.3d 82 (2d Cir. 2009) 9

Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26 (1976) 5, 11

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) 33, 34

Tex. Indus. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) 33

United States v. Richardson, 418 U.S. 166 (1974) 17

Valley Forge Christian College v. Am. United for Separation of Church and State, Inc., 454 U.S. 464 (1982) 8, 16, 18

Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir. 1983) 17

Vieth v. Jubelirer, 541 U.S. 267 (2004) 21, 23, 26, 27

Warth v. Seldin, 422 U.S. 490 (1975) 4, 10, 14, 16

TABLE OF AUTHORITIES – Continued

Page

White v. United States, 601 F.3d 545 (6th Cir. 2010) 9

Whitmore v. Arkansas, 495 U.S. 149 (1990) 7, 14

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

28 U.S.C. § 1331 23

28 U.S.C. § 1350 33

28 U.S.C. § 1604 14

28 U.S.C. § 2201 23

42 U.S.C. § 7401 30

42 U.S.C. § 7470 30

42 U.S.C. § 7602 30

Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844 36

Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) 31

Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492 36

Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 35

Energy Security Act of 1980, Pub. L. No. 96-294, 94 Stat. 611 36

Global Change Research Act of 1990, Pub. L. No. 101-606, 104 Stat. 3096 36

TABLE OF AUTHORITIES – Continued

Page

Global Climate Protection Act of 1987, Pub. L. No. 100-204, 101 Stat. 1407 36

Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010) 32

Mandatory Reporting of Greenhouse Gases, 74 Fed. Reg. 56,264 (Oct. 30, 2009) 31

National Climate Program Act of 1978, Pub. L. No. 95-367, 92 Stat. 601 35

Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) 31

Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010) 31

U.S. Const. Art. I, § 1 32

OTHER AUTHORITIES

American Clean Energy and Leadership Act of 2009, S. 1462, 111th Cong. (2009) 36

American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009) 36

Clean Energy Jobs and American Power Act, S. 1733, 111th Cong. (2009) 36

TABLE OF AUTHORITIES – Continued

Page

Laurence H. Tribe, et al., *Too Hot for Courts To Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* (Wash. Legal Found., Working Paper No. 169, 2010) 20, 28, 29

Papers of John Marshall (C. Cullen ed. 1984).....17

Restatement (Second) of Torts § 821B (1979).....27

The Federalist No. 47 (James Madison) 19

The Federalist No. 78 (Alexander Hamilton) 19

INTEREST OF AMICI CURIAE

Amici curiae are law professors with an interest and expertise in constitutional, administrative, environmental, and regulatory law. Each believes that the challenges posed by global climate change are complex and multi-faceted and, as an initial matter, beyond the competence of the courts. For that reason, many have participated as amici to this Court in support of the Petition for a Writ of Certiorari and to courts of appeals that have considered public nuisance actions brought against emitters of greenhouse gases or conventional pollutants, including the proceedings below and those in *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *reh'g granted*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010), and *North Carolina v. TVA*, 615 F.3d 291 (4th Cir. 2010).[1]

John S. Baker, Jr., is the Dale E. Bennett Professor of Law (retired), Louisiana State University Law Center. He has written widely on the U.S. legal system, separation of powers, administrative law, and tort law.

Steven G. Calabresi is the George C. Dix Professor of Law, Northwestern University Law School,

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for amici represents that it entirely authored this brief and no party, its counsel, or any other entity but amici and their counsel made a monetary contribution to fund the brief's preparation or submission. All parties have consented to the filing of this brief. Letters reflecting their consent are filed with the Clerk. Amici's institutional affiliations are provided for identification purposes only.

where he teaches administrative law, comparative law, and constitutional law.

The Honorable Ronald A. Cass, Dean Emeritus of Boston University School of Law, has written and taught about administrative law for more than 30 years. He is co-author of a leading text on administrative law, served as a federal regulatory official, and remains deeply engaged with matters of administrative and judicial process.

Robert A. Destro is Professor of Law and director and founder of the Interdisciplinary Program in Law & Religion, Catholic University of America, Columbus School of Law. He teaches and has written extensively on constitutional law.

Elizabeth Price Foley is Professor of Law, Florida International University College of Law, where she teaches constitutional law and civil procedure.

Jason S. Johnston is the Henry L. and Grace Doherty Charitable Foundation Professor of Law and Nicholas E. Chimicles Research Professor of Business Law and Regulation, University of Virginia School of Law. His recent research has focused on the law and economics of climate change policy, and he teaches courses in natural resource law, law and economics, and climate change law.

Stephen B. Presser is the Raoul Berger Professor of Legal History, Northwestern University Law School, where he teaches American jurisprudence and legal history.

Ronald D. Rotunda is the Doy & Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University School of Law. He is the author of leading course books on constitutional law and legal ethics and is co-author of a six-volume treatise on constitutional law.

John C. Yoo is Professor of Law, University of California, Boalt Hall, where he teaches constitutional law and history.

Todd J. Zywicki is the George Mason University Foundation Professor of Law, George Mason University School of Law, and Senior Scholar of the Mercatus Center at George Mason University. He has written widely on regulatory and administrative matters.

SUMMARY OF THE ARGUMENT

The decision below presents this Court with the choice of whether to allow states and private entities to sidestep the political process and to conscript the Judiciary into regulating greenhouse gas emissions from American industry based on "the same principles we use to regulate prostitution, obstacles in highways, and bullfights." *North Carolina*, 615 F.3d at 301.

Petitioners are electric utilities, and are alleged to be the five largest greenhouse gas emitters in the United States. Petitioners are heavily regulated entities that are subject to the Clean Air Act's comprehensive pollution control scheme and to state duty-to-serve laws that require the production of

reliable and affordable energy. Respondents are a collection of States that have pressed, unsuccessfully as a rule, for federal legislative and administrative action with regard to global climate change and similarly situated environmental groups. Respondents' action is part of a broader push for judicial regulation of greenhouse gas emissions and is mirrored by suits brought by Gulf Coast residents, *see Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010) (dismissing appeal), Native Americans, *see Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal pending*, No. 09-17490 (9th Cir. Nov. 5, 2009), officious intermeddlers, *see Korsinsky v. EPA*, No. 05-cv-859 (NRB), 2005 U.S. Dist. LEXIS 21778 (S.D.N.Y. Sept. 29, 2005), and groups of states, including certain Respondents, *see California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 U.S. Dist. LEXIS 68547 (N.D. Cal. Sept. 17, 2007). Respondents' stated goal is to force Petitioners into making "*their share* of the carbon dioxide emission reductions," J.A. 102 (emphasis added), as determined by the courts rather than the political branches.

Respondents lack Article III standing to enlist the federal courts as regulators. Article III standing is "founded in concern about the proper – and properly limited – role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). It prevents courts from being "called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions. . . ." *Id.* at 500.

To have Article III standing, Respondents must plausibly allege a legally cognizable injury that is fairly traceable to the actions they challenge, and which can be redressed by a judicial decree. *See Allen v. Wright*, 468 U.S. 737, 751 (1984). Here, Respondents' alleged harm is caused by greenhouse gas emission concentrations that have accumulated over the last several centuries, Pet. App. 9a, making it impossible for Respondents to demonstrate a "substantial likelihood" that Petitioners' emissions, rather than emissions from the billions of "third part[ies] not before the court," *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42 (1976), caused their alleged injuries. The impossibility of determining traceability is underscored by the sister actions in *Kivalina*, *General Motors*, and *Comer*, where primarily different (but some common) plaintiffs allege that different defendants are legally responsible for the injuries purportedly caused by the same global phenomenon.

Nor would the most aggressive judicial decree redress Respondents' purported injuries. Petitioners' emissions are alleged to account for only 10 percent of current United States emissions. Pet. App. 8a. Where alleged injury is caused by hundreds of years of accumulated greenhouse gas emissions, Pet. App. 9a, it is wholly speculative to assume that "relief from the injury" would be "'likely' to follow from a favorable decision." *See Allen*, 468 U.S. at 751. Irrespective of whether *Congress* may create an incremental legislative scheme that creates standing for procedural injuries, *see Massachusetts v. EPA*, 549 U.S. 497, 517-18 (2007), Respondents have no standing to

demand that the Judiciary exercise such policy-making functions.

Respondents' claims similarly present a non-justiciable political question. Like standing, the political question doctrine "originate[s] in Article III's 'case' or 'controversy' language," *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006), and precludes federal courts from deciding certain actions in the absence of antecedent legal principles reflecting the political branches' policy judgments.

The court below disregarded the political question doctrine because it believed that this action is simply an "ordinary tort suit." Pet. App. 34a. The Second Circuit's inappropriate "semantic cataloguing," *Baker v. Carr*, 369 U.S. 186, 217 (1962), ignores the fact that all actions presenting political questions are predicated on causes of action that are, like tort actions, regularly adjudicated by courts. If that were not the case, there would be no need for a political question doctrine at all – suits would simply be dismissed for the lack of a cause of action. The political question doctrine should bar suit here because answering Respondents' invitation to consider their claims would require the Court to make the non-judicial policy determinations that Petitioners' conduct, providing safe, affordable energy, carries attendant externalities that outweigh its social benefit, and that Petitioners alone should be required to control their greenhouse gas emissions and to remediate Respondents' alleged injuries.

Even if the Court were to determine that it had Article III jurisdiction to decide Respondents' claims, it should not countenance a federal common law cause of action arising from global climate change. Petitioners' claims are unlike any other federal common law public nuisance claims, and adjudicating them raises significant separation of powers concerns and threatens to undermine the legitimacy of the Judicial Branch. Moreover, the Clean Air Act plainly displaced any possible federal common law remedy. *See City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981).

ARGUMENT

I. Respondents Lack Standing To Assert Nuisance Claims Against Emitters Of Greenhouse Gases

"[T]he law of Art. III standing is built on a single basic idea – the idea of separation of powers." *Allen*, 468 U.S. at 752. In its vesting of power on the three federal departments, the Constitution does not define the terms "legislative," "executive," and "judicial," but "depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992). That understanding is shaped largely by the "case" or "controversy" requirement of Article III, which, through standing and other doctrines, "serv[es] to identify those disputes which are appropriately resolved through the judicial process." *Id.* at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

To establish Article III standing, Respondents "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen*, 468 U.S. at 751. Absent a statutorily authorized procedural right, Respondents are not excused from meeting "the normal standards for redressability and immediacy." *Massachusetts*, 549 U.S. at 517. Even assuming Respondents properly alleged an actual or imminent *parens patriae* or proprietary injury, they did not and could not demonstrate either that their alleged injuries were traceable to Petitioners' emissions or that reducing Petitioners' emissions would redress their injuries. Pet. App. 41a-76a.

Respondents' disregard of the basic principles of standing in their attempt to employ the courts "as a convenient forum for policy debates," *Massachusetts*, 549 U.S. at 546 (Roberts, C.J., dissenting), infects every aspect of their claims, from their arbitrary selection of defendants to their inherently political demand that the Judicial Branch fashion relief by limiting Respondents to "*their share* of the carbon dioxide emission reductions necessary to significantly slow the rate and magnitude of global warming." *See* J.A. 102 (emphasis added). *See also Valley Forge Christian College v. Am. United for Separation of Church and State, Inc.*, 454 U.S. 464, 487 (1982) ("The federal courts were simply not constituted as ombudsmen of the general welfare.").

The Court should hew to Article III's limitations on the judicial power and reverse the decision below

that Respondents have adequately pleaded Article III standing.

A. Respondents Have Not Established Fair Traceability

"Since [the elements of Article III standing] are not mere pleading requirements but rather an indispensible part of the plaintiff's case, each element must be supported in the *same way as any other matter* on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of litigation." *Lujan*, 504 U.S. at 561 (emphasis added). Plaintiffs must plead non-conclusory factual allegations that "plausibly give rise to an entitlement to relief" to survive a motion to dismiss, *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009),[2] and make such a showing for each of the three elements that comprise the "irreducible constitutional minimum" of standing. *Lujan,* 504 U.S. at 560.

---

[2] The Second Circuit's application of a "lowered bar for standing at the pleading stage," Pet. App. 43a (citing pre-*Iqbal* Supreme Court case law), is inconsistent both with this Court's statement in *Lujan* and the case law of at least two other Circuit Courts of Appeals. *See White v. United States*, 601 F.3d 545, 551-52 (6th Cir. 2010) (citing *Iqbal* as pleading standard for elements of Article III standing); *Ramirez-Lebron v. Int'l Shipping Agency, Inc.*, 593 F.3d 124, 127-28 (1st Cir. 2010) (same); *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 88 (2d Cir. 2009) (same).

A plaintiff therefore must plead factual allegations that make plausible the conclusion that its injury is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court" to demonstrate Article III standing. *Lujan*, 504 U.S. at 561 (internal quotation marks and citation omitted). An injury is traceable only where a plaintiff distinctively ties its injuries to the defendant's challenged conduct, as opposed to that of third parties or other competing causal factors. *See Bennett v. Spear*, 520 U.S. 154, 167 (1997). In the absence of specific factual allegations making plausible the conclusion that the plaintiff's injury "resulted, in any concretely demonstrable way," from a defendant's acts, the plaintiff has "failed to satisfy its burden." *Warth*, 422 U.S. at 504.

Thus, in *Allen v. Wright*, the Court held that causation was "attenuated at best," 468 U.S. at 757, where the plaintiffs, who alleged tax breaks to private schools engaging in racial discrimination stymied integrated public schooling, were unable to show that, in the absence of the tax exemption, "a large enough number of the numerous relevant school officials and parents would reach decisions that collectively would have a significant impact on the racial composition of the public schools." *Id.* at 758. This chain of logic was "pure speculation" and therefore unable to support standing. *Id.*

Respondents' causal theory contains too many links, with connections too attenuated to the claimed injury, and relies on the conduct of too many parties

over too long a period of time and dispersed over too wide a geographic area, to satisfy the requirements of standing. Respondents alleged that climate change is a product of the combined effect of accumulated greenhouse gases in the atmosphere over the course of "several centuries." Pet. App. 9a. Respondents' concessions about the cumulative nature of harm resulting from greenhouse gas emissions make it impossible, however, to show a "substantial likelihood" that it was the carbon dioxide emissions from the defendants – and not the billions of "third part[ies] not before the court," *Simon*, 426 U.S. at 42 – that caused plaintiffs' alleged injuries.

Plaintiffs' pleading requirements are increased where the causal chain "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.). *See also Simon*, 426 U.S. at 41-42. There, "it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation." *Lujan*, 504 U.S. at 562. Respondents have failed to plead any facts that would allow the Court to conclude that Petitioners' activities are causally responsible for a phenomenon they concede is centuries in the making and global in scope.

Respondents' selection of defendants highlights its failure to allege proper causation. Respondents

have selected a subset of U.S. industry allegedly responsible for approximately 10 percent of current U.S. anthropogenic emissions (and a far smaller percentage of historic emissions), to the exclusion of billions of other emitters dating back centuries and millions of current emitters. Pet. App. 8a (naming four electric utilities and Tennessee Valley Authority). But other plaintiffs, *including one of the Respondents in this action*, have pointed to different defendants as legally responsible for the same precise global phenomenon. *See Kivalina*, 663 F. Supp. 2d 863 (naming select oil companies and utilities and a single coal company); *Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010) (naming select oil, utility, coal, and chemical companies and TVA); *General Motors*, 2007 U.S. Dist. LEXIS 68547 (naming six automakers only). The fact that overlapping groups of plaintiffs have spent the last several years in federal court making alternate factual allegations about what parties are legally responsible for the same precise global phenomenon discredits the decision below that Respondents have identified and pleaded a particularized injury fairly traceable to the specific defendants before the Court.[3] The Court may properly take notice of these prior lawsuits. *See Brown v. Board of Ed. of Topeka, Shawnee County, Kan.*, 344 U.S. 1, 3 (1952) (taking judicial notice of filed and pending cases).

---

[3] Respondents' selection of defendants demonstrates the infinite universe of potential defendants (and potential lawsuits) if the Second Circuit's opinion were allowed to stand.

B. Respondents Have Not Established Redressability

Respondents' requested judicial cap on defendants' emissions cannot satisfy the redressability requirement for Article III standing. The decision below that redressability exists so long as a court "[can] provide some measure of relief," Pet. App. 75a, is contrary to this Court's established case law and must be reversed.

Respondents' pleadings are not only inadequate to demonstrate redressability, but they effectively concede that their requested relief will fail to redress their injuries. Respondents allege that "[r]eductions in the carbon dioxide emissions of the defendants *will contribute to a reduction in the risk and threat of injury* to the plaintiffs and their citizens and residents from global warming. For example, by reducing emissions by approximately three percent annually over the next decade, the defendants would achieve *their share* of the carbon dioxide emission reductions necessary to significantly slow the rate and magnitude of global warming." J.A. 102. *See also* J.A. 145 ("[r]eductions in Defendants' . . . emissions will reduce all injuries and risks of injuries to the pubic"). Respondents thereby concede that their requested relief, limitations on Petitioners' emissions alone, will fail "to significantly slow the rate and magnitude of global warming." To achieve redress, they therefore assume, without so much as asserting, commensurate actions by third-party emitters who are not party to this litigation, among them entities in China, India,

and other jurisdictions who are wholly beyond the Court's jurisdiction, as foreign entities without ties to the United States, and, in some instances, as instrumentalities of foreign sovereigns. *See* 28 U.S.C. § 1604.

As such, Respondents plainly fail to allege proper redressability. The Court's jurisprudence unambiguously requires that a plaintiff "must allege specific, concrete facts demonstrating . . . that he personally would benefit in a tangible way from the court's intervention." *Warth*, 422 U.S. at 491. *See Allen*, 468 U.S. at 751 ("relief from the injury must be 'likely' to follow from a favorable decision"). Instead, Respondents request relief they acknowledge would not, in itself, cause them tangible benefit, absent action by numerous third parties not before the Court, necessarily coordinated by the political branches.

That aspect of Respondents' purported theory of redressability – the assumption that a favorable judgment will coerce political action that, in turn, redresses their alleged injuries – further underscores the threat to limitations on the judicial power posed by their claims. "It is not for this Court to employ untethered notions of what might be good public policy to expand our jurisdiction in an appealing case." *Whitmore*, 495 U.S. at 161. In the absence of requested relief that would itself bring redress to their alleged injuries, Respondents necessarily premise standing on the pressure that a favorable decision would exert on the political branches to adopt nation- or world-wide emissions limitations similar to those

that would be imposed on Petitioners. In this scheme, the Court is a political actor, weighing the likely political impact of its judgments in order to determine the scope of its jurisdiction. This approach to redressability would open the door to all manner of judicial intervention in legislative and political affairs, the very thing standing exists to prevent. *See DaimlerChrysler*, 547 U.S. at 353.

The Second Circuit's decision that *Massachusetts* supported Respondents' standing is erroneous. *Massachusetts* held only that states could exercise the procedural right created by the Clean Air Act to sue to compel the Environmental Protection Agency to consider setting carbon dioxide limits even though those limits could not "reverse global warming." 549 U.S. at 517-18. The Court's decision was premised explicitly on the fact that "a litigant to whom Congress has 'accorded a procedural right to protect his concrete interests' . . . 'can assert that right without meeting all the normal standards for redressability and immediacy.'" *Id.* (emphasis added) (quoting *Lujan*, 504 U.S. at 572 n.7). It was also bolstered by the Court's conclusion that, unlike for the Judiciary, it is the business of agencies to "whittle away at [problems] over time" to achieve ultimate result, *Massachusetts*, 549 U.S. at 524, and they must be permitted the latitude to do so in the most appropriate fashion under the circumstances. As such, *Massachusetts* did not purport to upend the "irreducible constitutional minimum" of standing, *Lujan*, 504 U.S.

at 560, but merely to recognize injuries to States' quasi-sovereign interests. 549 U.S. at 519. Respondents are claiming rights under federal common law, not exercising a statutorily created procedural right, so no "special solicitude," *id.*, applies here.

C. Respondents' Claims Implicate Serious Separation-Of-Powers Concerns

Respondents' alleged theory of causation and their request that the Court require Petitioners to do "their share" under a new, judicially-created national climate policy do not establish Article III standing. Nor should they. Standing "is not merely a troublesome hurdle to be overcome if possible so as to reach the 'merits' of a law-suit which a party desires to have adjudicated." *Valley Forge*, 454 U.S. at 476.

Rather, the standing requirement is "founded in concern about the proper – and properly limited – role of the courts in a democratic society." *Warth*, 422 U.S. at 498. As Chief Justice Marshall explained,

> If the judicial power extended to every question under the constitution it would involve almost every subject proper for legislative discussion and decision; if to every question under the laws and treaties of the United States it would involve almost every subject on which the executive could act. The division of power [among the branches of government] could exist no longer, and the other departments would be swallowed up by the judiciary.

4 Papers of John Marshall 95 (C. Cullen ed. 1984) (quoted in *DaimlerChrysler*, 547 U.S. at 341). The result, which the Framers labored to prevent, would be judicial tyranny.

Even lesser encroachment, though, strains the constitutional fabric, and must be avoided. Thus the standing requirement "help[s] to ensure the independence of the Judicial Branch by precluding debilitating entanglements between the Judiciary and the two political Branches." *Mistretta v. United States*, 488 U.S. 361, 385 (1989). It also operates to avoid "repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government," which threaten "the public confidence essential to the former and the vitality critical to the latter." *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring). Ultimately, it serves to enforce the "limits to the powers of an unelected, unrepresentative judiciary in our kind of government." *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring).

Respondents would have the Court cast off those limits and set itself on a collision course with the political branches of government. This is evident in their theory of traceability, in which no breathing individual or energy-consuming enterprise the world over is free from potential liability. And it is apparent in their demand that the courts limit Petitioners to "*their share* of the carbon dioxide emission reductions necessary to significantly slow the rate and

magnitude of global warming," J.A. 102 (emphasis added), a formulation which implies that further arbitrary collections of defendants will follow in subsequent cases.

A theory of standing that empowers the courts to arbitrarily restrict the productive activity of any individual or entity is no limitation on judicial power at all, but a massive intrusion on the power of the political branches and, ultimately, on democratic self-rule. Most of all, it is not a theory of *judicial power*, "in the sense in which judicial power is granted by the Constitution to the courts of the United States." *Valley Forge*, 454 U.S. at 471 (quotation omitted) And it would render the courts not merely "roving commissions assigned to pass judgment on the validity of the Nation's laws," *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973), but roving commissions to make law as they see fit.

II. Respondents' Claims Present A Non-Justiciable Political Question

The decision below improperly decided non-justiciable political questions. Respondents' suit suffers from numerous infirmities, including that its adjudication would require the Court to make "initial policy determination[s] of a kind clearly for non-judicial discretion" and that "judicially discoverable and manageable standards for resolving" it claims do not exist. *Baker*, 369 U.S. at 217. Far from being an "ordinary tort suit," Pet. App. 38a, Respondents'

claims would require the Court to exercise non-judicial, political functions to advance aims that the political branches have refused.

A. The Political Question Doctrine Is A Core Aspect Of The Judicial Power

The Article III judicial power is limited: federal courts "'possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree.'" *Rasul v. Bush*, 542 U.S. 466, 489 (2004) (quoting *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994)). "[J]udges can exercise no executive prerogative . . . nor any legislative function, though they may be advised with by the legislative councils." *The Federalist No. 47*, at 224 (James Madison) (Hallowell ed. 1842). Rather, "[t]he courts must declare the sense of the law . . . [for] if they should be disposed to exercise will instead of judgment, the consequence would equally be the substitution of their pleasure to that of the legislative body." *The Federalist No. 78*, at 358 (Alexander Hamilton) (Hallowell ed. 1842).

The political question doctrine "originate[s] in Article III's 'case' or 'controversy' language." *Daimler-Chrysler*, 547 U.S. at 352.[4] An Article III "case or

---

[4] At times, the Supreme Court has described the political question doctrine as a matter of justiciability but not jurisdiction. *See Powell v. McCormack*, 395 U.S. 486, 512 (1969). In either case, there is no dispute that the doctrine delineates

(Continued on following page)

controversy" requires the existence of legal principles that define the relationship among parties, which in turn allows the allocation of liability and the fashioning of remedies. *See, e.g., Muskrat v. United States*, 219 U.S. 346, 361 (1911). Where responsibility cannot be assigned or an injury remedied absent the antecedent legal principles reflecting particular policy judgments, the matter falls beyond the judicial power as authorized by Article III. *See* Laurence H. Tribe, et al., *Too Hot for Courts To Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* 3 (Wash. Legal Found., Working Paper No. 169, 2010) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803), and *Baker*, 369 U.S. at 217). Similarly, questions "beyond areas of judicial expertise" are outside the judicial power. *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring).

The Supreme Court in *Baker* notably illustrated six circumstances where an action presents a political question and is outside Article III jurisdiction:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking

---

limits on the Article III judicial power that are required by the separation of powers and by judicial competence.

> independent resolution without expressing the lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217. The instant matter falls beyond the proper reach of the judiciary in any of these circumstances. *See Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004) (plurality); *INS v. Chadha*, 462 U.S. 919, 941 (1983). As with all applications of the case or controversy principle, the Court must undertake a "discriminating inquiry into the precise facts and posture of the particular case," *Baker*, 369 U.S. at 217, to determine the existence, *vel non*, of a political question.

B. The Court Below Improperly Made Non-Judicial Initial Policy Determinations

"Federal courts have neither the expertise nor the authority to evaluate . . . policy judgments" concerning whether and how to regulate greenhouse gas emissions. *Massachusetts*, 549 U.S. at 533; *see also Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) ("courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature") (quotations omitted). Rather than look to the determinations that need to be made, as the political question

doctrine clearly requires, the court below looked merely to the form of the suit, declaring that "where a case appears to be an ordinary tort suit, there is no impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." Pet. App. 38a-39a (internal quotations omitted).

The Second Circuit proceeded from the flawed assumption that the Respondents "need not await an 'initial policy determination' in order to proceed on this federal common law of nuisance claim, as such claims have been adjudicated in federal courts for over a century." Pet. App. 38a. In so doing, the court below ignored the Court's admonition that it is impossible to resolve the political doctrine question's applicability "by any semantic cataloguing." *Baker*, 369 U.S. at 217. It also ignored contrary authority stating that tort suits may, in fact, present political questions. *See Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271 (11th Cir. 2009) (political question doctrine precluded court from deciding tort claims arising from automobile accident); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007) (political question doctrine precluded court from deciding torts claims in violation of international law); *Antolok v. United States*, 873 F.2d 369, 383 (D.C. Cir. 1989) (Sentelle, J.) (stating that a tort action presented a political question where "the political nature of" the issues raised were of the type where "the Judiciary has no expertise."); *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petrol.*, 577 F.2d 1196, 1203 (5th Cir. 1978) (political question doctrine barred

tortious conversion claims); *Chaser Shipping Corp. v. United States*, 649 F. Supp. 736, 738 (S.D.N.Y. 1986) ("Even though awarding tort damages is a traditional function for the judiciary, it is apparent that there is a clear lack of judicially discoverable and manageable standards for arriving at such an award."), *aff'd*, 819 F.2d 1129 (2d Cir. 1987), *cert. den'd*, 484 U.S. 1004 (1988).

In fact, all cases presenting political questions are predicated on causes of action that are, like tort actions, justiciable in other instances. For example, *Vieth* involved a Section 1983 suit against the Commonwealth of Pennsylvania and various executive and legislative officials, and sought a ruling that Pennsylvania's redistricting plan violated Article I of the Constitution and the Fourteenth Amendment's equal protection clause because it was a partisan gerrymander. 541 U.S. at 271. Similarly, *Nixon v. United States* involved a suit against the United States for injunctive relief under 28 U.S.C. § 1331 and declaratory relief under 28 U.S.C. § 2201, alleging that his impeachment and conviction violated Article I of the Constitution. 506 U.S. 224, 228 (1993). Like "tort suits," claims under these constitutional provisions have been adjudicated in the federal courts for many years. Unlike the court below, however, the Supreme Court undertook a "discriminating inquiry into the precise facts," *Baker*, 369 U.S. at 217, of the "garden variety" claims asserted in these cases and determined that they constituted political questions.

Stripped of its reliance on the purported "ordinariness" of Respondents' claims, the decision below would require the district court to balance competing interests on an inherently national and international scale and to make initial policy judgments the political branches have struggled for decades to make:

- The initial policy determination as to whether Petitioners' methods for providing affordable, reliable energy (or the frequency with which they use those methods) are less socially beneficial than the harms to which the Petitioners are alleged to contribute, considered in the context of millions or billions of contributing emitters beyond the Court's control.[5]
- The initial policy determination as to whether greenhouse gas emission limits could be imposed on the five Petitioners but not their competitors or other industries, requiring the district court to balance the social utility and costs of industrial, agricultural, and individual activities throughout the nation, if not the globe, that are only remotely related (if at all) to the alleged harm.[6]

---

[5] *See Kivalina*, 663 F. Supp. 2d at 876 (finding the need for an initial policy determination because adjudication "requires balancing the social utility of Defendants' conduct with the harm it inflicts")

[6] *See* Pet. App. 183a-184a (district court found that it would be required to "determine and balance the implications of such

(Continued on following page)

- The initial policy determination as to whether Petitioners should be the parties to bear the burden of doing "their share" to remedy harms that Respondents allege were caused by cumulative greenhouse gas emissions.[7]

Congress has made numerous legislative enactments regarding climate change over the last two decades, none of which required emission reductions from existing emission sources like those allegedly operated by the Petitioners. *See infra* p. 35-36.[8] A fact

---

relief on [ongoing international negotiations]," to "assess and measure available alternative energy sources," and to "determine and balance the implications of such relief on national energy sufficiency and thus its national security"); *Kivalina*, 663 F. Supp. 2d at 876-77 (adjudicating common law claims regarding greenhouse gas emissions requires the court to make a policy judgment of a legislative nature about what kind of emissions limits should have been imposed, rather than to resolve the dispute through legal and factual analysis).

[7] *See Kivalina*, 663 F. Supp. 2d at 877 ("Plaintiffs are . . . asking this Court to make a political judgment that the two dozen Defendants named in this action should be the only ones to bear the cost of contributing to global warming . . the allocation of fault – and cost – of global warming is a matter appropriately left for determination by the executive or legislative branch in the first instance.").

[8] The Second Circuit suggests that "[i]t is [ ] fair to say that the Executive branch and Congress have not indicated they favor increasing greenhouse gases." Pet. App. 38a. The authority for this statement, the Global Climate Protection Act of 1987, states that the U.S. should "slow[ ] the rate of increase" of concentrations, i.e., reduce the carbon intensity of emissions, not that U.S. emitters or any other party decrease emissions or hold them constant. And to the extent any statute did stand for that

(Continued on following page)

finder cannot properly, effectively, and reasonably fill this legislative "gap" and determine an appropriate level of emissions such as requested in this suit simply asking what is "reasonable." *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 89 (1994) (refusing to create federal common law tort malpractice liability standards because "[w]hat sort of tort liability to impose on lawyers and accountants . . . who provide services to federally insured financial institutions . . . 'involves a host of considerations that must be weighed and appraised'" and "'is more appropriately for those who write the laws, rather than for those who interpret them'") (quoting *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 98 n.41 (1981)). This inherently open-ended policy determination is akin to "judging whether a particular line is longer than a particular rock is heavy," *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., dissenting), and should not be the federal courts' to make.

C. There Are No Judicially Manageable Standards For Deciding Respondents' Claims

"Judicial action must be governed by *standard*, by *rule*." *Vieth*, 541 U.S. at 278 (emphases in original). "Laws promulgated by the Legislative Branch

---

proposition, it too would serve to displace the federal common law that the court below invoked.

can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions." *Id.* Courts are without guidance for resolving questions that are "delicate, complex, and involve large elements of prophecy," *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948), or that would plunge them into a "sea of imponderables," *Vieth*, 541 U.S. at 290 (plurality). As such, the lack of judicially discoverable and manageable standards is a "dominant consideration[ ]" in determining the existence of a political question. The decision below is erroneous because there are no "judicially discoverable and manageable standards for resolving" this dispute. *Baker*, 369 U.S. at 217.

The Second Circuit held that there were judicially manageable standards for deciding this suit because "[w]ell-settled principles of tort and public nuisance law provide appropriate guidance to the district court in assessing [Respondents'] claims and the federal courts are competent to deal with these issues." Pet. App. 34a. The authority the Court cites for this statement is the *Restatement (Second) of Torts* (1979), Pet. App. 32a-35a, but the *Restatement* is clear that "the court is acting without an established and recognized standard" where, as is the case with greenhouse gas emissions, the underlying act does not constitute a common law crime. *See Restatement (Second)* § 821B cmt. e. *See also North Carolina*, 615 F.3d at 302 ("[W]hile public nuisance law doubtless encompasses environmental concerns,

it does so at such a level of generality as to provide almost no standard of application."); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting) (stating that one may "search[ ] in vain . . . for anything resembling a principle in the common law of nuisance").

Thus, the Court would be required to assess the "reasonable" level of emissions for defendants' contributions to the "sum of carbon dioxide in the Earth's atmosphere." *California*, 2007 U.S. Dist. LEXIS 68547, at *46. It would have to evaluate "the energy producing alternatives that were available in the past and consider their respective impact on far ranging issues such as their reliability as an energy source, safety considerations and the impact of the different alternatives on consumers and business." *Kivalina*, 663 F. Supp. 2d at 874. It would then have to balance "the benefits derived from those choices against the risk that increasing greenhouse gases would in turn increase the risk of" the alleged harm. *Id.* at 874-75. Any lower level of emissions must not have been offset, or even exceeded, by foreign competitors' increased emissions. *See* Tribe, *supra*, at 17-18. There is no indication that these considerations were paramount in any of the Supreme Court's prior suits involving water pollution, nor were they present in *Georgia v. Tennessee Copper*, 206 U.S. 230, 236 (1907). Greenhouse gas emissions should not be regulated in accordance with "the same principles we use to regulate prostitution, obstacles in highways, and bullfights." *North Carolina*, 615 F.3d at 301.

The "difficulty of fashioning relief" also bespeaks the lack of judicially discoverable and manageable standards. *Nixon*, 506 U.S. at 236. The Court would not be able to issue effective relief, as it may not bind the non-parties (some gone for centuries) who are responsible for the vast majority of the emissions that have allegedly harmed the Respondents. This inability "automatically makes [courts] institutionally ill-suited to entertain lawsuits concerning problems [as] irreducibly global and interconnected in scope" as global climate change. Tribe, *supra*, at 21. In rendering relief, the Court would also need to accommodate the Petitioners' duty to serve its customers, and would be engaged in judicial oversight of technical issues outside the judicial expertise. These considerations further evidence the political question presented by this action.

III. The Court Should Not Recognize A Federal Common Law Public Nuisance Cause Of Action For Greenhouse Gas Emissions

Assuming *arguendo* that Respondents have demonstrated Article III standing and that this action is not barred by the political question doctrine, the Court should not recognize a federal common law cause of action arising from global climate change. The Clean Air Act displaced any federal common law that could exist in this area. And even if it did not, the Court should not exercise its discretion to recognize a federal common law cause of action arising from global climate change because of the difficulty

addressing such claims, risk of adverse policy consequences, and risk that such a decision would facilitate "gaming" of judicial recusals by plaintiffs.

A. The Clean Air Act Displaced Any Federal Common Law Of Public Nuisance For Greenhouse Gas Emissions

Congress' "establishment of a comprehensive regulatory program supervised by an expert administrative agency" displaces federal common law. *Milwaukee*, 451 U.S. at 317. The Clean Air Act is a comprehensive regulatory scheme designed "to encourage or otherwise promote reasonable Federal, State, and local government actions, consistent with the provisions of this chapter, for pollution protection." 42 U.S.C. § 7401(c). It broadly applies to air pollutants, 42 U.S.C. § 7602(g), a term that includes greenhouse gases, *see Massachusetts*, 549 U.S. at 528-30, The Clean Air Act also recognizes that maximum pollution control is not desirable, and seeks "to protect and enhance the quality of the Nation's air quality resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1); *see also* 42 U.S.C. § 7470(3) (Clean Air Act provision stating the purpose of the Prevention of Significant Deterioration program: "to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources").

The Environmental Protection Agency's ("EPA") regulation under the Clean Air Act clearly supports this view. The court below stated, "EPA has yet to make any determination that such emissions are subject to regulation under the [Clean Air] Act, much less endeavor *actually* to regulate the emissions." Pet. App. 144a. That statement was incorrect when it was made, and is obsolete in light of EPA's regulatory actions. EPA has finalized numerous rules regulating greenhouse gas emissions from stationary sources of the type allegedly operated by Petitioners. *See* Mandatory Reporting of Greenhouse Gases, 74 Fed. Reg. 56,264 (Oct. 30, 2009); Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) ("endangerment finding" determining that greenhouse gases may reasonably be anticipated to endanger public health or welfare); Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010) (determining that the PSD stationary source program applies as of January 2, 2011); Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) ("tailoring rule" rewriting Congress' emission rate standards for the prevention of significant deterioration and Title V permitting programs to allow for regulation of greenhouse gases). EPA has entered into settlement agreements with states and environmental groups, including certain Respondents, mandating the Agency to promulgate existing

source performance standards from Petitioners, as well as other industrial sources. *See Am. Petr. Inst. v. EPA*, No. 08-1277 (D.C. Cir. filed Aug. 21, 2008); *New York v. EPA*, No. 06-1322 (D.C. Cir. filed Sept. 13, 2006). EPA has also regulated mobile source emissions from light-duty motor vehicles. *See* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010).

The only reasonable conclusion that may be reached from the Clean Air Act is that Congress has spoken directly to the harm caused by air pollutants, displacing any extant federal common law. *See Milwaukee*, 451 U.S. at 325.

B. The Court Should Not Recognize A Federal Common Law Public Nuisance For Greenhouse Gas Emissions

The Court should not exercise its discretion to recognize a federal common law of public nuisance arising from greenhouse gas emissions or for harm caused by global climate change. "It is emphatically the duty of the Judicial Department to say what the law is," and not what it ought to be, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and legislative power is vested in Congress, not the Judiciary. *See* U.S. Const. Art. I, § 1. Federal common law accordingly is disfavored, and "cases in which judicial creation of a special federal rule would be justified . . . are few and restricted." *O'Melveny & Myers*, 512 U.S.

at 87. Following the Supreme Court's rejection of a general common law in *Erie Railroad v. Tompkins*, 304 U.S. 64, 78 (1938), the Court has recognized federal common law only in limited enclaves of distinct federal interest. *See Tex. Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981).

The Court has, of course, in the past recognized a federal common law of public nuisance for some environmental claims and stated in dicta that it exists "[w]hen we deal with air and water in their ambient or interstate aspects[]." *Illinois v. Milwaukee*, 406 U.S. 91, 103 (1972). The decision to recognize federal common law in some interstate pollution contexts is not, however, a mandate that the Court must exercise it in any purported interstate pollution dispute. The Court allows federal remedies for violations of customary international law that have "definite content and acceptance among civilized nations" equivalent to "the historical paradigms familiar when" the Alien Tort Statute, 28 U.S.C. § 1350, was enacted, *see Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004), but does not allow a federal common law suit based on less definite and specific norms. Similarly, the Court recognizes a federal common law damages remedy for constitutional violations by certain federal actors, *see Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), but has consistently refused to extend that remedy "to any new context or new category of defendants." *See Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 67-68 (2001).

The Court has exercised its discretion to recognize remedies sparingly, considering both the inherent limits to judicial rulemaking and the need to avoid potential infringement of Congressional or Executive prerogatives. For instance, the Court has exercised highly circumscribed discretion in extending federal common law norms because "the general practice has been to look for legislative guidance before exercising innovative authority over substantive law." *Sosa*, 542 U.S. at 726. A "decision to create a private right of action is one better left to legislative judgment in the great majority of cases," due to the large number of policy determinations that inevitably accompany such a decision and to the likelihood that such judicial determinations, in the absence of guidance by the political branches, "would raise risks of adverse [] policy consequences." *Sosa*, 542 U.S. at 727-28.

Respondents' claims would extend the federal common law of public nuisance far beyond its previous applications in the absence of any indication from Congress that such action is appropriate. In each of those cases, the claims were based on discrete lines of causation from individual sources to their alleged injuries that unfolded in a specified distance and time. *See Georgia*, 206 U.S. at 236 (Georgia alleged that "forests, orchards and crops" were harmed by an open smelting pit several miles from the Tennessee-Georgia border); *Missouri v. Illinois*, 200 U.S. 496, 517 (1906) (Missouri alleged that Illinois directed sewage from Chicago into an artificial channel that flowed into the Mississippi River where it "deposited"

and contaminated property and waterways used for drinking, agriculture and manufacturing); *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493 (1971) (defendant companies dumped chemicals into streams that flowed directly into Lake Erie, damaging Ohio property); *New Jersey v. New York*, 283 U.S. 473, 476 (1931) (New York released "noxious, offensive and injurious materials . . . into the ocean," and those discrete materials were "cast upon the beaches . . . causing great and irreparable injury"). By contrast, Respondents' claims are not so limited. If litigation is the appropriate response to global climate change, the only appropriate litigation would be the war of all against all, with virtually every natural and corporate person worldwide as simultaneous plaintiffs and defendants.

Other differences between these actions and the cause of action authorized by the decision below counsel against extending a common law remedy. These include the lack of judicially manageable standards for deciding these actions, *see supra* p. 26-29, and the general lack of judicial expertise in the difficult technical questions presented by Respondents' claims.

Similarly, Congress' legislative enactments counsel against extending federal common law to impose emission limitations on individual greenhouse gas emitters. Congress has returned over and again to the subject of greenhouse gas emissions, *see, e.g.*, National Climate Program Act of 1978, Pub. L. No. 95-367, 92 Stat. 601; Energy Policy Act of 1992, Pub.

L. No. 102-486, tit. XVI, § 1601, 106 Stat. 2776, 2999; Global Change Research Act of 1990, Pub. L. No. 101-606, 104 Stat. 3096; Energy Security Act of 1980, Pub. L. No. 96-294, tit. VII, § 711, 94 Stat. 611, 774-75; Global Climate Protection Act of 1987, Pub. L. No. 100-204, tit. XI, 101 Stat. 1407; Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492; Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, tit. II, 121 Stat. 1844, 2128, but with the arguable exception of the Clean Air Act's broad provisions, has never restricted greenhouse gas emissions from individual emitters or suggested that liability should attach to greenhouse gas emissions. Even where Congress has considered legislation that would restrict greenhouse gas emissions, it has not considered enacting legislation that in any way resembles a public nuisance remedy. *See, e.g.*, American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009) (passed House, June 26, 2009); American Clean Energy and Leadership Act of 2009, S. 1462, 111th Cong. (2009); Clean Energy Jobs and American Power Act, S. 1733, 111th Cong. (2009).

C. Recognizing A Federal Common Law Public Nuisance For Greenhouse Gas Emissions Allows Gaming Of Judicial Recusals

Global warming public nuisance cases threaten judicial legitimacy by raising the specter of strategic gaming by plaintiffs to force judicial recusals. In the case of greenhouse gas public nuisance claims, this

problem is uniquely acute, however, because of the lack of substance inherent in the cause of action and the corresponding lack of limitations on the universe of potential defendants – millions of sources in the United States emit significant quantities of greenhouse gases. Plaintiffs may, for example, select defendants in order to force the recusal of certain judges or to defeat the possibility of *en banc* review or even review by this Court. In *Comer*, 607 F.3d 1049, for example, the United States Court of Appeals for the Fifth Circuit dismissed an appeal of a putative class action against a number of corporate defendants that was based on a greenhouse gas public nuisance theory for lack of quorum after one of the judges who participated in the decision to rehear the case *en banc* later recused herself. This Court has faced at least one similar circumstance under a broad theories of liability under the Alien Tort Statute. *See Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008).

This Court's approval of common law actions against arbitrarily selected collections of defendants would guarantee that mass recusals, possibly motivated by plaintiffs' strategic aims, would arise in future cases. This problem may be unavoidable where courts discharge their duty under federal statute, but the Court should not extend federal common law causes of action where such significant potential for abuse exists.

CONCLUSION

For the foregoing reasons, and those set forth in the Brief for Petitioners, *Amici* urge the Court to reverse the decision below and remand with orders that it be dismissed.

Respectfully submitted,

DAVID B. RIVKIN, JR.
Counsel of Record
LEE A. CASEY
MARK W. DELAQUIL
ANDREW M. GROSSMAN
BAKER & HOSTETLER LLP
1050 Connecticut Avenue, N.W.
Washington Square, Suite 1100
Washington, D.C. 20036
drivkin@bakerlaw.com
(202) 861-1500

Counsel for Amici Curiae

FEBRUARY 7, 2011

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
MAR 16 2011
OFFICE OF THE CLERK

No. 10-174

In The
Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY, INC., et al.,

Petitioners,

v.

STATE OF CONNECTICUT, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

STUART BANNER
UCLA SUPREME COURT CLINIC
UCLA SCHOOL OF LAW
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-8506
banner@law.ucla.edu

JAMES R. MAY
Counsel of Record
WIDENER UNIVERSITY SCHOOL OF LAW
4601 Concord Pike
Wilmington, DE 19803
(302) 477-2060
jrmay@widener.edu

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Is this common law nuisance suit non-justiciable under the political question doctrine?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. The Political Question Doctrine Has No Application to Issues of Common Law 8

A. This Court Has Never Found a Common Law Claim Non-Justiciable Under the Political Question Doctrine 9

B. When a Non-Justiciable Constitutional Issue Has Arisen *Within* a Common Law Claim, the Court Has Always Taken Jurisdiction and Decided the Common Law Claim on the Merits, After Deferring to the Political Branches' Resolution of the Constitutional Issue 19

C. There Is No Reason to Expand the Political Question Doctrine to Include Common Law Claims 23

II. This Nuisance Claim Would Not Be a Political Question Even if the Political Question Doctrine Applied to Issues of Common Law 27

A. This Nuisance Claim Is Not Textually Committed to the Political Branches 28

TABLE OF CONTENTS – Continued

Page

B. This Nuisance Claim Is Governed by Judicially Discoverable and Manageable Standards 30

C. This Nuisance Claim Can Be Decided Without an Initial Policy Determination of the Kind Clearly for Nonjudicial Discretion 34

D. None of the Remaining *Baker* Formulations Is Present 38

CONCLUSION 39

TABLE OF AUTHORITIES

Page

CASES:

Baker v. Carr, 369 U.S. 186 (1962) ..... *passim*

Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103 (1948) 13

Cohens v. Virginia, 19 U.S. 264 (1821) 19

Coleman v. Miller, 307 U.S. 433 (1939) 9, 32, 33

Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009), appeal dismissed, 607 F.3d 1049 (5th Cir. 2010) 1

County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) 17

Davis v. Bandemer, 478 U.S. 109 (1986) 17

Doe v. Braden, 57 U.S. 635 (1853) 21

Georgia v. Stanton, 73 U.S. 50 (1867) 10

Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) 26, 32

Gilligan v. Morgan, 413 U.S. 1 (1973) 9, 30

Goldwater v. Carter, 444 U.S. 996 (1979) 33

Illinois v. City of Milwaukee, 406 U.S. 91 (1972) 10, 11, 12, 32

INS v. Chadha, 462 U.S. 919 (1983) 17

Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221 (1986) 12

Juilliard v. Greenman, 110 U.S. 421 (1884) 21

TABLE OF AUTHORITIES – Continued

Page

Kiernan v. City of Portland, 223 U.S. 151 (1912) 10

Lexington & Ohio R.R. Co. v. Applegate, 38 Ky. 289 (1839) 25

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 31

Luther v. Borden, 48 U.S. 1 (1849) 19, 20

Marshall v. Marshall, 547 U.S. 293 (2006) 19

Massachusetts v. EPA, 549 U.S. 497 (2007) 13

Massachusetts v. Mellon, 262 U.S. 447 (1923) 10

Missouri v. Illinois, 180 U.S. 208 (1901) 10, 11, 32

Mountain Timber Co. v. Washington, 243 U.S. 219 (1917) 10

Native Village of Kivalina v. ExxonMobil Corp., appeal pending, No. 09-17490 (9th Cir.) 1

New Jersey v. City of New York, 283 U.S. 473 (1931) 10, 11

Nixon v. Herndon, 273 U.S. 536 (1927) 26

Nixon v. United States, 506 U.S. 224 (1993) 9, 16, 29

Oetjen v. Central Leather Co., 246 U.S. 297 (1918) 20

Ohio ex rel. Bryant v. Akron Metro. Park Dist., 281 U.S. 74 (1930) 9

Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565 (1916) 10

TABLE OF AUTHORITIES – Continued

Page

Ohio v. Wyandotte Chems. Corp., 401 U.S. 493 (1971) 10, 11, 12

Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) 10

Powell v. McCormack, 395 U.S. 486 (1969) 17

Ricaud v. American Metal Co., 246 U.S. 304 (1918) 21, 22

Taylor v. Beckham, 178 U.S. 548 (1900) 10

Union Pac. R.R. Co. v. Brotherhood of Locomotive Engineers, 130 S. Ct. 584 (2009) 19

United States Dep't of Commerce v. Montana, 503 U.S. 442 (1992) 13, 17

United States v. Munoz-Flores, 495 U.S. 385 (1990) 17, 33

Vieth v. Jubelirer, 541 U.S. 267 (2004) 9, 16, 18, 28, 32

Webster v. Doe, 486 U.S. 592 (1988) 13

Williams v. Suffolk Ins. Co., 38 U.S. 415 (1839) 21

CONSTITUTIONAL PROVISIONS:

U.S. Const. art. III, § 2 ..... 6, 17, 18, 29, 30

OTHER AUTHORITIES:

Rachel E. Barkow, "More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy," 102 *Colum. L. Rev.* 237 (2002) 14

TABLE OF AUTHORITIES – Continued

Page

Erwin Chemerinsky, *Federal Jurisdiction* (5th ed. 2007) 14

Jesse H. Choper, "The Political Question Doctrine: Suggested Criteria," 54 *Duke L.J.* 1457 (2005) 14

Louis Henkin, "Is There a 'Political Question' Doctrine?", 85 *Yale L.J.* 597 (1976) 15

Paul M. Kurtz, "Nineteenth Century Anti-Entrepreneurial Nuisance Injunctions – Avoiding the Chancellor," 17 *Wm. & Mary L. Rev.* 621 (1976) 25

Martin H. Redish, "Judicial Review and the 'Political Question,'" 79 *Nw. U. L. Rev.* 1031 (1985) 15

Restatement (Second) of Torts 24, 25

Alexis de Tocqueville, *Democracy in America* (Harvey C. Mansfield and Delba Winthrop eds., 2000) 26

Laurence H. Tribe, *American Constitutional Law* (3d ed. 2000) 14, 15

Mark Tushnet, "Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine," 80 *N.C. L. Rev.* 1203 (2002) 15

Charles Alan Wright, Arthur R. Miller, et al., 13C *Federal Practice and Procedure: Jurisdiction and Related Matters* § 3534.3 (3d ed.) 14, 24

INTEREST OF AMICI CURIAE

Amici curiae, listed below, are law professors who teach, research, and write about environmental law, constitutional law, and torts. They have an interest in preserving the courts' traditional authority to adjudicate common law claims involving the environment. Most participated as amici in two similar nuisance cases in the Courts of Appeals, *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), appeal dismissed, 607 F.3d 1049 (5th Cir. 2010), and *Native Village of Kivalina v. ExxonMobil Corp.*, appeal pending, No. 09-17490 (9th Cir.). Amici file this brief as individuals and not on behalf of the institutions with which they are affiliated.[1]

Randall S. Abate is Associate Professor of Law at Florida A&M University College of Law.

Denise E. Antolini is Professor of Law and Director of the Environmental Law Program at the University of Hawai'i at Mānoa, William S. Richardson School of Law.

William W. Buzbee is Professor of Law, Director of the Environmental and Natural Resources Law

---

[1] The parties have consented to the filing of this brief in letters on file in the Clerk's office. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici, their counsel, and their institutions, made a monetary contribution intended to fund the preparation or submission of this brief.

Program, and Director of the Center on Federalism and Intersystemic Governance at Emory Law School.

Federico Cheever is Professor and Associate Dean for Academic Affairs at the University of Denver, Sturm College of Law.

Jamison E. Colburn is Professor of Law at Penn State University.

Robin Kundis Craig is Associate Dean for Environmental Programs and Attorneys' Title Professor of Law at the Florida State University College of Law.

Holly Doremus is Professor of Law at the University of California, Berkeley, School of Law.

Daniel Farber is Sho Sato Professor of Law at the University of California, Berkeley, School of Law.

Robert L. Glicksman is J.B. & Maurice C. Shapiro Professor of Environmental Law at George Washington University Law School.

Oliver A. Houck is Professor of Law at Tulane University Law School.

David Hunter is Associate Professor of Law and Director of International and Comparative Environmental Law at American University, Washington College of Law.

Alice Kaswan is Professor of Law at the University of San Francisco School of Law.

Alexandra B. Klass is Associate Professor of Law at the University of Minnesota Law School.

Sarah Krakoff is Associate Dean for Research and Professor of Law at the University of Colorado Law School.

JoEllen Lind is Professor of Law and Associate Dean for Faculty Development at Valparaiso University School of Law.

Patricia Ross McCubbin is Professor of Law at Southern Illinois University School of Law.

Jeffrey G. Miller is Professor of Law and Vice Dean for Academic Affairs at Pace University School of Law.

Kenneth M. Murchison is James E. and Betty M. Phillips Professor at Louisiana State University, Paul M. Hebert Law Center.

Hari M. Osofsky is Associate Professor of Law, Associate Director of Law, Geography & Environment, Consortium on Law and Values in Health, Environment & the Life Sciences, and Adjunct Associate Professor of Geography at the University of Minnesota.

Patrick A. Parenteau is Professor of Law and Senior Counsel, Environmental and Natural Resources Law Clinic, at Vermont Law School.

Robert V. Percival is Robert F. Stanton Professor of Law and Director of the Environmental Law Program at the University of Maryland School of Law.

Zygmunt J.B. Plater is Professor of Law at Boston College Law School.

Mary Christina Wood is Philip H. Knight Professor and Faculty Director, Environmental and Natural Resources Law Program, at the University of Oregon School of Law.

SUMMARY OF ARGUMENT

I. Under the political question doctrine, certain *constitutional* issues are reserved to the political branches for decision. The doctrine has no application to common law claims like the one in this case. The Court should reject petitioners' invitation to extend the doctrine far beyond its traditional limits.

A. In every case in which the Court has found federal jurisdiction lacking because of the political question doctrine, the plaintiff's claim has been founded on the Constitution. Meanwhile the Court has addressed a great many common law issues over the years, without ever suggesting, much less holding, that any of them might be political questions. This sharp distinction is not a mere matter of labeling. It is a fundamental divide necessitated by the very nature of the political question doctrine, which is rooted in the Constitution's separation of powers. The six formulations established in *Baker v. Carr*, 369 U.S. 186 (1962), are tools for dividing constitutional claims between the competence of the courts and the political branches. They have never had any bearing

on common law claims, which are always within the competence of courts.

B. Whenever a constitutional issue that is non-justiciable under the political question doctrine has arisen *within* a lawsuit under the common law, the Court has deferred to the political branches' resolution of the constitutional issue, but has nevertheless always retained jurisdiction over the common law case and decided it on the merits. In such cases the Court has never decided that the common law claim itself is non-justiciable.

C. There is no reason to accept petitioners' invitation to expand the political question doctrine far beyond its traditional confines. A legal issue is not converted into a political question simply because one might have policy grounds for preferring that it be resolved by another branch of government. Even if this nuisance suit will be as novel and complex as petitioners allege, their concerns can be addressed the way such concerns have always been addressed, through the courts' interpretation of the common law of nuisance.

II. Even if the political question doctrine applied to non-constitutional issues, this nuisance claim would not be a political question. None of the six *Baker* formulations is inextricable from this case. The authority to resolve common law nuisance claims is neither textually nor implicitly committed to either Congress or the President.

A. This nuisance claim is not textually committed to the political branches. The Constitution does not commit to the political branches the exclusive power to resolve nuisance claims, to adjudicate environmental disputes, or to address the question of climate change. If there is any constitutional text authorizing one of the branches to decide this case, it is Article III, which explicitly provides that "[t]he judicial Power shall extend to all Cases, in Law and Equity."

B. This nuisance claim is governed by judicially discoverable and manageable standards. Petitioners argue that because the law of nuisance incorporates a broad reasonableness standard rather than a set of precise rules, there will be no "right" or "wrong" answers in this case. But that is an argument that would make political questions out of all nuisance cases, not just this one. Indeed, all of the Court's prior nuisance cases were governed by the very same standards that petitioners claim are undiscoverable in this case.

An issue does not become non-justiciable merely because it is governed by a broad standard like reasonableness. An issue is non-justiciable when it is governed by no standard at all. When the applicable standard is merely broadly worded or incapable of being reduced to bright line rules, the Court has consistently refused to hold that an issue is a political question.

C. This nuisance claim can be decided without an initial policy determination of the kind clearly for nonjudicial discretion. This *Baker* formulation prevents courts from making only those policy determinations that are clearly within the exclusive power of the executive branch, involving matters like which nation has sovereignty over disputed territory, and it proscribes only decisions explicitly setting forth the policy of the United States on a particular matter. It does not bar courts from making the implicit policy judgments they traditionally make in common law cases.

D. None of the remaining *Baker* formulations is inextricable from this case. A court applying the common law would not express any lack of the respect due to the political branches. The common law of nuisance cannot override any decisions already made by the political branches. And there is no possibility of inconsistent pronouncements by the judiciary and another branch, because the other branches can always displace the common law of nuisance.

ARGUMENT

The political question doctrine limits judicial review of certain constitutional claims that are committed to the political branches. The Court has never held, or even suggested, that the doctrine forecloses judicial review of common law claims like the one in this case. And even if the political question doctrine

limited judicial consideration of common law claims, the claim in this case would not be a political question.

I. The Political Question Doctrine Has No Application to Issues of Common Law.

The political question doctrine has no application to issues of common law, like the nuisance claim in this case. The doctrine is a judicial gloss on the Constitution's separation of powers, under which there are certain *constitutional* issues that the Constitution reserves, textually or implicitly, to the political branches for decision. The common law, by contrast, is the province of the judiciary, which is the only branch with the authority to interpret the common law.

The Court has always adhered to this distinction between constitutional claims and common law claims. In every case in which the Court has found federal jurisdiction lacking because of the political question doctrine, the plaintiff's claim has been founded on a provision of the Constitution. The Court has decided many common law issues, but it has never suggested that any of them were non-justiciable under the political question doctrine. Perhaps the clearest evidence of this sharp distinction can be found in the cases in which a non-justiciable constitutional issue has arisen *within* a lawsuit under the common law, as an element of the plaintiff's or the defendant's case. In such cases, the

Court's consistent practice has been to defer to the political branches' resolution of the constitutional issue, but nevertheless to retain jurisdiction and to decide the common law issue on the merits. Common law issues are never political questions.[2]

There is no reason to accept petitioners' invitation to expand the political question doctrine far beyond its traditional confines. Petitioners' concerns can be addressed the traditional way, through the courts' interpretation of the common law of nuisance.

A. This Court Has Never Found a Common Law Claim Non-Justiciable Under the Political Question Doctrine.

In every case in which the Court has found federal jurisdiction lacking because of the political question doctrine, the plaintiff's claim has been a constitutional claim. *See, e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (plurality opinion) (Article I and Equal Protection Clause); *Nixon v. United States*, 506 U.S. 224 (1993) (Impeachment Trial Clause); *Gilligan v. Morgan*, 413 U.S. 1 (1973) (Due Process Clause); *Coleman v. Miller*, 307 U.S. 433 (1939) (Article V); *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281

[2] Respondent Tennessee Valley Authority is only half right in observing that "this case differs from most cases presenting a political question: Plaintiffs are not asking the courts to enforce a constitutional or another external standard or norm that is typically in the domain of nonjudicial actors." TVA Br. at 39-40. In fact, this case differs from *all* of this Court's prior such cases.

U.S. 74 (1930) (Guarantee Clause); *Massachusetts v. Mellon*, 262 U.S. 447 (1923) (Tenth Amendment); *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917) (Guarantee Clause); *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916) (Guarantee Clause); *Kiernan v. City of Portland*, 223 U.S. 151 (1912) (Guarantee Clause); *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912) (Guarantee Clause); *Taylor v. Beckham*, 178 U.S. 548 (1900) (Guarantee Clause and Due Process Clause); *Georgia v. Stanton*, 73 U.S. 50 (1867) (Constitutional challenge to Reconstruction Acts).

Common law issues, by contrast, are never political questions. The Court has addressed a great many questions of common law over the years, without any suggestion that any of them might be nonjusticiable as political questions. Many of these have been common law nuisance cases. Some have involved disputes that raised scientifically complex and politically sensitive questions of environmental policy, including the appropriate levels of pollution in the Atlantic Ocean, the Great Lakes, and the Mississippi River. *New Jersey v. City of New York*, 283 U.S. 473 (1931) (Atlantic Ocean); *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) (Lake Michigan); *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493 (1971) (Lake Erie); *Missouri v. Illinois*, 180 U.S. 208 (1901) (Mississippi River). Yet the Court has never even suggested, much less held, that these common law nuisance claims might be political questions. Rather, the Court has affirmed that the federal courts have jurisdiction to

decide them. *Illinois v. Milwaukee*, 406 U.S. at 98, 108; *Ohio v. Wyandotte Chems.*, 401 U.S. at 495-96; *New Jersey v. New York*, 283 U.S. at 476; *Missouri v. Illinois*, 180 U.S. at 241.

As the Court held in *Ohio v. Wyandotte Chemicals*, in light of this long history, "precedent leads almost ineluctably to the conclusion that we are empowered to resolve this dispute." 401 U.S. at 496. The case involved Ohio's effort to stop several Canadian and American chemical companies from dumping mercury into streams that reached Lake Erie. It involved extraordinarily difficult factual questions concerning whether Ohio residents had experienced any actual harm and the extent to which the defendants had contributed to that harm. "We already know," the Court explained,

> that Lake Erie suffers from several sources of pollution other than mercury; that the scientific consensus that mercury is a serious water pollutant is a novel one; that whether and to what extent the existence of mercury in natural waters can safely or reasonably be tolerated is a question for which there is no firm answer; and that virtually no published research is available describing how one might extract mercury that is in fact contaminating water.

Id. at 503-04. The Court recognized that "Ohio is raising factual questions that are essentially ones of first impression to the scientists." *Id.* at 504. The Court acknowledged that it lacked jurisdiction over

suits "that seek to embroil this tribunal in 'political questions.'" *Id.* at 496. Nevertheless, the Court concluded, "[t]hat we have jurisdiction seems clear enough." *Id.* at 495. The Court declined to exercise its discretionary *original* jurisdiction – not because the case presented a political question, but because an ordinary trial court would be better suited to adjudicate the case in the first instance. *Id.* at 505. *See also Illinois v. Milwaukee*, 406 U.S. at 108 (declining to exercise original jurisdiction over nuisance suit, but remitting the case "to an appropriate district court whose powers are adequate to resolve the issues").

Further evidence that the political question doctrine applies only to constitutional issues can be found in *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986), a case in which wildlife conservation groups alleged that federal statutes required the Secretary of Commerce to take action against Japan for exceeding its annual quota of whales under an international treaty. The defendants argued that the issue – although statutory rather than constitutional – was a non-justiciable political question because it was so closely connected with foreign relations. The Court disagreed; it held that an issue of statutory interpretation does not present a political question. "[I]t goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts," the Court explained. "[U]nder the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely

because our decision may have significant political overtones." *Id.* at 230. *See also Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) (finding no political question where "[t]he parties' dispute turns on the proper construction of a congressional statute, a question eminently suitable to resolution in federal court"). The interpretation of the common law, like the interpretation of statutes, is a traditional and characteristic function of the courts. Only constitutional issues can be political questions.[3]

For this reason, the Court has described the doctrine as one that can deprive a federal court of jurisdiction over *constitutional* claims, not other kinds of claims. *United States Dep't of Commerce v. Montana*, 503 U.S. 442, 458 (1992) ("In invoking the political question doctrine, a court acknowledges the possibility that a constitutional provision may not be judicially enforceable"); *Webster v. Doe*, 486 U.S. 592, 612-13 (1988) (Scalia, J., dissenting) ("we have found some constitutional claims to be beyond judicial review because they involve 'political questions'").

---

[3] In *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948), the Court determined that the Civil Aeronautics Act did not authorize judicial review of certain orders of the Civil Aeronautics Board regarding overseas air transportation. While the Court cited some of the same separation-of-powers concerns that motivate the political question doctrine, *id.* at 111, the decision rested on the Court's interpretation of the statute, not on the political question doctrine. *Id.* at 106 ("This Court long has held that statutes which employ broad terms to confer powers of judicial review are not always to be read literally").

Commentators have likewise consistently described the political question doctrine as one that applies only to constitutional issues. Laurence Tribe, for example, summarizes the political question doctrine as one that requires "federal courts to determine whether constitutional provisions which litigants would have judges enforce do in fact lend themselves to interpretation as guarantees of enforceable rights." Laurence H. Tribe, *American Constitutional Law* 385 (3d ed. 2000). As Tribe explains, "[a]n issue is political not because it is one of particular concern to the political branches of government but because the constitutional provisions which litigants would invoke as guides to resolution of the issue do not lend themselves to judicial application." *Id.* at 370.

See also Charles Alan Wright, Arthur R. Miller, et al., 13C *Federal Practice and Procedure: Jurisdiction and Related Matters* § 3534.3 (3d ed.) ("Challenges to official action or inaction are the stuff of the separation-of-powers concerns that underlie political-question reasoning"); Erwin Chemerinsky, *Federal Jurisdiction* 147 (5th ed. 2007) (defining the doctrine as requiring "that certain allegations of unconstitutional government conduct should not be ruled on by the federal courts"); Jesse H. Choper, "The Political Question Doctrine: Suggested Criteria," 54 *Duke L.J.* 1457, 1458 (2005) (defining the doctrine as stating "that courts should abstain from resolving constitutional issues that are better left to other departments of government"); Rachel E. Barkow, "More Supreme Than Court? The Fall of the Political Question

Doctrine and the Rise of Judicial Supremacy," 102 *Colum. L. Rev.* 237, 239-40 (2002) ("Underlying the political question doctrine . . . is the recognition that the political branches possess institutional characteristics that make them superior to the judiciary in deciding certain constitutional questions"); Mark Tushnet, "Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine," 80 *N.C. L. Rev.* 1203, 1207 (2002) ("For the political question doctrine, the 'issue,' in the Court's sense, is: Who gets to decide what the right answer to a substantive constitutional question is?"); Martin H. Redish, "Judicial Review and the 'Political Question,'" 79 *Nw. U. L. Rev.* 1031, 1031 (1985) ("The so-called 'political question' doctrine postulates that there exist certain issues of constitutional law that are more effectively resolved by the political branches of government and are therefore inappropriate for judicial resolution"); Louis Henkin, "Is There a 'Political Question' Doctrine?", 85 *Yale L.J.* 597, 599 (1976) ("a political question is one in which the courts forego their unique and paramount function of judicial review of constitutionality"); Tribe, *supra*, at 367 ("Professor Henkin is clearly right that one should not accept lightly the proposition that there are provisions of the Constitution which the courts may not independently interpret").

Amici Law Professors try to avoid this sharp distinction between constitutional issues and common law issues by insisting that all of the Court's "cases presenting political questions are predicated on causes

of action that are, like tort actions, justiciable in other instances." Brief for Law Professors as Amici Curiae in Support of Petitioners at 23. What they do not mention is that every such political question has involved a constitutional claim. The fact that some constitutional claims are non-justiciable has no bearing on whether any common law claims are non-justiciable.

Petitioners rely heavily on language from *Baker v. Carr*, 369 U.S. 186 (1962), Pet. Br. at 46, but they have plucked that language out of context. In *Baker*, the Court lists several "formulations" describing when prior cases had found an issue non-justiciable. Among these are "a lack of judicially discoverable and manageable standards for resolving it," and "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." 369 U.S. at 217. These "formulations," however, are relevant to deciding which *constitutional* questions should be deemed non-justiciable. They have no bearing on questions of common law. The Court makes that clear in the very next paragraph of *Baker*, which explains that courts should refer to these formulations in determining "whether some action denominated 'political' exceeds constitutional authority." *Id.* *Baker* itself involved a claim under the Equal Protection Clause. All the Court's subsequent cases applying the *Baker* formulations have likewise involved constitutional claims. *Vieth*, 541 U.S. 267 at 277-78 (plurality opinion) (Article I and Equal Protection Clause); *Nixon*, 506 U.S. at 228 (Impeachment

Trial Clause); *United States Dep't of Commerce*, 503 U.S. at 456 (Article I); *United States v. Munoz-Flores*, 495 U.S. 385, 389-90 (1990) (Origination Clause); *Davis v. Bandemer*, 478 U.S. 109, 121-22 (1986) (Equal Protection Clause); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 248-50 (1985) (Indian Commerce Clause); *INS v. Chadha*, 462 U.S. 919, 940-42 (1983) (Article I); *Powell v. McCormack*, 395 U.S. 486, 518-19 (1969) (Article I). The *Baker* formulations are a tool for dividing constitutional claims between the competence of courts and the political branches. They have no relevance to common law claims, because common law claims are always within the competence of courts.

This distinction between constitutional issues and common law issues is not a mere matter of labeling or "semantic cataloguing," *Baker*, 369 U.S. at 217. It is a fundamental divide necessitated by the very nature of the political question doctrine. At bottom, "[t]he nonjusticiability of a political question is primarily a function of the separation of powers." *Id.* at 210. The Constitution's text commits certain tasks to branches other than the judiciary. Its structure may so commit others. But the adjudication of common law cases is at the core of the judiciary's constitutional role. It is committed to the judiciary both textually, in the words of Article III ("The judicial Power shall extend to all Cases, in Law and Equity"), and structurally, in the relationship of Article III to Articles I and II, neither of which authorizes the other branches to do anything remotely similar. As the Court has

explained, "[t]he judicial Power" created by Article III is "the power to act in the manner traditional for English and American courts." *Vieth*, 541 U.S. at 278 (plurality opinion). Nothing could be more traditional than the adjudication of a common law case, the judiciary's core function since long before the Constitution was enacted.

There are two sound prudential reasons for this clear line between constitutional and common law issues. First, when courts interpret the Constitution, they are the final arbiters. The political branches cannot undo what the courts have done. The separation-of-powers concerns underlying the political question doctrine are thus at their strongest, because the political branches cannot provide a check on judicial action. When courts interpret the common law, by contrast, the political branches can override their rulings at any time. In such cases, the political branches themselves can police the judiciary. The separation-of-powers concerns that lie behind the political question doctrine are substantially weaker.

Second, if the political question doctrine applied to all issues, not just constitutional issues, the doctrine would cease to be "a delicate exercise in constitutional interpretation," *Baker*, 369 U.S. at 211. If the doctrine were to lose its constitutional grounding, it would lack any limiting principle. It would become a free-floating discretionary power of federal courts to disclaim jurisdiction over factually complex or politically sensitive cases. But of course federal courts have no such power. They must hear even the most

difficult cases brought before them. *Union Pac. R.R. Co. v. Brotherhood of Locomotive Engineers*, 130 S. Ct. 584, 590 (2009); *Marshall v. Marshall*, 547 U.S. 293, 298 (2006); *Cohens v. Virginia*, 19 U.S. 264, 404 (1821).

B. When a Non-Justiciable Constitutional Issue Has Arisen *Within* a Common Law Claim, the Court Has Always Taken Jurisdiction and Decided the Common Law Claim on the Merits, After Deferring to the Political Branches' Resolution of the Constitutional Issue.

Constitutional issues sometimes arise *within* lawsuits brought under the common law, as parts of either the plaintiff's or the defendant's case. Sometimes those constitutional issues are non-justiciable as political questions. In such cases, the Court's uniform practice has been to defer to the political branches' resolution of the non-justiciable constitutional issue, but nevertheless to take jurisdiction and decide the common law claim on the merits. The Court has never decided that the common law claim itself is non-justiciable.

The best-known example is *Luther v. Borden*, 48 U.S. 1 (1849). Although *Luther* is usually remembered for holding that Guarantee Clause claims are non-justiciable, the case itself was an action for trespass, for breaking and entering a house. *Id.* at 34. The plaintiff was one of the participants in the Dorr Rebellion; the defendants were officers of the

established "charter" government of Rhode Island, which was attempting to suppress the rebellion. *Id.* As part of the plaintiff's case, he argued that the charter government lacked lawful power – that the rebel government was the real one – and that the defendants thus had no authority to enter his house. *Id.* at 38. It was this particular argument that the Court found non-justiciable, on the ground that the political branches have the sole power to determine whether a state government is genuine. *Id.* at 39-43. But the Court did not find the case non-justiciable as a whole. The Court did not dismiss the case for want of jurisdiction. Rather, the Court decided the case on the merits. The case had been tried below to a jury, which had returned a verdict for the defendants. *Id.* at 18. This Court affirmed that judgment. *Id.* at 47. The plaintiff's argument about the true government of Rhode Island was non-justiciable, but his common law action for trespass *was* justiciable.[4]

Every time a political question has arisen within a common law case, the Court has likewise deferred to the political branches on the political question but has decided the case on the merits. *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918) (suit for replevin decided on the merits, after deferring to the political

---

[4] Amici Consumer Energy Alliance, et al. summarize *Luther* incorrectly. Brief of Amici Curiae Consumer Energy Alliance, et al. at 21. The Court did not hold that the common law trespass claim in *Luther* was non-justiciable. The Court decided that issue on the merits.

branches as to which was the legitimate government of Mexico, an issue the Constitution exclusively commits to the political branches); *Juilliard v. Greenman*, 110 U.S. 421 (1884) (suit for breach of contract decided on the merits, after deferring to the political branches on the question of whether to make treasury notes legal tender, an issue the Constitution exclusively commits to the political branches); *Doe v. Braden*, 57 U.S. 635 (1853) (suit for ejection decided on the merits, after deferring to the political branches as to the validity of a treaty, an issue the Constitution exclusively commits to the political branches); *Williams v. Suffolk Ins. Co.*, 38 U.S. 415 (1839) (action of assumpsit decided on the merits, after deferring to the political branches as to which government had jurisdiction over the Falkland Islands, an issue the Constitution exclusively commits to the political branches). As the Court explained in *Juilliard*, the wisdom of using one sort of currency or another "is a political question, to be determined by congress when the question of exigency arises, and not a judicial question." 110 U.S. at 450. Nevertheless, the Court held, "[t]here can . . . be no doubt of the jurisdiction of this court" over the breach of contract claim. *Id.* at 436.

When a political question arises within a non-constitutional case, the Court's consistent practice has thus been to take jurisdiction of the case, despite deferring to the political branches on the political question. The Court explained this consistent practice in *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918). *Ricaud* was a suit in equity to recover lead bullion

imported from Mexico. One element of the plaintiff's case was the allegation that the ostensible government of Mexico, the source of the defendant's title, was in fact not the legitimate government of Mexico. The Court held that because the United States had recognized that government as legitimate, the judiciary could not decide the question anew. It was a question constitutionally committed to the political branches. The Court continued: "This last rule, however, does not deprive the courts of jurisdiction once acquired over a case." *Id.* at 309. The resolution of the political question by the political branches "must be accepted by our courts as a rule for their decision." *Id.* Nevertheless, "[t]o accept a ruling authority and to decide accordingly is not a surrender or abandonment of jurisdiction but is an exercise of it." *Id.* The Court proceeded to decide the case on the merits.

Amicus Chamber of Commerce correctly notes that the Court has "refused to adjudicate political questions even when such questions arise in the context of private litigation involving common law." Brief Amicus Curiae of the Chamber of Commerce at 17. The important thing, however, is that when a political question has arisen within a common law case, the Court has not dismissed the case for lack of jurisdiction. The Court has exercised jurisdiction and decided the case on the merits.

An issue of common law, therefore, can never be non-justiciable under the political question doctrine. Only constitutional claims can be non-justiciable as political questions. Because the present case involves

a common law claim of nuisance, the political question doctrine is no bar to the federal courts' exercise of jurisdiction.

C. There Is No Reason to Expand the Political Question Doctrine to Include Common Law Claims.

Petitioners are not arguing that there is a constitutional provision requiring federal courts to defer to the political branches on some element of the case, such as the validity of a treaty or the authenticity of a government. Rather, they are arguing that the entire case itself is non-justiciable. They are urging the Court to expand the political question doctrine far beyond its traditional confines. But even if this nuisance suit will be as novel and complex as petitioners allege, such a radical departure from precedent is hardly necessary. Petitioners' concerns can be addressed the traditional way, through the courts' interpretation of the common law of nuisance.

A legal issue is not converted into a political question simply because one might have policy grounds for preferring that it be resolved by another branch of government. Those policy concerns can be addressed in many other ways, none of which would require twisting the political question doctrine beyond recognition. As the leading treatise on the federal courts explains:

> Traditional use of the political-question label stops short of embracing all the myriad

> circumstances in which courts conclude that a particular problem is better addressed by another branch. A decision not to create a new common-law cause of action, for example, may well rest on a sense that the subject is better suited to legislative or even administrative action, without even pausing to think of political-question doctrine.

Charles Alan Wright, Arthur R. Miller, et al., 13C *Federal Practice and Procedure: Jurisdiction and Related Matters* § 3534.3 (3d ed.). If there are pressing reasons respondents should not prevail in their nuisance suit, they are reasons of nuisance law, and they can be addressed by a decision on the merits. There is no need for a drastic expansion of the political question doctrine. Petitioners' own amici demonstrate that the courts have had no trouble rejecting innovative nuisance suits on the merits, by applying the substantive law of nuisance. Brief of Amici Curiae National Federation of Independent Business Small Business Legal Center, et al. at 10-12. And if Amici's arguments are correct, the courts will have no trouble doing the same here. *Id.* at 12-27.

Under the common law of nuisance, respondents will have to prove that the pollution produced by petitioners "is an unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B(1). If the questions of causation and harm in this case are in fact as intractable as petitioners allege, respondents will not be able to prove their case. Among the circumstances a court

will have to consider are "[w]hether the conduct involves a significant interference with the public health" and "whether the conduct . . . has produced a permanent or long-lasting effect." *Id.*, § 821B(2). If such matters are as fraught with uncertainty as petitioners contend, respondents will not be able to sustain their burden of proof.

In making these determinations, courts will be doing what they have always done: they will be adapting the common law of nuisance to new problems. New technologies have always given rise to new and difficult questions of nuisance law, and courts have always been able to develop the common law, case by case, in response to these new questions. When the earliest railroads were assailed as nuisances, for example, courts did not dismiss the suits for lack of jurisdiction, on the theory that only the political branches were equipped to make the difficult policy determinations of how many railroad lines the nation should have and where they should be located. When the railroads won, they won on the merits. *E.g.*, *Lexington & Ohio R.R. Co. v. Applegate*, 38 Ky. 289 (1839). Industrialization did not cause courts to treat nuisance suits against factories as political questions, on the theory that industrial policy was a new and complex subject best left to the political branches. When the factories won, they won on the merits. Paul M. Kurtz, "Nineteenth Century Anti-Entrepreneurial Nuisance Injunctions – Avoiding the Chancellor," 17 *Wm. & Mary L. Rev.* 621 (1976). When air pollution first became an important policy concern, courts did

not dismiss nuisance suits against polluters, on the theory that there were no right or wrong answers to the question of how clean the air ought to be. *E.g.*, *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907). When the polluters won, they won on the merits. These were issues that in their day were just as controversial and just as difficult, in both a legal and a scientific sense, as climate change is today. Yet courts were able to perform their traditional task of accommodating the law of nuisance to new circumstances.

In the end, petitioners' argument concerning the political question doctrine is, as Justice Holmes put it in a similar context, "little more than a play on words." *Nixon v. Herndon*, 273 U.S. 536, 540 (1927). Climate change *is* a "political question" in the colloquial meaning of the phrase, in the sense that it is a question that has produced political controversy. But so were school desegregation, and abortion, and capital punishment, and scores of other issues over which the federal courts have exercised jurisdiction. It is this colloquial sense of the phrase that Tocqueville had in mind when he wrote that "[t]here is almost no political question in the United States that is not resolved sooner or later into a judicial question." Alexis de Tocqueville, *Democracy in America* 257 (Harvey C. Mansfield and Delba Winthrop eds., 2000). The legal definition of a "political question," however, is much narrower than its colloquial definition. Under the legal definition, a common law claim of nuisance has never been considered a political question, and there is no reason to start doing so now.

The Court should instead hew closely to the political question doctrine's limited reach. After all, the doctrine is a creation of the courts themselves. The only boundaries to the doctrine are found in the Court's own cases. Once those boundaries are burst, there would be no principled limit to the doctrine's expansion.

II. This Nuisance Claim Would Not Be a Political Question Even if the Political Question Doctrine Applied to Issues of Common Law.

Petitioners' argument rests on the erroneous assumption that the political question doctrine applies to non-constitutional issues. Pet. Br. at 46-51. But even if their assumption were correct, the nuisance claim in this case would not be a political question.

The Court's political question jurisprudence has consisted of careful, case-by-case inquiries into "whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Baker*, 369 U.S. at 198. In *Baker*, the Court analyzed its prior cases and found six common "formulations" among the issues it had found to be political questions. *Id.* at 217. "Prominent on the surface of any case held to involve a political question," the Court determined, is either:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate

> political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. Dismissal is warranted only if at least one of these six elements is "inextricable" from the case. *Id.*

A plurality of the Court has suggested that these formulations "are probably listed in descending order of both importance and certainty." *Vieth*, 541 U.S. at 278 (plurality opinion).

None of the six *Baker* formulations is "inextricable" from this case.

A. This Nuisance Claim Is Not Textually Committed to the Political Branches.

The most important and easily discernible of the *Baker* formulations is whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker*, 369 U.S. at 217. This *Baker* formulation requires explicit constitutional language, not inference from the

Constitution's structure or from the capacities of the three branches.

The text of the Constitution does not assign the resolution of common law nuisance claims like this one to the legislative or executive branches. Petitioners do not even try to argue that it does. Articles I and II say nothing about any exclusive power of the political branches to resolve nuisance claims (or indeed any common law claims), to adjudicate environmental disputes, or to address the question of climate change. The Commerce Clause has never been understood to deprive federal courts of jurisdiction over cases involving interstate or international commerce. Article III, by contrast, explicitly states that "[t]he judicial Power shall extend to all Cases, in Law and Equity." U.S. Const. art. III, § 2. If the Constitution textually commits this issue to any branch, it is the judiciary.

This case is very different from the only two cases since *Baker* in which the Court has found issues textually committed to the political branches. In *Nixon*, the Court determined that the trial of impeachments is textually committed to the Senate, and thus that the Senate's choice of impeachment procedure is a political question. *Nixon*, 506 U.S. at 229-33. The basis for this decision was Article I, Section 3, Clause 6, which says very clearly that "[t]he Senate shall have the sole Power to try all Impeachments." *Id.* at 229. There is no comparable constitutional text in this case.

In *Gilligan*, the Court found that the organization and discipline of the National Guard is textually committed to Congress. *Gilligan*, 413 U.S. at 6-9. The basis for this decision was Article I, Section 8, Clause 16, which says that Congress has the power "[t]o provide for organizing, arming, and disciplining, the militia." *Id.* at 6. There is no comparable constitutional text to govern this case. None, that is, except for Article III, which commits the issue to the courts.

B. This Nuisance Claim Is Governed by Judicially Discoverable and Manageable Standards.

Petitioners rely almost entirely on the second *Baker* formulation, whether there is "a lack of judicially discoverable and manageable standards," *Baker*, 369 U.S. at 217, for resolving this case. Pet. Br. at 46-51. They argue that because the law of nuisance is governed by a reasonableness standard rather than a set of precise rules, there will be no "right" or "wrong" answers in a nuisance case. *Id.* at 48. But an issue does not become a political question merely because it is governed by a broad standard like reasonableness. An issue is a political question when it is governed by no standard at all.

This nuisance case is a political question, petitioners argue, because the judge who decides it will "'search[ ] in vain . . . for anything resembling a principle in the common law of nuisance.'" Pet. Br. at 48 (quoting *Lucas v. South Carolina Coastal Council*,

505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting)). Amici Consumer Energy Alliance, et al. likewise worry that "[p]ublic nuisance law operates at such a high level of generality as to provide no meaningful notice or consistent standard of application." Brief of Amici Curiae Consumer Energy Alliance, et al. at 28.

But this is an argument that would make political questions out of *all* nuisance cases, not just this one. A legal issue does not transform into a political question simply because it is governed by a reasonableness standard. If it did, not only would every nuisance case become a political question, but so would the vast swaths of the law – from negligence to the Fourth Amendment – that also require courts to determine what is reasonable. So would the great many constitutional issues that involve equally broad standards, like whether punishment is "cruel and unusual," or whether congressional action is "necessary and proper." The fact that the law of nuisance cannot be reduced to a set of discrete principles, *see* Pet. Br. at 48, or an algorithm that spits out "right" and "wrong" answers, *see id.*, is thus utterly beside the point. The law of nuisance may be broadly worded, but it is hardly undiscoverable or unmanageable.

The standards that will govern this case *are* in fact discoverable. They can be discovered very easily, by reading the Restatement of Torts. Courts have been applying them for centuries, without any suggestion that courts have been exceeding their jurisdiction all the while. Indeed, all the Court's prior nuisance cases – none of which presented political

questions – were governed by the very same standards that petitioners claim are undiscoverable in this case. *See, e.g., Illinois v. City of Milwaukee*, 406 U.S. 91 (1972); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907); *Missouri v. Illinois*, 200 U.S. 496 (1906).[5]

An issue does not become a political question under this *Baker* formulation merely because it is governed by a broad standard like reasonableness. An issue is a political question when it is governed by no standard at all. In *Vieth*, for instance, the plurality determined that political gerrymandering claims are non-justiciable, not because they require courts to apply a broad standard like reasonableness, but because courts had been unable to articulate any meaningful standard whatsoever. *Vieth*, 541 U.S. at 278-90 (plurality opinion). In *Coleman*, the Court found that a claim under Article V was non-justiciable, not because it was governed by a broad standard like reasonableness, but because it was not

---

[5] Amici Law Professors argue that the Restatement provides no standards where the alleged nuisance does not constitute a common law crime. Brief for Law Professors as Amici Curiae in Support of Petitioners at 27. Now that common law crimes are virtually nonexistent, however, this is an argument that would make political questions out of virtually all nuisance cases. The TVA argues that only the political branches can provide standards for resolving common law nuisance cases. TVA Br. at 39 n.17. But this is an oxymoron: if courts were applying standards prescribed by another branch, they would no longer be applying the common law. In common law cases, whether nuisance or any other kind, courts have always discovered the applicable standards within the common law itself.

governed by any standard at all. *Coleman*, 307 U.S. at 450-54. *See also Goldwater v. Carter*, 444 U.S. 996, 1003 (1979) (Rehnquist, J., concurring in the judgment) (concluding that a Senator's challenge to the President's abrogation of a treaty is non-justiciable, because while the Constitution sets forth the manner in which the Senate participates in the ratification of treaties, it provides no standards for the Senate's participation in their abrogation).

Where the governing standard is merely broadly worded or incapable of being reduced to bright line rules, by contrast, the Court has consistently refused to hold that an issue is a political question. In *Munoz-Flores*, for example, the government argued that claims under the Origination Clause are political questions, because it would be impossible for courts to fashion manageable standards to govern the issue. *Munoz-Flores*, 495 U.S. at 395. This Court disagreed. "[T]he Government suggests no reason that developing such standards will be more difficult in this context than in any other," the Court explained. "Surely a judicial system capable of determining when punishment is 'cruel and unusual,' when bail is '[e]xcessive,' when searches are 'unreasonable,' and when congressional action is 'necessary and proper' for executing an enumerated power is capable of making the more prosaic judgments demanded by adjudication of Origination Clause challenges." *Id.* at 395-96. These are issues governed by standards at least as broad as the law governing nuisance, yet there has never been doubt that federal courts have

jurisdiction to decide them. *See also Baker*, 369 U.S. at 226 (finding reapportionment claims justiciable because "[j]udicial standards under the Equal Protection Clause are well developed and familiar").

This nuisance claim might involve a more complex chain of causation than others, but this is a difference that has nothing to do with the existence of judicially discoverable standards. The standards that will be applied to this case are exactly the same as the ones that courts have always applied to nuisance cases. A more complex chain of causation might make this nuisance case more difficult to prove under the substantive law of nuisance, but the substantive law is no different.

C. This Nuisance Claim Can Be Decided Without an Initial Policy Determination of the Kind Clearly for Nonjudicial Discretion.

Petitioners claim, in a single sentence, that deciding this case will require "initial policy decisions" by judges. Pet. Br. at 51. Amici Law Professors argue that judges will have to make implicit policy judgments about the social benefits of various methods of producing energy, about the fairness of imposing emission limits on petitioners but not their competitors, and about whether petitioners should bear the burden of doing their share to remedy a harm also caused by many others. Brief for Law

Professors as Amici Curiae in Support of Petitioners at 24-25.

Under *Baker*, however, a political question is one that requires judges to make a particular *kind* of policy decision – the kind "clearly for nonjudicial discretion." 369 U.S. at 217. As *Baker* made clear, such policy decisions involve matters such as which nation has sovereignty over disputed territory, or whether a war has ended. *Id.* at 212-13. Policy decisions like these are clearly for the executive branch, not the judiciary. And as *Baker* made equally clear, the Court was referring to *overt* policy decisions, decisions explicitly setting forth the policy of the United States on a particular matter, like whether to recognize a foreign government. *Id.* The Court was not referring to the implicit policy decisions courts make while deciding common law cases.

This case will not require judges to make policy decisions that purport to represent the official policy of the United States on any matter, much less policy decisions that are clearly reserved to the political branches. Judges will have to decide only a legal question: whether petitioners are committing a common law nuisance harmful to respondents. That alone is enough to render this *Baker* formulation inapplicable.

Nor will this case require judges to step out of their judicial role to make implicit policy decisions that are "clearly for nonjudicial discretion." The policy determinations required by common-law decision-making are ones that have traditionally been

within the province of the courts: they are not "clearly" relegated to "nonjudicial discretion." Many legal issues have policy implications of one kind or another. At least since Oliver Wendell Holmes (and probably well before), it has been commonplace to observe that judges, in the course of deciding cases, are in effect making policy decisions, even if they do not explicitly say that is what they are doing. In that sense, judges deciding all nuisance cases can be said to make policy decisions. In even the simplest of nuisance cases, such as a suit to enjoin a factory from polluting, a judge might have to weigh the harm from pollution against the cost to the community of the lost employment from the factory. Such judgments are not the kind of policy decisions "clearly for nonjudicial discretion." They are the kind of policy decisions judges make every day. If this case involves a political question, so does much of the normal work of the courts.

It is thus hardly surprising that neither petitioners nor their amici can cite a single case in which this Court has found a political question simply because an issue has important policy implications. There are no such cases. It is breathtakingly overbroad to suggest that the courts lack jurisdiction whenever Congress has authority – even untapped – to regulate a matter of interstate or international commerce. *See* Brief Amicus Curiae of Pacific Legal Foundation at 28-32; Brief Amicus Curiae of Cato Institute at 26-28. If that were true, federal judges would have very little to do.

This case may involve a more complex chain of causation than the typical nuisance case. But that difference has nothing to do with whether the case requires "an initial policy determination of a kind clearly for nonjudicial discretion." Rather, it has to do with the burden respondents will have to shoulder under the substantive law of nuisance. The fact that petitioners are not the only entities causing the alleged harm, for example, is a fact that a court will have to consider on the merits, in deciding whether respondents have sustained their burden of proof. It is not a fact that has any bearing on whether this issue is a political question.

The same is true of the fact that this nuisance suit will have a greater geographical scope than others the Court has adjudicated. *Cf.* Brief for American Chemistry Council, et al. at 14-18. That might make this case harder to prove on the merits, but it has no bearing on whether the federal courts have jurisdiction to decide it. The political question doctrine is about the nature of the issues in a case, not about the scope of the litigation or the number of parties to it. The mere size and complexity of a case do not have constitutional relevance. If they did, the political question doctrine would have no principled limit: it would swallow all kinds of complex litigation.

D. None of the Remaining *Baker* Formulations Is Present.

Petitioners do not assert the existence of the fourth, fifth, or sixth *Baker* formulations. None is inextricable from this case. A court applying the common law would not express a "lack of the respect due coordinate branches of the government." *Baker*, 369 U.S. at 217. Any common law decision a court reaches could effectively be undone by the political branches. A decision in this case would be no more disrespectful to the other branches than a decision in any other common law case.

For the same reasons, this case does not involve "an unusual need for unquestioning adherence to a political decision already made," or "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.* The common law of nuisance cannot override any decisions already made by the political branches. And there is no possibility of embarrassment from inconsistent pronouncements by the judiciary and another branch, because the other branches can always displace the common law of nuisance.

Because none of the six *Baker* formulations is "inextricable" from this case, this nuisance claim would not be a political question even if the political question doctrine applied to issues of common law.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

STUART BANNER
UCLA SUPREME COURT CLINIC
UCLA SCHOOL OF LAW
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-8506
banner@law.ucla.edu

JAMES R. MAY
Counsel of Record
WIDENER UNIVERSITY SCHOOL OF LAW
4601 Concord Pike
Wilmington, DE 19803
(302) 477-2060
jrmay@widener.edu

Counsel for Amici Curiae

March 2011

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
FEB 7 - 2011
OFFICE OF THE CLERK

No. 10-174

In The
Supreme Court of the United States

AMERICAN ELECTRIC
POWER COMPANY INC., *et al.*,

Petitioners,

v.

STATE OF CONNECTICUT, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS URGING REVERSAL

STEVEN J. LECHNER, ESQ.
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
lechner@mountainstateslegal.com

Attorney for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

41705 n 35

QUESTION PRESENTED

Whether States and private parties have standing to seek judicially fashioned emissions caps on four private utility companies for their alleged contribution to harms claimed to arise from global climate change caused by more than a century of emissions by billions of independent sources.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

IDENTITY AND INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 3

ARGUMENT 5

I. THE IMMUTABLE REQUIREMENTS OF ARTICLE III STANDING: INJURY IN FACT, CAUSATION, AND REDRESSABILITY 5

II. THIS COURT SHOULD OVERRULE *MASSACHUSETTS* BECAUSE IT SERIOUSLY WEAKENED THE CAUSATION AND REDRESSABILTY REQUIREMENTS OF ARTICLE III STANDING 8

III. THIS COURT SHOULD REVERSE THE JUDGMENT OF THE SECOND CIRCUIT BECAUSE IT EVISCERATES WHAT IS LEFT OF CAUSATION AND REDRESSABILITY 16

A. The Second Circuit Essentially Eliminated The Causation Requirement 17

B. The Second Circuit Rendered The Redressability Requirement Meaningless 22

TABLE OF CONTENTS – Continued

Page

IV. THIS COURT SHOULD REVERSE THE JUDGMENT OF THE SECOND CIRCUIT BECAUSE RESPONDENTS' CLAIMS ARE NON-JUSTICIABLE, GENERALIZED GRIEVANCES 24

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Allen v. Wright, 468 U.S. 737 (1984) 2, 7, 9, 10

Babbitt v. Farm Workers, 442 U.S. 289 (1979) 16

Bennett v. Spear, 520 U.S. 154 (1997) 24

Center for Biological Diversity v. U.S. Department of the Interior, 563 F.3d 466 (D.C. Cir. 2009) 13, 14

Clinton v. New York, 524 U.S. 417 (1998) 1

Connecticut v. American Electric Power, Inc., 406 F. Supp. 2d 265 (S.D.N.Y. 2005) 4

Connecticut v. American Electric Power, Inc., 582 F.3d 309 (2nd Cir. 2009) 4, 5, 16, 22, 25

Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) 18

Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) 25

Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658 (D.C. Cir. 1996) 7, 9

Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp., 95 F.3d 358 (5th Cir. 1996) 20

Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149 (4th Cir. 2000) 19, 20, 21

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167 (2000) 12

TABLE OF AUTHORITIES – Continued

Page

Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979) 6

Hein v. Freedom from Religion Found., 551 U.S. 587 (2007) 15

Lewis v. Casey, 518 U.S. 343 (1996) 12

Linda R.S. v. Richard D., 410 U.S. 614 (1973) 24

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) ..... *passim*

Lujan v. National Wildlife Federation, 497 U.S. 871 (1990) 13, 19

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 12

Massachusetts v. EPA, 549 U.S. 497 (2007) ..... *passim*

Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991) 2

Morrison v. Olson, 487 U.S. 654 (1988) 2

Natural Res. Def. Council v. Watkins, 954 F.2d 974 (4th Cir. 1992) 19, 20

Pennsylvania v. West Virginia, 262 U.S. 553 (1923) 16

Public Citizen, Inc. v. Bomer, 274 F.3d 212 (5th Cir. 2001) 26

Public Interest Research Group v. Powell Duffryn Terminals, 913 F.2d 64 (3rd Cir. 1990) 17, 18, 19, 20

TABLE OF AUTHORITIES – Continued

Page

Raines v. Byrd, 521 U.S. 811 (1997) 6

Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) 2

Sierra Club v. Morton, 405 U.S. 727 (1972) 12

Sierra Club v. Peterson, 185 F.3d 349 (5th Cir. 1999) 13

Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546 (5th Cir. 1996) 19, 21

Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26 (1976) 9

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998) 23

Summers v. Earth Island Inst., ___ U.S. ___, 129 S.Ct. 1142 (2009) 12

Texas Independent Producers and Royalty Owners Association v. E.P.A., 410 F.3d 964 (7th Cir. 2005) 20

United States v. Richardson, 418 U.S. 166 (1974) 2

United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973) 12, 13, 15

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982) 6, 24, 25

Warth v. Seldin, 422 U.S. 490 (1975) 24, 25

Whitmore v. Arkansas, 495 U.S. 149 (1990) 16

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISION

U.S. Const. art. II, § 3 .....7, 16, 20

STATUTES

33 U.S.C. § 1251(a) 17

33 U.S.C. § 1311(a) 17

33 U.S.C. § 1342 17

33 U.S.C. § 1342(k) 17

RULE

Supreme Court Rule 37 1

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION

Pursuant to Supreme Court Rule 37.3, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioners urging reversal.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of the right to own and use property, individual liberty, limited and ethical government, and the free enterprise system.

Separation of powers is an essential feature of the American constitutional system and is necessary for the preservation of liberty. *Clinton v. New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Separation of powers was designed to implement a

[1] All parties have consented to the filing of this brief. Copies of the consent letters have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, MSLF affirms that no counsel for a party authored this brief in whole or in part and that no party, person, or entity made a monetary contribution specifically for the preparation or submission of this brief.

fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty."); *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) ("The ultimate purpose of . . . separation of powers is to protect the liberty and security of the governed."); *Morrison v. Olson*, 487 U.S. 654, 710 (1988) (Scalia, J., dissenting) ("While the separation of powers may prevent [the Judiciary] from righting every wrong, it does so in order to ensure that we do not lose liberty.").

The Article III requirement of standing is an essential part of the separation of powers. *Allen v. Wright*, 468 U.S. 737, 752 (1984) ("[T]he law of Article III standing is built on a single basic idea – the idea of separation of powers."). "To permit a complainant who has no concrete injury to require a court to rule" on important questions of national importance "would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.'" *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974); *see also United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring) ("[W]e risk a progressive impairment of the effectiveness of the federal courts if their limited resources are diverted increasingly from their historic role to the resolution of public-interest suits brought by litigants who cannot distinguish themselves from all taxpayers or all citizens.").

In the instant case, a two-judge panel of the Second Circuit, relying on this Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), ruled that eight States, a municipality, and three non-profit land trusts had Article III standing to bring common law nuisance claims against four private utility companies and the Tennessee Valley Authority ("TVA") for the purported consequences of global climate change. If this decision is allowed to stand, it would open the floodgates to federal court litigation with respect to an issue of national and global importance that should be addressed by the politically accountable branches of the federal government. Therefore, MSLF respectfully submits this amicus curiae brief urging this Court to reverse the judgment of the Second Circuit.

STATEMENT OF THE CASE

Fearing the uncertain future effects from elevated levels of carbon dioxide in the atmosphere, eight States, three private land trusts, and a municipality ("Respondents")[2] seek to hold four private utility companies ("Petitioners") and the TVA jointly and severally liable for an ongoing phenomenon, *i.e.*, global climate change. *See generally* Joint Appendix ("JA") 56-59, 117-19. Respondents allege that

[2] The term "Respondents" refers to all Respondents except the TVA.

Petitioners' carbon dioxide emissions contribute to atmospheric levels of greenhouse gases ("GHGs"), which contribute to global climate change, which, in turn, will allegedly cause various injuries someday. *Id.* 57-58, 99-100. These alleged future injuries include beach erosion, marsh and aquifer salinization caused by rising sea levels, impairment of shipping and recreation in the Great Lakes region caused by declining lake levels, and, more generally, destruction of ecosystems and reduced biodiversity. *Id.* 57-58. Respondents are uncertain as to when these alleged injuries might occur but suggest sometime within the next 10 to 100 years. *Id.* 83-84.

The district court dismissed these claims as presenting non-justiciable political questions. *Connecticut v. American Electric Power, Inc.*, 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005). The district court reasoned that, because climate change is a global phenomenon attributed to global GHG emissions, resolution of the claims would necessarily involve a number of policy determinations that should be made by the politically accountable branches. *Id.* at 271-74 (The claims "present non-justiciable political questions that are consigned to the political branches, not the Judiciary."). In light of this conclusion, the district court found it unnecessary to address whether the States had standing to bring their claims. *Id.* at 271 n.6.

On appeal, a two-judge panel of the Second Circuit reversed. *Connecticut v. American Electric Power, Inc.*, 582 F.3d 309 (2nd Cir. 2009). As to standing, the panel ruled that Respondents had standing

under *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) ("*Defenders of Wildlife*"), as seriously weakened by *Massachusetts v. EPA*, 549 U.S. 497 (2007). *Connecticut*, 582 F.3d at 339-49. Although Respondents did not have a purported procedural right that was of critical importance in *Massachusetts*, 549 U.S. at 517-18, the Second Circuit still applied *Massachusetts*'s weakened standing requirements to conclude that Respondents had standing to seek injunctive relief with respect to speculative future injuries resulting from Petitioners' purported contribution to global climate change. *Connecticut*, 582 F.3d at 339-49.

ARGUMENT

I. THE IMMUTABLE REQUIREMENTS OF ARTICLE III STANDING: INJURY IN FACT, CAUSATION, AND REDRESSABILITY.

In *Defenders of Wildlife*, this Court reaffirmed that the "irreducible constitutional minimum" of standing is comprised of three requirements:

> First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not

> the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

504 U.S. at 560-61 (1992) (citations, quotations, ellipses, brackets, and footnotes omitted). Importantly, these "immutable" requirements of Article III standing – injury in fact, causation, and redressability – may not be modified or abrogated by any branch of government. *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 487 n.24 (1982) ("Neither the Administrative Procedure Act, nor any other congressional enactment, can lower the threshold requirements of standing under Art. III."); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) ("In no event, however, may Congress abrogate the Art. III minima . . . .").

In reaffirming these immutable requirements, this Court recognized a possible narrow exception, *i.e.*, where a plaintiff is "seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest . . . (*e.g.*, the procedural requirement of a hearing prior to the denial of their license application . . .)." *Defenders of Wildlife*, 504 U.S. at 572. Under such circumstances,

this Court suggested that a plaintiff could establish standing "without meeting all the demanding normal standards for redressability and immediacy."[3] *Defenders of Wildlife*, 504 U.S. at 572 n.7. The basis for the relaxed requirements of redressability and immediacy is to ensure the federal government's compliance with the procedural requirements established by either the Constitution or Congress to protect an individual's particularized concrete interest from impairment. *Id.* at 572. Without the impairment to a particularized concrete interest, however, an individual plaintiff could usurp the President's most important constitutional duty, *i.e.*, to "take care that the Laws be faithfully executed, Art. II, § 3." *Id.* at 577; *see Allen*, 468 U.S. at 761.

---

[3] Importantly, this Court did not relax the causation requirement *Defenders of Wildlife*, 504 U.S. at 572 n.7. To the contrary, a plaintiff still must show that the impairment of the concrete interest is fairly traceable to the procedural violation. *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664-65 (D.C. Cir. 1996) (en banc) ("[T]he Court has never freed a plaintiff alleging a procedural violation from showing a causal connection between the government action that supposedly required the disregarded procedure and some reasonably increased risk of injury to its particularized interest. . . . To demonstrate standing . . . a procedural-rights plaintiff must show not only that the defendant's acts omitted some procedural requirement, but also that it is *substantially probable* that the procedural breach will cause the essential injury to the plaintiff's own interest.") (emphasis added).

II. THIS COURT SHOULD OVERRULE *MASSACHUSETTS* BECAUSE IT SERIOUSLY WEAKENED THE CAUSATION AND REDRESSABILTY REQUIREMENTS OF ARTICLE III STANDING.

In *Massachusetts*, this Court held that Massachusetts had standing to challenge the decision of the Environmental Protection Agency ("EPA") not to regulate GHG emissions from new motor vehicles under the Clean Air Act ("CAA"). 549 U.S. at 526. That "Congress ha[d] authorized this type of challenge" in the CAA was "of critical importance" to this Court's standing analysis. *Id.* at 516. Recognizing that a plaintiff normally must meet the immutable requirements of standing, *id.* at 517, this Court relied on the procedural right in the CAA to find that Massachusetts was not required to meet the normal requirements for redressability and immediacy. *Id.* at 517-18 ("[A] litigant to whom Congress has 'accorded a procedural right . . . can assert that right without meeting all the normal standards for redressability and immediacy[.]' ") (quoting *Defenders of Wildlife*, 504 U.S. at 572, n.7).

In *Massachusetts*, however, this Court took *Defenders of Wildlife*'s relaxed requirements for standing in procedural right cases and weakened them further. First, it diminished the causation requirement. *Defenders of Wildlife* requires a plaintiff to show that the complained of injury be "fairly traceable" to the defendant's conduct and not " 'the result of the independent action of some third party

not before the court.'" 504 U.S. at 560 (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976)); *see also Fla. Audubon Soc'y*, 94 F.3d at 663 (The plaintiff must show that "it is substantially probable . . . that the challenged acts of the defendant, not of some absent third party, will cause the particularized injury of the plaintiff."). The more attenuated the causal chain between the challenged conduct and the asserted injury, the less likely the plaintiff will be able to establish causation. *Allen*, 468 U.S. at 757-58.

In *Massachusetts*, however, this Court found causation based upon the following attenuated causal chain:

- Man-made GHG emissions contribute to global warming;
- Global warming and the concomitant rising of sea levels have caused Massachusetts to lose a portion of its coastline, and future increases in global temperatures would cause it to lose more;
- A minute portion of global warming is attributable to GHG emissions from new motor vehicles sold in the United States;
- The EPA's failure to regulate GHG emissions from those new motor vehicles has caused total GHG emissions to be higher than they would have been with such regulation; and
- Massachusetts's injury is, therefore, "fairly traceable" to the EPA's failure to regulate

> GHG emissions from new motor vehicles sold in the United States.

See Massachusetts, 548 U.S. at 542-43 (Roberts, C.J., dissenting).

This attenuated causal chain is inconsistent with *Defenders of Wildlife*'s requirement that the plaintiff's injury not be the result of the independent action of some third party. 504 U.S. at 560. Indeed, "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Id.* at 562 (quoting *Allen*, 468 U.S. at 758). It stretches credulity to suggest that Massachusetts's asserted injury is "fairly traceable" to the EPA failure to regulate GHG emissions from new motor vehicles. To overcome this infirmity, this Court suggested that causation was satisfied because the EPA's failure to regulate GHG emissions from new motor vehicles "contributes" to Massachusetts's loss of coastline. *Id.* at 523. Thus, after *Massachusetts*, if a plaintiff has a procedural right, causation may be established if that plaintiff can show that the defendant's actions contribute in some tiny, attenuated way to the asserted injury.

Second, *Massachusetts* also lessened the redressability requirement. In *Defenders of Wildlife* this Court ruled that it must be "likely," as opposed to merely "speculative," that a plaintiff's alleged injury will be "redressed by a favorable decision." 504 U.S. at 560-61. In *Massachusetts* this Court changed this

requirement so that redressability is satisfied if any problem may be redressed, even slightly, as is evident from the following:

> While it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it. Because of the enormity of the potential consequences associated with man-made climate change, the fact that the effectiveness of a remedy might be delayed during the (relatively short) time it takes for a new motor-vehicle fleet to replace an older one is essentially irrelevant. Nor is it dispositive that developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century: A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.

Massachusetts, 549 U.S. at 525-26 (emphasis in original) (citation and footnote omitted). The flaw with this logic is that the purported remedy (lowering emissions from new motor vehicles) is not "likely" to redress Massachusetts's alleged injury (loss of coastal land). Instead, this purported remedy is aimed at global warming. *Id.* at 525 ("While it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it.") (emphasis in

original). Yet, global warming is a phenomenon, not an injury, and not the injury asserted by Massachusetts. *See id.* (noting that Massachusetts's alleged injury was loss of coastal land); *see also Lewis v. Casey*, 518 U.S. 343, 357 (1996) (the remedy must be limited to addressing the alleged injury). Moreover, "the province of the court is, solely, to decide on the rights of individuals," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803), not to vindicate the public interest in environmental protection or a stable climate. *See Defenders of Wildlife*, 504 U.S. at 576-77; *Summers v. Earth Island Inst.*, ___ U.S. ___, 129 S.Ct. 1142, 1149 (2009) (an allegation of harm to the environment, in and of itself, will not support standing); *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 181 (2000) ("The relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff."); *Sierra Club v. Morton*, 405 U.S. 727, 734-736 (1972) (rejecting the idea that an interest in protecting the environment alone could establish standing).

As the forgoing demonstrates, *Massachusetts* so weakened the immutable requirements of causation and redressability that nothing remains of those requirements in procedural rights cases. In short, *Massachusetts* revived the liberal view of standing in *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973) ("SCRAP"),

the reported demise of which was apparently premature.[4] *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990) ("*National Wildlife Federation*") (*SCRAP* "has never since been emulated by this Court"); *Sierra Club v. Peterson*, 185 F.3d 349, 361 n.13 (5th Cir. 1999) (*National Wildlife Federation* "likely eviscerated certain prior cases that afforded procedural rights plaintiffs standing where the [immutable requirements of Article III standing were] not met, *see, e.g.*, [*SCRAP*]. . . .").

Indeed, this is evident from the decision in *Center for Biological Diversity v. U.S. Department of the Interior*, 563 F.3d 466 (D.C. Cir. 2009). In that case, environmental groups challenged an offshore oil and gas leasing program on both substantive and procedural grounds. *Id.* at 471-72. The groups argued that the federal agency had failed to consider both the economic and environmental costs of potential GHG emissions associated with the program and the effects of climate change on the wildlife in the areas to be leased. *Id.* at 475.

The D.C. Circuit ruled that the groups lacked standing to challenge the leasing program on substantive grounds because their alleged injury from

---

[4] In *SCRAP*, environmental groups were found to have standing to challenge a decision of the ICC to allow railroads to impose a surcharge on freight because the surcharge could discourage recycling and encourage the use of non-recycled goods, which may require natural resources to be taken from areas used by the environmental groups. 412 U.S. at 688.

climate change was too general. *Id.* at 478. It also ruled that, even if the groups would have been able to satisfy the injury prong, they still would lack standing because they could not establish a causal link between the agency action and the alleged injury. *Id.* at 478-79. In so doing, the D.C. Circuit ruled that the following chain of causation was too attenuated:

- The leasing program will bring about drilling;
- Drilling, in turn, will bring about more oil;
- This oil will be consumed;
- The consumption of this oil will result in additional carbon dioxide being emitted into the Earth's atmosphere;
- This carbon dioxide will contribute to global climate change;
- Global climate change will adversely affect the wildlife that the groups enjoy; and.
- The groups are, therefore, injured by the adverse effects on the wildlife they enjoy.

Id. The D.C. Circuit properly rejected this attenuated chain of causation because it relies "on the speculation that various different groups of actors not present in th[e] case – namely, oil companies, individuals using oil in their cars, cars actually dispersing carbon dioxide – might act in a certain way in the future." *Id.* at 479.

Inexplicitly, the D.C. Circuit then ruled that this same attenuated chain of causation was sufficient for

the groups to have standing to complain about procedural violations. *Id.* In *Defenders of Wildlife*, however, this Court ruled that only redressability and immediacy were relaxed when a plaintiff seeks to enforce a procedural right. 504 U.S. at 572 n.7. This Court did not relax the causation element. Thus, if the D.C. Circuit's ruling is a precursor of what is to come, environmental groups will be able to challenge a federal agency's failure to comply with a procedural requirement without having to prove a causal relationship between that failure and the impairment of a concrete interest. *See Defenders of Wildlife*, 504 U.S. at 572 n.8 (Rejecting idea that the violation of a procedural requirement "satisfies the concrete-injury requirement by itself, without any showing that the procedural violation endangers a concrete interest of the plaintiff (apart from his interest in having the procedure observed).").

Therefore, this Court should take the opportunity and put the final nail in *SCRAP*'s coffin by overruling *Massachusetts*. *Cf. Hein v. Freedom from Religion Found.*, 551 U.S. 587, 636 (2007) (Scalia, J., concurring in the judgment) (noting that overruling prior precedent "is a serious undertaking" but sometimes better than the alternative).

III. THIS COURT SHOULD REVERSE THE JUDGMENT OF THE SECOND CIRCUIT BECAUSE IT EVISCERATES WHAT IS LEFT OF CAUSATION AND REDRESSABILITY.

In the instant case, the Second Circuit unjustifiably extended *Massachusetts* by ruling Respondents had standing to bring federal common law nuisance claims for alleged future injuries from global climate change. *Connecticut*, 582 F.3d at 345-47. Although Respondents do not have the purported procedural right that was of great importance in *Massachusetts*, the Second Circuit still applied the weakened causation and redressability requirements of *Massachusetts* to conclude that Respondents had standing to seek injunctive relief with respect to Petitioners' purported contribution to global climate change.[5] *Connecticut*, 582 F.3d at 345-49.

---

[5] Based upon *Massachusetts*, the Second Circuit also found that Respondents' alleged future injuries that might occur within the next 10 to 100 years if global climate change were not abated satisfies the injury in fact requirement. *Connecticut*, 582 F.3d 342-44. MSLF submits that an alleged injury occurring decades in the future fails the immediacy requirement. *See Whitmore v. Arkansas*, 495 U S 149, 155 (1990) ("'Allegations of possible future injury do not satisfy the requirements of Art III A threatened injury must be "certainly impending" to constitute injury in fact.'") (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923))).

A. The Second Circuit Essentially Eliminated The Causation Requirement.

In finding that Respondents satisfied the causation requirement, the Second Circuit relied primarily on the "contributor theory" from *Public Interest Research Group v. Powell Duffryn Terminals*, 913 F.2d 64 (3rd Cir. 1990) ("*Powell Duffryn*"), and its progeny. *Connecticut*, 582 F.3d at 345-47. Based upon these Clean Water Act ("CWA") cases,[6] the Second Circuit reasoned that the Respondents' injuries are "fairly traceable" to Petitioners' emissions because those emissions "contribute to" Respondents' alleged injuries. By relying on inapposite CWA cases, the Second Circuit essentially eliminated the causation requirement.

In *Powell Duffryn*, an environmental group and others brought a citizen suit under the CWA, alleging the defendant was exceeding the terms of its discharge permit. 913 F.2d at 69. The defendant moved for summary judgment because the plaintiffs could not establish to "a reasonable scientific certainty" that defendant's discharges adversely affected the

---

[6] The purpose of the CWA is to regulate the discharge of pollutants into water bodies. *See* 33 U.S.C. § 1251(a). Under the CWA, persons are prohibited from discharging pollutants into navigable water bodies unless they obtain a National Pollution Discharge Elimination System permit, which limits the amount of effluent (pollution) that may be discharged. *See* 33 U.S.C. §§ 1311(a), 1342. Compliance with the terms and conditions of the permit constitutes compliance with the CWA. 33 U.S.C. § 1342(k).

water body used by the plaintiffs. *Id.* at 71-72. The district court denied summary judgment because the defendant's violation of the discharge permits, in and of itself, was sufficient to demonstrate that the plaintiffs' injury was fairly traceable to the defendant's discharges. *Id.* at 72.

On appeal, the Third Circuit agreed with the defendant that "permit exceedance alone" is insufficient to meet the causation prong of the test for standing, but it concluded there were sufficient facts to establish causation. *Id.* at 72. Specifically, the Third Circuit ruled:

> The requirement that plaintiff's injuries be "fairly traceable" to the defendant's conduct does not mean that plaintiffs must show to a scientific certainty that defendant's effluent, and defendant's effluent alone, caused the precise harm suffered by the plaintiffs. A plaintiff need not prove causation with absolute scientific rigor *to defeat a motion for summary judgment*.

Id. at 72 (emphasis added).

Thus, according to the Third Circuit, CWA plaintiffs must demonstrate that they are more than "concerned bystanders" by showing there is a "substantial likelihood" that the defendant's conduct caused their alleged injury. *Id.* at 72 (quoting *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 75 n.20 (1978)). This likelihood may be established by showing that the defendant has:

(1) discharged a pollutant in concentrations greater than allowed by its permit; (2) into a water body used by the plaintiffs; and (3) the pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs. *Powell Duffryn*, 913 F.2d at 72.

Whether this "contributor theory" satisfies the "fairly traceable" requirement in CWA cases is debatable. Yet, the Second Circuit's reliance on it in the instant case is indefensible. Prior to the Second Circuit's decision, the *Powell Duffryn* "contributor theory" had been used only when the alleged pollution was discharged into a discrete area of a water body used by the plaintiffs. *See, e.g.*, *Powell Duffryn*, 913 F.2d at 68-69 (discharge into Kill Van Kull, a tidal strait); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 156-62 (4th Cir. 2000) (en banc) ("*Gaston Copper*") (discharge into a water body upstream from a private, manmade lake); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 550 (5th Cir. 1996) ("*Cedar Point Oil*") (discharge into the Galveston Bay); *Natural Res. Def. Council v. Watkins*, 954 F.2d 974, 976-77 (4th Cir. 1992) (discharge into tributary of Savannah River). Because the pollution was discharged into a discrete area used by the plaintiffs, the courts believed it was reasonable to presume that the alleged pollution would "contribute" to the plaintiffs' alleged injuries. *E.g.*, *Powell Duffryn*, 913 F.2d at 71-73.

The *Powell Duffryn*'s CWA "contributor theory," however, has no application in the instant case because there is no discrete area. *Cf. National Wildlife*

Federation, 497 at 889 ("[A]verments which state only that one of respondent's members uses unspecified portions of an immense tract of territory, on some portions of which [regulated] . . . activity has occurred or probably will occur by virtue of the governmental action, are insufficient to show that the member's rights have been adversely affected or aggrieved by Government action."); *Defenders of Wildlife*, 504 U.S. at 565 (rejecting the idea that any person who uses any part of a "contiguous ecosystem" adversely affected by an agency action has standing even if the challenged activity is located a great distance away from the area used); *Texas Independent Producers and Royalty Owners Association v. E.P.A.*, 410 F.3d 964, 972-74 (7th Cir. 2005) (noting a distinction between the plaintiff who is within the discharge zone of a defendant and those who are so far downstream that their injuries cannot fairly be traced to that defendant); *Gaston Copper*, 204 F.3d at 162 (same); *Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.*, 95 F.3d 358, 360-62 (5th Cir. 1996) (environmental organization members who used lake 18 miles and three tributaries from source of alleged unlawful discharge failed to satisfy "fairly traceable" component of Article III standing). Instead, the relevant area in the instant case is the Earth's atmosphere. Because of the immense size of the Earth's atmosphere it is utterly unreasonable to presume causation. Indeed, to take the Second Circuit's analysis to its extreme would mean that every person on Earth was within the discharge zone.

The Second Circuit's reliance on *Powell Duffryn*'s CWA "contributor theory" is badly misplaced for another reason. In all the cases in which it has been applied there was a direct connection between the defendant's alleged discharge of pollutants and the plaintiffs' alleged injuries. *E.g.*, *Powell Duffryn*, 913 F.2d at 72-73 (defendant's discharge of oil and grease could cause the complained of oily or greasy sheen on water body); *Gaston Copper*, 204 F.3d at 156-59 (defendant's discharge of cadmium, copper, iron, lead, and zinc could cause the complained of environmental degradation); *Cedar Point Oil Co.*, 73 F.3d at 558 (defendant's discharge of water produced from oil and gas wells could cause harmful effects on water quality); *Natural Res. Def. Council*, 954 F.2d at 974 (issues of fact as to whether defendant's thermal discharge could cause complained of environmental effects precluded granting of summary judgment).

In the instant case, there is no direct connection. Petitioners' emissions of carbon dioxide into the Earth's atmosphere will not directly affect any of Respondents. Rather, alleged future injuries of Respondents are the alleged result of a phenomenon called global climate change, which may or may not be the result of manmade GHGs in the atmosphere, which may or may not be the result of Petitioners' emissions. Taking the Second Circuit's novel causation theory to its logical extreme would mean that a creative plaintiff's attorney could establish causation against any entity whose emission of carbon dioxide "contributes" in some tiny way to the total amount of

GHGs in the Earth's atmosphere. The absurdity of this proposition proves Respondents lack standing.

B. The Second Circuit Rendered The Redressability Requirement Meaningless.

Respondents seek injunctive relief involving judicially imposed emissions caps on Petitioners and the TVA. *Connecticut*, 582 F.3d at 348. In ruling that Respondents met the redressability requirement, the Second Circuit focused on the statement in *Massachusetts* that redressability is satisfied if global climate change is "slow[ed]" or reduce[d]." *Connecticut*, 582 F.3d at 348 ("[*Massachusetts*] recognized that regulation of motor vehicle emissions would not 'by itself reverse global warming,' but that it was sufficient for the redressability inquiry to show that the requested remedy would 'slow or reduce it.'") (quoting *Massachusetts*, 549 U.S. at 525).

The Second Circuit's reliance on the redressability requirement of *Massachusetts* is badly misplaced because, again, Respondents lack the requisite procedural right that was of critical importance in *Massachusetts*. The lowest threshold of redressability was accepted in *Massachusetts* because federal agencies can take incremental steps in making regulatory changes. 549 U.S. at 524. That analysis has no applicability here because Respondents are asking for judicially fashioned incremental steps that would afford no relief.

Judicially capping the emissions of a few utilities offers, at best, a speculative chance in reducing total GHG emissions. Moreover, assuming a reduction in total emissions, there is no guarantee that the reduction would reduce global climate change. The amount of global climate change is not directly proportional to a few utilities' GHG emissions. Instead, according to Respondents, global climate change results from GHG emissions from billions of sources over centuries. JA 79-84, 134-36. These emissions randomly mix in the Earth's atmosphere and presumably result in a gradual increase in global temperatures. Thus, capping Petitioners' emissions will not redress global climate change, much less Respondents' alleged future injuries. Accordingly, Respondents lack standing. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107 (1998) ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.").

Moreover, judicially capping Petitioners' emissions would violate *Defenders of Wildlife*'s requirement that it be "likely," as opposed to merely "speculative," that the plaintiffs' alleged injury will be "redressed by a favorable decision." 504 U.S. at 560-61. In *Defenders of Wildlife*, federal agencies supplied only "a fraction of the funding" for projects causing the alleged injury 504 U.S. at 571. Thus, it was pure speculation whether the plaintiffs' injury would be redressed because the alleged injurious projects could go forward even without funding from

federal agencies. *Id.*; *see also Warth v. Seldin*, 422 U.S. 490, 505-06 (1975) (low-income plaintiffs' challenge to exclusionary zoning practices was not redressable because, even if zoning ordinances were invalidated, there was no proof that suitable, low-income housing would be constructed); *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (mother seeking child support lacked standing because the only result of her requested relief would be the incarceration of the father, and, thus, any payment of child support was purely speculative). In short, the uncertainty of any relief in the instant case proves Respondents lack standing.

IV. THIS COURT SHOULD REVERSE THE JUDGMENT OF THE SECOND CIRCUIT BECAUSE RESPONDENTS' CLAIMS ARE NON-JUSTICIABLE, GENERALIZED GRIEVANCES.

In addition to the immutable requirements of Article III standing, this Court also adheres "to a set of prudential principles that bear on the question of standing." *Valley Forge*, 454 U.S. at 474. "Like their constitutional counterparts, these self-imposed limits on the exercise of federal jurisdiction are founded in concern about the proper – and properly limited – role of the courts in a democratic society[.]" *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (quotations omitted). One important prudential principal is the "'rule barring adjudication of generalized grievances more appropriately addressed in the

representative branches. . . .'" *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 12 (2004) (quoting *Allen*, 468 U.S. at 751). Without this prudential principle, "the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Warth*, 422 U.S. at 500; *see also Valley Forge*, 454 U.S. at 472 (The prohibition on generalized grievances is "to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.").

Respondents' federal common law nuisance claims are precisely the kind of "generalized grievances" that are "more appropriately addressed in the representative branches." *Elk Grove*, 542 U.S. at 12. This is especially true considering that Respondents did not have a purported procedural right that was of critical importance in *Massachusetts*. *See Warth*, 422 U.S. at 500 (noting that Article III standing analysis may be different if there is a constitutional or statutory provision that provides a right to judicial relief). Moreover, the speculative future injuries Respondents seek to redress could potentially be suffered by all landowners in the United States. *See Connecticut*, 582 F.3d at 342 (describing Respondents' alleged future injuries). Thus, "no matter how well intended, [Respondents] have done little more than present a

generalized grievance, common to all citizens or litigants in [the United States], and as such, lack standing." *Public Citizen, Inc. v. Bomer*, 274 F.3d 212, 219 (5th Cir. 2001); *Warth*, 422 U.S. at 499 ("[W]hen the asserted harm is . . . shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction."); *see Defenders of Wildlife*, 504 U.S. at 573-74 ("We have consistently held that a plaintiff . . . claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief [that] no more directly and tangibly benefits him than it does the public at large[,] does not state an Article III case or controversy.").

Accordingly, this Court's prudential standing principles mandate that Respondents take their generalized grievances to the representative branches. Therefore, this Court should reverse the judgment of the Second Circuit.

CONCLUSION

For the foregoing reasons, this Court should hold that Respondents lack standing and reverse the judgment of the Second Circuit.

Respectfully submitted,

STEVEN J. LECHNER, ESQ.
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
lechner@mountainstateslegal.com

Attorney for Amicus Curiae

February 7, 2011

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
FEB 7 - 2011
OFFICE OF THE CLERK

No. 10-174

In The

Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY, INC., et al.,
Petitioner,

v.

STATE OF CONNECTICUT, et al.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF THE PETITIONER

Amy C. Chai*
Thomas J. Ward
National Association of
Home Builders
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 866-8200

* *Counsel of Record*

February 7, 2011

140 C
30

TABLE OF CONTENTS

Page (s)

INTEREST OF THE *AMICUS CURIAE* 1

ARGUMENT 3

I. THE SECOND CIRCUIT ERRONEOUSLY APPLIED STATUTORY STANDING FACTORS TO A COMMON LAW CAUSE OF ACTION 3

A. Significant Differences Exist in the Standing Analysis for Common Law and Statute-Based Causes of Action 3

1. Key Standing Principles 3

2. Standing and *Massachusetts v. EPA* 5

a. Injury-in-Fact 6

b. Causation-by-Contribution 7

c. Redressability 8

II. THE SECOND CIRCUIT'S CONFUSION RESULTED IN AN IMPROPER STANDING DETERMINATION 9

A. Because There is No Procedural Right at Issue in *Connecticut*, a Relaxed Immediacy Requirement is Inappropriate 9

TABLE OF CONTENTS (*cont.*)

Page (s)

B. The Second Circuit Erroneously Relied on Statute-Based Tests to Determine Causation 10

C. The Second Circuit Impermissibly Relaxed the Redressability Requirement and Misunderstood the Nature of the Requested Relief in *Massachusetts* 13

D. The Second Circuit Failed to Consider Prudential Barriers to Standing 15

I. ***WARTH v. SELDIN* & *HAVENS REALTY v. COLEMAN* – A COMPARISON OF STANDING ANALYSES** 16

A. *Warth v. Seldin:* Assertion of a Constitutional Claim to Combat Exclusionary Housing Ordinance 17

B. *Havens Realty v. Coleman:* A Fair Housing Act Cause of Action Challenging Racial Steering 20

C. A Comparison of *Warth* and *Havens* Demonstrates the Critical Distinctions Between the Standing Analyses Employed in Common Law and Statute-Based Claims 22

CONCLUSION 23

TABLE OF AUTHORITIES

Page (s)

Cases

Bennett v. Spear, 520 U.S. 154 (1997) 15

Connecticut v. Am. Elec. Power, 582 F.3d 309 (2d Cir. 2009) 3, 10, 11

Gladstone, Realtors, v. Vill. of Bellwood, 441 U.S. 91 (1979) 21

Havens Realty Corp., et al., v. Coleman, 455 U.S. 363 (1982) 20, 21, 22

International Primate Prot. League v. Admin. of Tulane Educ. Fund, 500 U.S. 72 (1991) 6

Lujan v. Def. of Wildlife, 504 U.S. 555 (1992) ..... *passim*

Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497 (2007) ..... *passim*

Native Vill. of Kivalina v. ExxonMobil Corp., et al., 663 F.Supp.2d 863 (2009) 12

Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64 (3d Cir. 1990) 10-11, 12

TABLE OF AUTHORITIES (*cont.*)

Page (s)

Trafficante v. Metro. Life Ins. Co., 409 U.S. 205 (1972) 20, 23

U.S. v. Hays, 515 U.S. 737 (1995) 15

Valley Forge Christian Coll. v. Am. United for Separation of Church and State, 454 U.S. 464 (1982) 4, 15

Warth v. Seldin, 422 U.S. 490 (1975) ..... *passim*

Whitmore v. Arkansas, 495 U.S. 149 (1990) 10

Statutes

Clean Air Act § 304, 42 U.S.C. §7604(a) 5, 6

Clean Air Act § 307, 42 U.S.C. §7607 5

Clean Air Act § 202(a)(1), 42 U.S.C. 7521(a)(1) 5

Fair Housing Act of 1968 § 804, 42 U.S.C. §3604 ..... 20, 21, 22

Fair Housing Act of 1968 § 804(d), 42 U.S.C. §3604 21

Fair Housing Act of 1968 § 812, 42 U.S.C. §3612 21

Administrative Procedure Act of 1966, 5 U.S.C. §553(e) 5

TABLE OF AUTHORITIES (*cont.*)

Page (s)

Other

Paul Emrath, PhD and Helen Fei Liu, PhD, *Residential Greenhouse Gas Emissions*, Special Studies, April 30, 2007 at http://www.nahb.org/generic.aspx?genericcontentID=75563&fromGSA=1 2

INTERESTS OF *AMICUS CURIAE*

The National Association of Home Builders (NAHB) has received the parties' written consent to file this *amicus curiae* brief supporting petitioners.[1] NAHB is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the shelter industry. As the voice of America's housing industry, NAHB helps promote policies that will keep housing a national priority. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's 160,000 members are home builders and/or remodelers, and its members construct about 80 percent of the new homes built each year in the United States.

NAHB is a vigilant advocate in the Nation's courts, and it frequently participates as a party litigant and *amicus curiae* to safeguard the property rights and interests of its members. NAHB was a petitioner in *NAHB v. Defenders of Wildlife*, 551 U.S. 644 (2007). Attached at Appendix A to this brief is a list of cases in which NAHB has participated before this Court as *amicus curiae* or "of counsel." A large number of these cases involved landowners and other parties aggrieved by excessive regulation under a wide array of statutes and regulatory programs.

NAHB's organizational policies have long advocated that access to the federal courts be limited

---

[1] Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

to those parties that have satisfied Article III standing requirements, as well as prudential standing principles. In particular, NAHB has advocated for standing to be conferred where a party is within the "zone of interests" of a statute or is the object of the challenged regulation. The Second Circuit's opinion threatens to undermine this Court's longstanding jurisprudence of properly limited access to the federal courts, and would grant near-unfettered access to the federal courts for parties seeking to advance all manner of "generalized grievances."

Residential structures are estimated to be responsible for 18% of domestic greenhouse gas (GHG) emissions, largely due to the energy used by occupants of the property.[2] NAHB has been at the forefront of establishing and promoting green building practices for more than a decade, and, along with the International Code Council, developed the only ANSI-approved standard, the National Green Building Standard. Green building at its core promotes greater energy efficiency and, among other benefits, reduces GHG emissions. NAHB members are nonetheless concerned that they, as GHG emitters like all other industries, could one day be subject to a public nuisance claim if the Second Circuit's decision is allowed to stand. *See, e.g.*, Pet. for Cert. at 3-4, *Am. Elec. Power Company, Inc., et al. v. State of Connecticut*, 2010 WL 3054374 (Aug. 2, 2010)(No. 10-174).

---

[2] *See, e.g.*, Paul Emrath, PhD and Helen Fei Liu, PhD, *Residential Greenhouse Gas Emissions*, Special Studies, April 30, 2007 at http://www.nahb.org/generic.aspx?genericContentID=75563&fromGSA=1.

ARGUMENT

I. THE SECOND CIRCUIT ERRONEOUSLY APPLIED STATUTORY STANDING FACTORS TO A COMMON LAW CAUSE OF ACTION.

In *Connecticut v. American Electric Power*, 582 F.3d 309 (2d Cir. 2009), the Second Circuit found that the plaintiff states and trusts had sufficiently established their standing to bring a federal common law nuisance claim against five defendant utilities. *Id.* at 315. The court engaged in an exhaustive review of the various elements of standing – the unique nature of state standing (e.g., propriety, *parens patriae*, and sovereign); the Article III "irreducible constitutional minimum;" and reliance on this Court's standing determination in *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007). However, the Second Circuit's analysis is fatally flawed because it treats a common law cause of action exactly as it would a statutory cause of action. As discussed more fully below, this misapplication has resulted in an improper determination that the states and trusts have standing to bring their claim.

A. Significant Differences Exist in the Standing Analysis for Common Law and Statute-Based Causes of Action.

1. Key Standing Principles

All parties before the federal courts must satisfy Article III requirements for standing; that is,

first, "the plaintiff must have suffered an 'injury in fact'...which is (a) concrete and particularized...and (b) 'actual or imminent, not 'conjectural' or 'hypothetical'....Second, there must be a causal connection between the injury and the conduct complained of....Third, it must be 'likely'...that the injury will be 'redressed by a favorable decision.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

In addition to Article III, courts have over time fashioned prudential standing barriers. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 499 (1975). The purpose of prudential standing is anchored in the "concern about the proper – and properly limited – role of the courts in a democratic society." *Id.* at 498. There are three main principles embodied within prudential standing. First, the courts will typically decline standing where the plaintiff seeks to "'rest his claim to relief on the legal rights or interests of third parties.'" *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 474 (1982) (internal citations omitted). Second, courts will not adjudicate "'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." *Id.* at 475. Third, courts generally require that the plaintiff's complaint fall within "'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Id.* Unlike Article III standing, Congress can legislatively overrule prudential standing principles. *See, e.g., Warth*, 422 U.S. at 501 (1975)("Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules.").

However, where Congress has not acted to trump prudential standing, or as here, where there is no statute, the full range of prudential standing requirements apply.

The courts have also developed a distinct Article III analysis when the cause of action arises not from the common law or constitutional law, but from a statute. Courts have long recognized that Congress can "define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Lujan*, 504 U.S. at 580 (citing *Warth*, 422 U.S. at 500). This is especially true where a statute conveys a specific procedural right. *Lujan*, 504 U.S. at 572. While Congress cannot legislate away Article III requirements, courts have determined that a plaintiff alleging a violation of a procedural right need not be subject to "all the normal standards for redressability and immediacy." *Lujan*, 504 U.S. at 572 n.7. For example, the Clean Air Act creates a right of action for "any person" to bring a lawsuit against alleged violators of the Act, including the United States, and against the EPA for failing to act in accordance with the statute. *See* 42 U.S.C. §7604(a). The procedural rights granted by the Clean Air Act played a pivotal role in the case on which the Second Circuit heavily relied: *Massachusetts v. EPA*.

2. Standing and *Massachusetts v. EPA*

In *Massachusetts v. EPA*, plaintiff organizations filed a petition for rulemaking pursuant to Clean Air Act section 307, 42 U.S.C. §7607, and the Administrative Procedure Act, 5 U.S.C. §553(e), urging EPA to adopt GHG emissions standards for motor vehicles under Clean Air Act section 202(a)(1). *See* 549 U.S. at 510. EPA may grant or deny this

petition. *Id.* The Clean Air Act also provides that the petitioner can bring suit against the agency if it denies a petition or fails to respond in a timely fashion. 42 U.S.C. §7604(a). In this case, EPA denied the petition and the plaintiffs, joined by a number of intervening states, brought suit against EPA. *See Massachusetts,* 549 U.S. at 511-514.

A majority of this Court found that the Commonwealth of Massachusetts had standing to bring its claim against the EPA. *See Massachusetts,* 549 U.S. at 526. The Court was clear, however, that the existence of a statute, with its congressionally created procedural right, was a critical factor – if not the most critical factor – leading the court to find standing. "Congress has moreover authorized this type of challenge to EPA action....That authorization is of critical importance to the standing inquiry." *Id.* at 516. This Court has long held that "standing is gauged by the specific common-law, statutory or constitutional claims that a party presents." *International Primate Protection League v. Administrators of Tulane Educational Fund,* 500 U.S. 72, 77 (1991). Thus while Massachusetts remained subject to Article III requirements, the Court explicitly relaxed the standard for immediacy and redressability because of the statutorily created rights articulated in the Clean Air Act.

a. Injury-in-Fact

The Court in *Massachusetts* began its standing analysis by reviewing the *Lujan* test for an injury-in-fact that is concrete and particularized, and actual or imminent. 549 U.S. at 517. As the Court recognized, "[h]owever, a litigant to whom Congress has 'accorded a procedural right to protect his concrete

interests...can assert that right without meeting all the normal standards for redressability and immediacy." *Id.* at 517-518.

The Court noted that the petitioners challenged EPA's failure to regulate GHG emissions from mobile sources under the Clean Air Act section 202(a)(1). Petitioners alleged a wide range of harms that will result if global warming continues unabated, including reduced snowpack, more violent storms, and rising sea levels. *See Massachusetts*, 549 U.S. at 521-522. The *Massachusetts* Court focused on one of Massachusetts' alleged injuries – loss of shoreline from rising sea levels – to conduct its standing analysis. *See id.* at 522; *see also id.* at 540 (Roberts, C.J., dissenting).[3]

b. Causation-by-Contribution

In *Massachusetts*, this Court held that Massachusetts had sufficiently demonstrated causation, even though it sought EPA regulation of only U.S. motor vehicle emissions (as opposed to other domestic or foreign U.S. emissions sources), and these emissions were not the sole cause of the petitioners' harm. 549 U.S. at 523-24. The Court's rationale that the "contribution" of GHG emissions from motor vehicles is sufficient to allege causation because the petitioners' claim is based on statute. This Court recognized that legislatures and regulatory agencies

[3] While the majority did not delve deeply into the question of "imminence," the dissent did, disputing that plaintiffs sufficiently satisfied the requirement that their injuries, if not actual, be imminent. As the dissent stated, "accepting a century-long time horizon and a series of compounded estimates renders requirements of imminence and immediacy utterly toothless." 549 U.S. at 542 (Roberts, C.J., dissenting).

often tackle one element of a problem at a time; thus, if parties were not permitted to challenge incremental approaches in court, this "would doom most challenges to regulatory action." 549 U.S. at 524. Thus, the Court found that Massachusetts had sufficiently demonstrated that the injuries were caused by EPA's failure to treat carbon dioxide as a pollutant under the Clean Air Act, holding that "[t]here is...a 'substantial likelihood that the judicial relief requested' will prompt EPA to take steps to reduce that risk." *Id.* at 521.

c. Redressability

The *Massachusetts* Court held that "[w]hen a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant," 549 U.S. at 518, and that, in the context of "relaxed redressability," Massachusetts' injury could be redressed by a favorable decision. Additionally, and more significantly, this Court found that the petitioners' claims were redressable, even if a decrease in GHG emissions from motor vehicles did not reverse climate change, based solely on the statute. "While it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to slow or reduce it." *Id.* at 525 (emphasis in original). Thus, this Court did not hold that, when it comes to climate change, anything that slows or decreases emissions is sufficient to demonstrate redressability. Rather, the question was whether the statute created a duty for EPA to take action to slow

or reduce emissions. For this reason, the Commonwealth had standing, largely because it had asserted a procedural right granted to it by Congress.

II. THE SECOND CIRCUIT'S CONFUSION RESULTED IN AN IMPROPER STANDING DETERMINATION.

The Second Circuit's confusion regarding the appropriate tests for determining standing is not without consequence. The Court's misapplication of statutory standing factors to a common law cause of action resulted in the court incorrectly finding that the states and trusts have standing when in fact they do not. The Second Circuit relied on statutory constructs, such as the granting of a procedural right and the concomitant relaxed immediacy and redressability requirements, that are unavailable to common-law claims. Moreover, the Second Circuit failed to consider prudential standing, which governs unless Congress has explicitly removed a prudential principle. Where, as here, there is no statute underpinning the claim, all prudential standing principles must be considered to properly determine the court's jurisdiction.

A. Because There is No Procedural Right at Issue in *Connecticut*, a Relaxed Immediacy Requirement is Inappropriate.

Without a relaxed requirement to demonstrate "immediacy," the court should have found that the states and trusts failed to demonstrate an injury-in-fact because the future injuries they alleged are not immediate as required by Article III. The test for

immediacy is whether the injury-in-fact is "'actual or imminent, not conjectural or hypothetical.'" *Lujan*, at 560. In *Lujan*, the Court considered whether plaintiffs had standing when they asserted that their past visits to an endangered species' habitat meant they would return again at some unspecified time in the future. The Court found their allegations to be insufficient. "Such 'some day' intentions...do not support a finding of the 'actual or imminent' injury that our cases require." *Id.* at 564; *see also Whitmore v. Arkansas,* 495 U.S. 149, 155 (1990) (finding that, when alleging a future injury, that injury "must be concrete in both a qualitative and temporal sense.").

The states and trusts alleged a variety of injuries from greenhouse gas emissions to which they "expect" to be subjected within a timeframe of 10 years to 100 years into the future. *Connecticut*, 582 F.3d at 317-18. Even if the plaintiffs in *Lujan* had alleged they planned to return to the impacted locations sometime after 10 years but before they died, the Court's actual or imminent requirement would not have been satisfied. The states and trusts' time frame similarly does not satisfy the requirement. This lack of precision puts this Court in the precarious position of "deciding a case in which no injury would have occurred at all." *Lujan*, 504 U.S. at 564 n.2.

B. The Second Circuit Erroneously Relied on Statute-Based Tests to Determine Causation.

The Second Circuit relied primarily on this Court's holding in *Massachusetts* and the Third Circuit's decision in *Public Interest Research Group of*

New Jersey, Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64 (3d Cir. 1990) to find that the states and trusts had sufficiently alleged that their injuries are "fairly traceable" to the defendants' actions.[4] *Connecticut*, 582 F.3d at 345. However, the court's reliance on both is misplaced because *Massachusetts*' and *Powell Duffryn's* causation-through-contribution findings were based on the presence of a statute.

The Third Circuit in *Powell Duffryn* addressed environmental organizations' claims that a discharger violated its Clean Water Act National Pollution Discharge Elimination System (NPDES) permit and contributed to the pollution of a waterbody. *Powell Duffryn*, 913 F.2d at 68. The court employed a three-part test to determine whether the plaintiffs had standing. The court stated: "In a ***Clean Water Act*** case, [the substantial likelihood that the defendant's conduct caused the plaintiffs' harm] may be established by showing that a defendant has 1) discharged some pollutant in concentrations greater than allowed by its permit 2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that 3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs." *Powell Duffryn*, 913 F.2d at 72 (emphasis added).

Powell Duffryn concerned a violation of a permit issued under a paradigm established by statute, which is inapposite to the case here. Because

---

[4] While the Second Circuit briefly raises the notion of common law public nuisance principles of "liability on contributors to an indivisible harm," 582 F.3d at 346, the court appears to rest its decision on its analysis of *Massachusetts* and *Powell Duffryn*. *Id.* at 346-7.

there is no permit or statutory limit here, the Second Circuit should have refrained from reliance on the *Powell Duffryn* test in its entirety. Instead, the court seized on the third prong of the test — that the pollutant "cause[d] or contribute[d] to" the plaintiffs' injuries. This reading is inconsistent with the plain language of the decision. *See Native Village of Kivalina v. ExxonMobil Corp., et al.*, 663 F.Supp.2d 863, 880 n.7 ("The tripartite test articulated in *Powell Duffryn* to demonstrate the requisite 'substantial likelihood' is stated in the conjunctive, not the disjunctive as concluded by the *AEP* court.").

The Second Circuit also turned to *Massachusetts* to support its causation-by-contribution claim, but again, misapplied this Court's holding which was based on the existence of a statutory claim. 582 F.3d at 347 ("Tellingly, in *Massachusetts'* discussion of causation, the Court rejected EPA's argument that 'its decision not to regulate greenhouse gas emissions from new motor vehicles contributes so insignificantly to petitioners' injuries that the agency cannot be haled into federal court to answer for them.'" (quoting *Massachusetts*, 549 U.S. at 523.)). However, the Court did not base its decision on a finding that EPA's claim of a small contribution to a much larger problem was incorrectly downplayed by the agency. Instead, *Massachusetts* held that EPA incorrectly assumed that incremental regulatory actions could not be subjected to judicial review. 549 U.S. at 524 ("[A]ccepting that premise would doom most challenges to regulatory action.").

Despite this Court's repeated emphasis in *Massachusetts* on the statutory origin of the petitioners' claim, the Second Circuit proceeded to

apply this contribution analysis to a non-statutory case. However, unlike a rulemaking agency which can "whittle away" at a problem over time, *id.*, a court ruling on a common law nuisance claim has no such flexibility. Instead, it can only adjudicate the particular issue brought to it by the parties in a conflict. Unlike an executive agency or legislature, courts cannot proceed to tackle another element of an issue, no matter how warranted, unless the issue is brought to them by parties with a justiciable conflict. The Second Circuit misapplied both of the causation-by-contribution analyses described above, thereby incorrectly finding that the states and trusts have adequately demonstrated a causal link between their injuries and the defendants' conduct.

C. The Second Circuit Impermissibly Relaxed the Redressability Requirement and Misunderstood the Nature of the Requested Relief in *Massachusetts*.

Again, the Second Circuit relied on *Massachusetts* to justify its holding that the states and trusts' injuries could be redressed by a favorable decision. Defendants argued that reducing their emissions would not redress the states and trusts' injuries because GHG emissions will continue to rise globally. The court rejected their arguments, stating "*Massachusetts* disposed of this argument," 582 F3d at 348, and "recognized that regulation of motor vehicle emissions would not 'by itself *reverse* global warming,' but that it was sufficient for the redressability inquiry to show that the requested remedy would '*slow or reduce* it.'" *Id* (emphasis in original). However, the Second Circuit omitted a key

phrase, critical to the *Massachusetts* holding: "While it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to determine ***whether EPA has a duty*** to take steps to *slow* or *reduce* it." 549 U.S. at 525 (emphasis added). Thus, it was not "sufficient for the redressability inquiry to show that the requested remedy would 'slow or reduce it.'" *Id.* Instead, *Massachusetts* held that the court had jurisdiction to consider whether EPA had a duty under the Clean Air Act, and whether the petitioners' assertion of a procedural right could be remedied, at least in part, by requiring EPA to reconsider its denial of the petitioners' petition for rulemaking. The Court believed that ordering EPA to consider promulgating a GHG emissions regulation would reduce risks to the plaintiffs by "some extent." *Id.* at 526.

The Second Circuit had no such procedural right question before it, and therefore did not have the benefit of a relaxed redressability standard, nor did it have a statutory obligation through which it could force an agency to act. Instead, the Second Circuit should have judged redressability by asking whether it would be "'likely,' as opposed to merely 'speculative,'...that the injury will be "redressed by a favorable decision." *Lujan*, at 561 (internal citations omitted).

The Second Circuit therefore erred in its finding of redressability because it misinterpreted the procedural right nature of the claim at issue in *Massachusetts*, and misapplied a statutory causation test to a common law cause of action.

D. The Second Circuit Failed to Consider Prudential Barriers to Standing.

The Second Circuit made no mention of prudential considerations in its decision, despite its obligation to consider both Article III and prudential standing limitations. *See, e.g., U.S. v. Hays*, 515 U.S. 737, 742 (1995)("The federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.'"). Where, as here, Congress has not legislatively overruled prudential considerations, the Second Circuit is bound to apply prudential standing principles along with Article III requirements. *See Bennett v. Spear*, 520 U.S. 154, 162 (1997). As discussed above, there are three prudential barriers to standing: raising the legal interests or rights of third parties; "'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches;" and an affirmative requirement that parties must be within the zone of interests the statute sought to protect. *Valley Forge Christian College*, 454 U.S. at 474-5. At a minimum, the Second Circuit should have considered whether the prudential limitation against generalized grievances applied to this case.

Global climate change arguably impacts the global population. *See generally Massachusetts*, 549 U.S. at 508-10, 541 ("Global warming is a phenomenon 'harmful to humanity at large.'") (Roberts, C.J., dissenting). The Second Circuit should therefore have considered whether the prudential bar against suits challenging generalized grievances that are best handled by the legislature or executive

branches, applied in this case. Given the global nature of global climate change, including not only global impacts, but also globally-located emitters numbering well into the hundreds of millions, there is a strong argument that this case, a common-law nuisance cause of action brought against five emitters, is one best left to the representative branches.

Because the Second Circuit applied statutory standing principles to a common law claim, the resulting conclusion is fundamentally flawed. The plaintiff states and trusts should have been evaluated based on Article III standing requirements, as well as the full range of prudential limitations, without the application of any injuries, chains of causation, or procedural rights created by statute. If the Second Circuit had correctly analyzed standing as it pertains to a common law claim, it would have found that the states and trusts had not sufficiently alleged facts to support the court's decision.

III. *WARTH v. SELDIN & HAVENS REALTY v. COLEMAN* – A COMPARISON OF STANDING ANALYSES.

To better illustrate the dangers of misapplying a statutory standing analysis to a common law claim, *Amicus* presents a comparison between two cases from a different context – housing discrimination. The comparison will demonstrate the vastly different results in standing determinations that occur where there is an applicable statute, even in causes of action that are otherwise very similar. In the following cases, plaintiffs alleged very similar injuries, but different causes of action. In the first case, plaintiffs

asserted constitutional claims, while in the second case, plaintiffs asserted statutory claims stemming from violations of the Fair Housing Act of 1968. Standing was a critical issue in both cases, and the Court's approach to determining whether the parties had standing in each case was governed by the nature of the claim asserted.

A. *Warth v. Seldin*: Assertion of a Constitutional Claim to Combat Exclusionary Housing Ordinance.

In *Warth,* petitioner individuals and organizations claimed that the Town of Penfield's zoning ordinances effectively excluded persons of low- and moderate-income from living in the town, an incorporated municipality adjacent to Rochester, New York. The petitioners brought suit under the First, Ninth, and Fourteenth Amendments. 422 U.S. at 493. Specifically, the petitioners claimed that the ordinance in question allocated 98% of the town's vacant land to single-family housing, and also required unreasonable lot size, set back, floor area, and habitable space requirements. *Id.* at 495. Only 0.3% of vacant land was allocated to low-density multifamily housing. *Id.* The petitioners also alleged that the Planning and Zoning Boards purposefully delayed action on proposals for low- and moderate-income housing projects; denied proposals; and refused to grant variances and permits to low- and moderate-income housing projects. *Id.*

There were three different categories of petitioners. First, several individuals in the suit were Rochester property owners and taxpayers, who claimed that because of Penfield's ordinance, they had

to pay higher taxes in Rochester so that Rochester could subsidize the low- and moderate-income housing needs that Penfield refused to meet. *Id.* at 496. Second, several individuals claimed that they had low to moderate incomes and that the ordinance prevented them from buying or leasing property in Penfield, forcing them to live in less attractive environments. *Id.* Third, three organizations, who entered or attempted to enter the litigation at various times, claimed they had standing either because the organization itself had been injured or because their members suffered injuries. *Id.* at 494, 497. The District Court dismissed the complaints on the grounds that the petitioners lacked standing, and the Second Circuit affirmed. *Id.* at 497-98.

This Court noted at the outset that the standing "inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth*, 422 U.S. at 498. The Court highlighted two prudential considerations that militated against standing in this case: the existence of a "'generalized grievance' shared in substantially equal measure by all or a large class of citizens," *id.* at 499, and the assertion of "legal rights or interests of third parties." The Court also noted that standing "often turns on the nature and source of the claim asserted. The actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing....'" *Id.* at 500 (citations omitted). In other words, "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules." *Id.* at 501.

The Court then applied these principles to each of the categories of petitioners in turn. Beginning with the low- and moderate-income petitioners, the Court found that the petitioners alleged "in conclusory terms" that they were members of the injured group. *Id.* at 503. While the petitioners claimed they had searched for affordable property to buy or rent in Penfield, the court found that they had failed to allege facts that would lead to a reasonable inference that, but for the defendants' ordinance and enforcement practices, the petitioners would have found affordable housing within Penfield. *Id.* at 503-504. "We may assume...that respondents' actions have contributed...to the cost of housing in Penfield. But there remains the question whether petitioners' inability to locate suitable housing in Penfield reasonably can be said to have resulted...from respondents' alleged constitutional and statutory infractions." *Id.* at 504.

The second group of petitioners, the Rochester property owners and taxpayers, had alleged that they would pay higher taxes to the City of Rochester so that the City could subsidize the services that Penfield refused to provide. *Id.* at 508-09. However, the Court found that any decision regarding taxes in Rochester would be made by the City of Rochester, which was not before the court. *Id.* at 509. The Court found that this group of petitioners sought to vindicate the rights of third parties, which was barred by prudential standing limitations. *Id.*

Finally, the Court turned to the association petitioners. One of the association petitioners, Metro-Act, alleged that the ordinance deprived Penfield residents (of which some were Metro-Act members) of

the benefits of living in a racially and ethnically integrated community. Metro-Act sought to rely on the Court's ruling in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), which held that petitioners had standing to bring a similar deprivation claim. *Id.* at 512. However, the Court noted the "critical distinction between *Trafficante* and the situation" in *Warth*: in *Trafficante*, "Congress had given residents of housing facilities covered by the statute an actionable right to be free from the adverse consequences to them of racially discriminatory practices directed at and immediately harmful to others." *Warth* at 513. In *Warth*, no statute was alleged to be applicable and therefore *Trafficante* was not controlling. *Id.* at 512. The Court affirmed the District Court and the Second Circuit, and the petitioners' claims were dismissed.

B. *Havens Realty v. Coleman*: A Fair Housing Act Cause of Action Challenging Racial Steering.

In *Havens Realty Corporation, et al., v. Coleman*, 455 U.S. 363 (1982), individual and association plaintiffs brought a class action suit against Havens Realty and one of its employees for engaging in racial steering. They alleged this violated section 804 of the Fair Housing Act of 1968. 455 U.S. at 366. The plaintiffs consisted of one African-American renter, two "testers" (one African-American and one Caucasian), and an organization whose purpose was to further equal opportunity housing in the Richmond, Virginia area. The District Court dismissed the claims of the organization and the testers on the grounds that they lacked standing.

Id. at 369. The Fourth Circuit reversed and remanded the case for further proceedings. *Id.*

The Court began its analysis by highlighting its earlier decision in *Gladstone, Realtors, v. Village of Bellwood*, 441 U.S. 91 (1979). *See Havens*, 455 U.S. at 371. In *Gladstone, Realtors*, which also concerned alleged racial steering, the Court found that "'Congress intended standing under section 812 to extend to the full limits of Art. III' and that the courts accordingly lack the authority to create prudential barriers to standing in suits brought under that section." *Havens*, 455 U.S. at 372.

The Court first turned to the standing inquiry of the "tester" plaintiffs. Section 804(d) of the Fair Housing Act, provides that it is unlawful to represent to "'*any person* ...that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.'" *Id.* at 373. The Court found that "Congress has thus conferred on all 'persons' a legal right to truthful information about available housing. This congressional intention cannot be overlooked in determining whether testers have standing to sue." *Id.* The Court held that the tester who received false information had standing to pursue her claim. *Id.* at 374.

Second, the Court turned to whether the individual plaintiffs had standing to allege that the petitioners' steering practices had "deprived them of the benefits of living in an integrated community." *Id.* at 375. The Court termed this standing "neighborhood standing" and labeled it an "indirect harm" because plaintiffs were alleging the harms of third parties – those potential renters or purchasers who are unlawfully steered away or toward housing

in violation of section 804. While a prudential bar exists to prevent plaintiffs from bringing claims on behalf of third parties, where there is a statute, the Court noted, the "distinction [between first- and third-party standing] is ... of little significance . . ." *Id.* at 375. Thus, the existence of a statute, conferring a legal right that was not before in existence, resulted in the Court's decision to uphold the Fourth Circuit and find that the plaintiffs had adequately alleged standing at the pleadings stage.

C. A Comparison of *Warth* and *Havens* Demonstrates the Critical Distinctions Between the Standing Analyses Employed in Common Law and Statute-Based Claims.

Plaintiffs in *Warth* and *Havens* alleged very similar injuries – both claimed they had been subject to exclusionary or discriminatory practices that deprived them of housing, and of the benefits of living in an integrated, diverse community. However, the plaintiffs in *Warth* had no substantive statute on which to rely and instead brought a purely constitutional cause of action. The plaintiffs in *Havens* had the benefit of the Fair Housing Act, which gave "rise to a case or controversy where none existed before." *Lujan*, 504 at 580 (Kennedy, J., concurring). The lack of a statute made the difference here between a justiciable and non-justiciable claim.[5]

---

[5] Interestingly, in both cases, the court found fault in the plaintiff's complaints. However, the Court in *Havens*, upon finding standing, encouraged the District Court to permit plaintiffs to file supplemental pleadings to more fully allege their standing.

Likewise, the plaintiffs in *Massachusetts* and this case allege similar injuries – threats to property and legal rights because of impacts resulting from global climate change – with one substantial difference. The plaintiffs in *Massachusetts* alleged a procedural harm, by virtue of a violation of the governing statute, the Clean Air Act. The statute and associated procedural right demonstrated Congress' intent to establish a new injury and chain of causation, and its intent to overrule at least some prudential standing considerations.

In this case, plaintiffs have no statute nor procedural right on which to hang their claims. In addition to bearing the burden of establishing that they have met all of the Article III requirements, the plaintiffs must also demonstrate they satisfy prudential standing considerations as well. As the Court held in *Worth*, the "critical distinction" between that case and *Trafficante* was the existence of a statute, which rendered the former case non-justiciable, while allowing plaintiffs in the latter case to proceed to the merits. That critical distinction exists here.

CONCLUSION

This Court is faced with determining standing where there is no statute that has created or conferred a specific legal right or interest on the plaintiffs. The Court must therefore determine not only whether the parties have Article III standing, it must also determine whether the parties can survive prudential standing barriers. *Massachusetts*, because its claims were based on a statute which conferred procedural rights to the plaintiffs, involved an analysis that allowed for relaxed immediacy and

redressability requirements. It also concerned a statute that legislatively overruled prudential standing considerations. Thus, from a standing perspective, *Massachusetts* is inapplicable to the case at bar. Therefore, the states and trusts must satisfy the full range of standing principles in a common law cause of action. For all of the reasons stated above, they have failed to do so.

Respectfully submitted,

Amy C. Chai*
Thomas J. Ward
National Association of
Home Builders
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 866-8200
* Counsel of Record

February 7, 2011

APPENDIX A

Cases in which NAHB has appeared as an *amicus curiae* or "of counsel" before this Court include:

Agins v. City of Tiburon, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Ore.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Franconia Assocs. v. United States*, 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga*

Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370 (2006); *Rapanos v. United States*, 547 U.S. 715 (2006); *NAHB v. Defenders of Wildlife*, 55 U.S. 644 (2007); *John R. Sand and Gravel Co. v. United States*, 551 U.S. 130 (2008); *Summers v. Earth Island Inst.*, 129 S. Ct. 1142 (2009); *Entergy Corp. v. Envtl. Prot. Agency*, 129 S. Ct. 1498 (2009); and *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008); *Coeur Alaska, Inc. v. Southeast Alaska Cons. Council*, 129 S. Ct. 2458 (2009); *Monsanto v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010); *United States v. Tohono O'odham Nation*, 559 F.3d 1284 (Fed. Cir. 2009), *cert. granted* 130 S. Ct. 2097 (2010) (No. 09-846).

AMICUS CURIAE BRIEF

No. 10-174

Supreme Court, U.S.
FILED
FEB 7 - 2011
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY INC., *et al.*,
Petitioners,

v.

CONNECTICUT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR *AMICUS CURIAE* NATIONAL BLACK CHAMBER OF COMMERCE AND AFFORDABLE POWER ALLIANCE IN SUPPORT OF PETITIONERS

HARRY C. ALFORD
President/CEO
NATIONAL BLACK CHAMBER OF COMMERCE®
1350 Connecticut Ave. NW
Suite 405
Washington, DC 20036
(202) 466-6886

NIGER INNIS
AFFORDABLE POWER ALLIANCE
National Spokesperson
Congress for Racial Equality
730 West Cheyenne Ave.
Las Vegas, Nevada 89030
(702) 633-4464

PETER S. GLASER
Counsel of Record
MARK E. NAGLE
TROUTMAN SANDERS LLP
401 9th Street, N.W.
Suite 1000
Washington, D.C. 20004
(202) 274-2998
peter.glaser@troutmansanders.com

DOUGLAS A. HENDERSON
TROUTMAN SANDERS LLP
600 Peachtree Street, NE
Suite 5200
Atlanta, GA 30308-2216

Counsel for National Black Chamber of Commerce and Affordable Power Alliance

February 7, 2011

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

199

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTERESTS OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. IF ENERGY AND ENVIRONMENTAL POLICY IN THE UNITED STATES IS REWRITTEN, IT SHOULD BE DONE BY CONGRESS, ONLY AFTER MEANINGFUL INPUT BY ALL PARTIES AND PEOPLES THROUGH THE POLITICAL PROCESS, NOT BY JUDGES AND NOT BY JURIES	4
CONCLUSION	7

TABLE OF AUTHORITIES

MISCELLANEOUS

Page

University of Southern California, THE CLIMATE GAP: INEQUALITIES IN HOW CLIMATE CHANGE HURTS AMERICANS & HOW TO CLOSE THE GAP (*available at*: http://college.usc.edu/pere/documents/The_Climate_Gap_Full_Report_FINAL.pdf). 5, 6

IN THE

Supreme Court of the United States

No. 10-174

AMERICAN ELECTRIC POWER COMPANY INC., *et al.*,
Petitioners,

v.

CONNECTICUT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR *AMICUS CURIAE* NATIONAL BLACK CHAMBER OF COMMERCE AND AFFORDABLE POWER ALLIANCE IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE* [1]

Amici respectfully ask the Court to reverse the decision below. *Amici* are representatives of minority groups, senior citizen groups, Black-owned businesses, faith-based coalitions, and other constituencies typically not aligned with industry on many

[1] All parties have consented to the filing of this brief. Their consents are on file with the Clerk of the Court. *Amici* state that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *Amici* and its counsel, contributed monetarily to the preparation and submission of this brief.

issues, but fundamentally concerned about energy and environmental policy, including climate change Specifically, *Amici* are

- The National Black Chamber of Commerce®, an association dedicated to economically empowering and sustaining African-American communities through entrepreneurship and capitalistic activity within the United States and throughout the world. The National Black Chamber of Commerce reaches 100,000 Black-owned businesses, which now total more than 1.9 million in the United States and account for over $137 billion in annual sales. The National Black Chamber of Commerce has been joining the discussions and debate on energy policies since the emergence of the Kyoto Protocol during the first Clinton Administration.
- The Affordable Power Alliance, an *ad hoc* coalition of civil rights, African American, Latino, small business, senior citizens and faith-based advocacy organizations. Its members include:
  - The Congress of Racial Equality, which was founded in 1942 and is the third oldest and one of the "Big Four" Civil Rights groups in the United States;
  - The High Impact Leadership Coalition, a national coalition of faith-based leaders, ministers and churches;
  - The National Hispanic Christian Leadership Conference, the largest Latino Christian organization in America, with 16-million Latino evangelical members and 24,000 member churches;

Amici share a deep appreciation for how energy and environmental policies affect the poor, unrepresented and vulnerable populations throughout the United States. Each recognizes that one judicial decision in the Southern District of New York can materially and forever affect the quality of life of Latino farmers in New Mexico, small businesses in Atlanta, senior citizens on fixed incomes in Alaska, and innumerable others in between.

SUMMARY OF ARGUMENT

At its core, Plaintiffs' lawsuit asks a United States District Court judge to order five utilities, who are all major providers of electricity to the public, to reduce their greenhouse gas emissions to a level that the Court would determine to be "reasonable." Practically, the Court's lowering of these emissions will require an increase in rates to electric consumers, and those rate increases will fundamentally affect the economic and health and welfare of society.

The brunt of the financial implications of the Second Circuit's opinion, if mandated by this Court, would disproportionately and forever impact vulnerable populations throughout the United States. By spending more money on energy, the vulnerable will have less money to spend on food, healthcare and the necessities of life.

The key point is in this case is the need for adequate representation. If energy and environmental policy in the United States involving climate change needs reshaping, it should be done by Congress, after meaningful input from all parties and peoples in the United States, rich and poor, of all colors and views and beliefs. But the Second Circuit's decision arrogates to the Judiciary the Congressional role of

developing and implementing energy and environmental policy. The Second Circuit's decision prevents *Amici* from weighing in on the historical issue of climate change policy and the direction of the Country.

ARGUMENT

I. IF ENERGY AND ENVIRONMENTAL POLICY IN THE UNITED STATES IS REWRITTEN, IT SHOULD BE DONE BY CONGRESS, ONLY AFTER MEANINGFUL INPUT BY ALL PARTIES AND PEOPLES THROUGH THE POLITICAL PROCESS, NOT BY JUDGES AND NOT BY JURIES

In support of petitioners in this truly landmark case, the National Black Chamber of Commerce and the Affordable Power Alliance adopt and join in the Amicus brief filed with this Court by the American Farm Bureau Federation and the National Mining Association.

As explained in that Brief, adjudicating Plaintiffs' claims would require a fact-finder to balance the range of social, cultural, and political concerns against an enormous range of governmental industrial, agricultural and individual activities that are only remotely related (if at all) to the alleged harm—and, after this, to assess and assign liability against certain sectors of society. Having one court determine energy policy in the United States would directly usurp the role of Congress. It should be Congress that designs and implements energy and environmental policy, and it should be Congress that determines how laws are made and not made.

The impact of the Second Circuit's decision on vulnerable populations would be far-reaching. The cost of energy substitutes required by a finding that legally permitted air emissions constitute a public nuisance would be passed on to consumers, and those costs would fall disproportionately on the poor. Study after study shows the costs of climate change will ravage the poor, darken dire situations even more, and reshape industrial America.

In a recent study of the health disparities related to climate change by the University of Southern California—supported by The Annenberg Foundation, the Energy Foundation, and the William and Flora Hewlett Foundation—the point was made very clear:

> Climate change is an issue of great importance for human rights, public health, and social fairness because of its profound consequences overall and the very real danger that poor neighborhoods and people of color will suffer even worse harms and hazards than the rest of Americans . . . Low-income and minorities already spend as much as 25 percent of their entire income on just food, electricity and water—much more than most Americans.

The Climate Gap: Inequalities in How Climate Change Hurts Americans & How to Close the Gap (*available at*: http://college.usc.edu/pere/documents/The_Climate_Gap_Full_Report_FINAL.pdf).

But that report also made the key point relevant to this case:

> **Policymakers** have a clear choice: ignoring the climate gap could reinforce and amplify current as well as socioeconomic and racial disparities. On the other hand, **policymakers** can proac-

> tively close the climate gap through strategies that address the regressive economic and health impacts of climate change, and that lift all boats by ensuring that everyone shares equally in the benefits of climate solutions, and no one is left bearing more than their fair share of the burdens.

The Climate Gap: Inequalities in How Climate Change Hurts Americans & How to Close the Gap (*available at*: http://college.usc.edu/pere/documents/The_Climate_Gap_Full_Report_FINAL.pdf) (emphasis added).

This case is about policymaking. It is a matter of national policy how climate change should be managed in the United States. It is for Congress to decide whether the poor will pay more because of climate change controls, whether Latino incomes will fall as a result, and whether minorities in the United States will bear the burdens of global climate change caused by other nations. Under the political system, *Amici* should have the right to weigh in before Congress on how and when this nation responds to climate change—and on who the costs associated with climate change will ultimately come to rest. Under the Panel's opinion, that decision would be for the Southern District of New York to decide, a result contrary to the structure of American government.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

HARRY C. ALFORD
President/CEO
NATIONAL BLACK CHAMBER OF COMMERCE®
1350 Connecticut Ave. NW
Suite 405
Washington, DC 20036
(202) 466-6886

NIGER INNIS
AFFORDABLE POWER ALLIANCE
National Spokesperson
Congress for Racial Equality
730 West Cheyenne Ave.
Las Vegas, Nevada 89030
(702) 633-4464

PETER S. GLASER
Counsel of Record
MARK E. NAGLE
TROUTMAN SANDERS LLP
401 9th Street, N.W.
Suite 1000
Washington, D.C. 20004
(202) 274-2998
peter.glaser@
troutmansanders.com

DOUGLAS A. HENDERSON
TROUTMAN SANDERS LLP
600 Peachtree Street, NE
Suite 5200
Atlanta, GA 30308-2216

Counsel for National Black Chamber of Commerce and Affordable Power Alliance

February 7, 2011

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
FEB 7 - 2011
OFFICE OF THE CLERK

No. 10-174

IN THE SUPREME COURT OF THE UNITED STATES

AMERICAN ELECTRIC POWER COMPANY, INC., *ET AL.*
Petitioners,

v.

STATE OF CONNECTICUT, *ET AL.*
Respondents.

On Appeal from the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, AMERICAN TORT REFORM ASSOCIATION, AND CROPLIFE AMERICA IN SUPPORT OF PETITIONERS

Victor E. Schwartz*
Philip S. Goldberg
Christopher E. Appel
SHOOK, HARDY & BACON L.L.P.
1155 F Street, N.W., Suite 200
Washington, D.C. 20004
(202) 783-8400
vschwartz@shb.com

* *Counsel of Record*

Additional Counsel Listed on Inside Cover

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

41702K (49)

Of Counsel

Karen R. Harned
Elizabeth Milito
NFIB SMALL BUSINESS LEGAL CENTER
1201 F Street, N.W., Suite 200
Washington, D.C. 20004
(202) 314-2061

H. Sherman Joyce
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, N.W., Suite 400
Washington, D.C. 20036
(202) 682-1163

Douglas T. Nelson
Joshua B. Saltzman
CROPLIFE AMERICA
1156 15th Street, NW, Suite 400
Washington, D.C. 20005
(202) 296-1585

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. THIS CASE IS AN UNPRECEDENTED STEP IN THE DECADES-LONG PURSUIT TO TURN THE TORT OF PUBLIC NUIS-ANCE INTO A CATCH-ALL ENVIRON-MENTAL "SUPER TORT" 6

A. Public Nuisance Law Has Distinct Elements and Boundaries 6

B. There Has Been a Campaign to Recast Public Nuisance into a "Super Tort" ... 9

C. Courts Have Rejected Efforts to Transform Public Nuisance Into a Catch-All "Super Tort" 10

II. PLAINTIFFS CANNOT STATE A VIABLE PUBLIC NUISANCE CLAIM UNDER THE FEDERAL COMMON LAW 12

A. Plaintiffs' Version of Public Nuisance is Unfounded in Federal and State Law 13

1) Defendants Have Not Engaged in Objectively Wrongful Conduct 13

2) Plaintiffs' Allegations Belie Causation Between Defendants' Emissions and Plaintiffs' Injuries 18

3) The Trusts' Claims Violate the Special Injury Rule 23

B. Federal Common Law Does Not Provide a Basis for Plaintiffs' Public Nuisance Claims 25

III. THIS LAWSUIT USHERS IN A NEW ERA OF FEDERAL LITIGATION 27

A. Plaintiffs Are Attempting to "Regulate" Emissions Through the Courts 28

B. The Litigation's Sponsors Admit this Case Represents Frustration with the Legislative Process 30

C. The Court Should Not Change the Tort of Public Nuisance to Allow State Attorneys General to Bring Political Lawsuits 32

CONCLUSION 35

TABLE OF AUTHORITIES

Page(s)

CASES

Alaska Native Class v. Exxon Corp., 104 F.3d 1196 (9th Cir. 1997) 25

Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) 23

Baker v. Carr, 369 U.S. 186 (1962) 29

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) 23

California v. Gen. Motors Corp., No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) 3, 20, 29

Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp., 273 F.3d 536 (3d Cir. 2001) 4, 18

City of Chicago v. Am. Cyanamid Co., 2003 WL 23315567 (Ill. Cir. Ct. Oct. 7, 2003) 14

City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099 (Ill. 2004) 3, 12, 18

City of Milwaukee v. Illinois, 451 U.S. 304 (1981) 6, 16, 26

City of St. Louis v. Benjamin Moore & Co., No. ED-87702, 2006 WL 3780785 (Mo. Ct. App. Dec. 26, 2006) 33

Comer v. Murphy Oil Co., 585 F.3d 855 (5th Cir. 2009), *vacated*, No. 07-60756, 2010 WL 2136658 (5th Cir. May 28, 2010) ..... *passim*

Connecticut v. Am. Elect. Power Co., Inc., 582 F.3d 309 (2d Cir. 2009) ..... *passim*

Connecticut v. Am. Elect. Power Co., Inc., 406 F. Supp. 2d 265 (S.D.N.Y. 2005) 3, 29

Diamond v. Gen. Motors Corp., 97 Cal. Rptr. 639 (Cal. Ct. App. 1971) 3, 10

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) 15

Erie Railroad v. Tompkins, 304 U.S. 64 (1938) 26

Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 380 (1996) 19

Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907) 26

Gibson v. Am. Cyanamid Co., 719 F. Supp. 2d 1031, 2010 WL 2465498 (E.D. Wis. 2010) 21

Goodwin v. Anheuser-Busch, Inc., No. BC310105, 2005 WL 280330 (Cal. Super. Ct. order Jan. 28, 2005) 12

Hawaii v. Standard Oil Co., 405 U.S. 251 (1972) 32

Holmes v. Sec. Investor Prot. Corp.,
503 U.S. 258 (1992) 20

Illinois v. City of Milwaukee,
406 U.S. 91 (1972) 26

In re Lead Paint Litig.,
924 A.2d 484 (N.J. 2007) 4, 8, 12

Landers v. E. Tex. Salt Water Disposal Co.,
248 S.W.2d 731 (Tex. 1952) 22

Massachusetts v. U.S. Environmental Protection Agency, 549 U.S. 497 (2007) 28, 32

Native Village of Kivalina v. ExxonMobil Corp.,
663 F. Supp. 2d 863 (N.D. Cal. 2009) .....*passim*

North Carolina ex rel. Cooper v. TVA,
615 F.3d 291 (4th Cir. 2010) 12

Pacific Mut. Life Ins. Co. v. Haslip,
499 U.S. 1 (1991) 15

Penelas v. Arms Tech., Inc., 778 So. 2d 1042
(Fla. Dist. Ct. App. 2001) 27

Riegel v. Medtronic, Inc., 552 U.S. 312
(2008) 4

Sindell v. Abbott Labs., 607 P.2d 924
(Cal. 1980) 22

Spitzer v. Sturm, Ruger & Co., 309 A.D.2d 91 (N.Y. App. Div. 2003) 4

State v. Lead Indus. Ass'n, 951 A.2d 428 (R.I. 2009) ..... *passim*

State v. Schenectady Chems., Inc., 459 N.Y.S.2d 971 (Sup. Ct. 1983) 11

St. Louis v. Benjamin Moore & Co., 226 S.W.3d 110 (Mo. 2007) 12

Texas v. American Tobacco Co., 14 F. Supp. 2d 956 (E.D. Tex. 1997) 12

Texas Carpenters Health Benefit Fund, IBEW-NECA v. Philip Morris, Inc., 21 F. Supp. 2d 664 (E.D. Tex. 1998) 21

Tioga Pub. Sch. Dist. v. U.S. Gypsum Co., 984 F.2d 915 (8th Cir. 1993) 11

Tull v. United States, 481 U.S. 412 (1987) 7

United States v. City of Las Cruces, 289 F.3d 1170 (10th Cir. 2002) 25

U.S. Steel Corp. v. Save Sand Key, Inc., 303 So. 2d 9 (Fla. 1974) 24

Zafft v. Eli Lilly & Co., 676 S.W.2d 241 (Mo. 1984) 22

STATUTES

42 U.S.C. § 7521(a)(1) 28

OTHER AUTHORITIES

2 Am. Law Inst., Enterprise Responsibility for Personal Injury: Reporter's Study 87 (1991) 33

Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After* Boomer, 54 Alb. L. Rev. 359 (1990) 24

Affordable Power Alliance, Potential Impact of EPA Endangerment Finding on Low Income Groups and Minorities, (Mar. 2010) 17

Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 Ecol. L.Q. 755 (2001) 9, 10

Theodore J. Boutrous, Jr. & Dominic Lanza, *Global Warming Tort Litigation: The Real "Public Nuisance,"* 35 Ecology L. Currents 80 (2008) 25

John Carey & Lorraine Woellert, *Global Warming: Here Come the Lawyers*, Bus. Week, Oct. 30, 2006 28

Congressional Budget Office, 110th Cong., Effects of Gasoline Prices on Driving Behavior and Vehicle Markets (2008) 17

John L. Diamond, Cases and Materials on Torts 256 (West Grp., 1st ed. 2001) 21

Dan B. Dobbs, *The Law of Torts* § 180 (2000) 21

Jessica Dye, *Lugar Floats New Energy Plan Minus Cap-And-Trade*, Law 360, March 10, 2010 16-17

Jessica Dye, *Senate Punts Climate Bill to Fall, Puts Focus on BP*, Law 360, July 22, 2010 16

Environmental Litigation: Law and Strategy 1 (Cary R. Perlman, ed. 2009) 28

Richard A. Epstein, *Federal Preemption, and Federal Common Law, in Nuisance Cases*, 102 N.W.U. L. Rev. 551 (2008) 26

Jack H. Friedenthal *et al.*, Civil Procedure 223 (1985) 26

Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741 (2003) 6, 15

Phil Goldberg, *Why Progressives Should Cool to "Global Warming" Lawsuits*, Progressive Pol'y Inst., Nov. 2010 32

Fowler V. Harper, *et al.*, The Law of Torts § 20.2 (1986) 19

W. Page Keeton *et al.*, *Prosser & Keeton on Torts* 616 (5th ed. 1984) 9, 14, 18

Key Judge Downplays Prospects for Successful Climate Change Suits, Clean Air Report, Vol. 21 Iss. 5, Mar. 2, 2010 31

Jane A. Leggett *et al.*, Cong. Research Serv. Rep. for Congress, China's Greenhouse Gas Emissions and Mitigation Policies (2008)..... 20

Robert Meltz, Cong. Research Serv. Rep. for Cong., Climate Change Litigation: A Growing Phenomenon (2008), *at* http://www.elaw.org/system/files/CRS_4_7_08.pdf 30

Natural Sources and Sinks of Carbon Dioxide, Environmental Protection Agency, Climate Change – Greenhouse Gas Emissions, *at* http://www.epa.gov/climatechange/emissions/co2_natural.html 20

Matthew F. Pawa & Benjamin A. Krass, *Global Warming as a Public Nuisance: Connecticut v. American Electric Power*, 16 Fordham Envtl. L. Rev. 407 (2005)..... 30-31

William L. Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997 (1966) 14

Robert B. Reich, *Don't Democrats Believe in Democracy?*, Wall St. J., Jan. 12, 2000, at A22 4

Restatement (Second) of Torts § 432 (1979)..... 21

Restatement (Second) of Torts § 433B (1979) 22

Restatement (Second) of Torts § 821 (1979) 15

Restatement (Second) of Torts § 821A (1979) 7

Restatement (Second) of Torts § 821B (1979) ..... *passim*

Restatement (Second) of Torts § 821C (1979) 8, 24

Restatement (Second) of Torts § 829A (1979) 14

Restatement (Second) of Torts § 840D (1979) 18, 22

Restatement of the Law (Third) of Torts: Liab. for Physical & Emotional Harm § 26 cmt. j (2010) 20

S. Res. 98, 105th Cong. (1997) 16

Mark Schleifstein, *Global Warming Suit Gets Go-Ahead*, Times-Picayune, Oct. 17, 200 31

Victor E. Schwartz, *et al.*, *Neutral Principles of Stare Decisis in Tort Law*, 58 S.C. L. Rev. 317 (200 25

Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541 (2006) 7

Victor Schwartz *et al.*, *Why Trial Courts Have Been Quick to Cool 'Global Warming' Suits*, 77 Tenn. L. Rev. 803 (2010)..... 28

Symposium, *The Role of State Attorneys General in National Environmental Policy: Global Warming Panel, Part I*, 30 Colum. J. Envtl. L. 335 (2005) 30, 31

INTEREST OF *AMICI CURIAE*[1]

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners in all fifty states. The approximately 350,000 members of NFIB own a wide variety of America's independent businesses from manufacturing firms to hardware stores.

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. ATRA files *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues.

CropLife America ("CLA") is a nationwide trade association representing manufacturers, formulators, and distributors of crop protection and pest control products. Its members produce and sell virtually all

---

[1] The parties consented to the filing of this brief and their letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief

the active compounds used in crop protection products registered for use in the United States.

Each of the *amici* have a substantial interest in ensuring that courts follow constitutional and traditional tort law principles. The nature of this case extends far beyond the Defendants and Plaintiffs. It represents an effort to circumvent legislative and executive branches on environmental policy issues, and has national and international implications. Should the Second Circuit ruling stand and subject utilities and other businesses engaged in lawful conduct to liability for alleged global climate change impacts, *amici*'s members would be adversely affected.

STATEMENT OF THE CASE

Amici adopt Defendants' Statement of the Case.

SUMMARY OF ARGUMENT

The Second Circuit's ruling represents an unprecedented and unwise expansion of federal common law. In addition to constitutional errors highlighted by Defendants, the Second Circuit also wrongly attempts to import into what it deems the federal common law a truncated version of the tort of public nuisance. It removes two of the tort's four essential elements, the requirements that Defendants engaged in unreasonable or wrongful conduct and that such wrongful conduct caused the injuries alleged. *See* Restatement (Second) of Torts § 821B cmt. a (1979) (defining the distinct elements and purpose of the centuries old tort). If the Court permits this interpretation of public nuisance law to stand – as a matter of federal law – the result will be, for all practical purposes, a defenseless federal "super tort" subject-

ing American businesses to liability for nearly any alleged environmental or social harm.

For the past forty years, advocates of such a "catch-all" tort have been seeking this breakthrough. Previous cases have largely been tried under state common law, ranging from attempts to subject businesses to liability for smog in Los Angeles to gun violence in cities to lead paint in people's homes. *See Diamond v. Gen. Motors Corp.*, 97 Cal. Rptr. 639 (Cal. Ct. App. 1971); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004); *State v. Lead Indus. Ass'n*, 951 A.2d 428 (R.I. 2009). Most of these cases have failed. State judges, as well as federal judges applying state law, schooled in the character and elements of the 700-year-old tort have dismissed them for failure to state a claim. In the four recent climate change cases, all of the federal trial judges dismissed the cases on political question grounds, and some also dismissed on standing grounds. *See Connecticut v. Am. Elect. Power Co., Inc.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005); *California v. Gen. Motors Corp.*, No. C06-05755, 2007 2726871 (N.D. Cal. Sept. 17, 2007); *Comer v. Murphy Oil Co.*, 585 F.3d 855, 860 n.2 (5th Cir. 2009) (reciting district court's bench ruling), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010), *mandamus denied*, No. 10-294 (U.S. Jan. 10, 2011); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal filed*, No. 09-17490 (9th Cir. Nov. 5, 2009).

Both state and federal judges, therefore, have widely recognized that removing wrongdoing and causation from public nuisance theory is as extreme as removing breach and causation from negligence; the result would be a "monster that would devour in

one gulp the entire law of tort." *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001); *see also In re* Lead Paint Litig., 924 A.2d 484, 502 (N.J. 2007) ("[T]he suggestion that plaintiffs can proceed against these defendants on a public nuisance theory would stretch the theory to the point of creating strict liability."). As one court warned, if these theories become law, "[a]ll a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets, and/or sells its non-defective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born." *Spitzer v. Sturm, Ruger & Co.*, 309 A.D.2d 91, 96 (N.Y. App. Div. 2003).

As discussed herein, Plaintiffs acknowledge that this litigation is an attempt to use the threat of such unyielding liability to force Defendants to change their practices or acquiesce to the Plaintiffs' regulatory or legislative preferences, regardless of the merits of those policies. *See Riegel v. Medtronic, Inc.*, 552 U.S. 312, 328-29 (2008) (explaining that tort duties "directly regulate" conduct). They chose the courts to advance this political agenda because the reductions in emissions they seek had been tried and denied in Congress, and at the time the suit was filed, by the then-existing Administration. Prominent legal scholar Robert Reich, who served as Secretary of Labor under President Clinton, termed lawsuits with such a purpose "regulation through litigation." Robert B. Reich, *Don't Democrats Believe in Democracy?*, Wall St. J., Jan. 12, 2000, at A22. While initially favoring these actions as means of advancing one's political agenda, he realized their danger,

concluding they amounted to "faux legislation, which sacrifices democracy." *Id.*

The additional wrinkle this suit presents is that Plaintiffs filed their claims under federal common law, presumably as an attempt to avoid the plethora of state law decisions rejecting their expansive theories. This Court has not specifically rejected the novel theories in this case, and the Second Circuit used this perceived blank canvass to paint an unprecedented view of public nuisance law. The panel held that whenever courts determine that "regulatory gaps exist, [federal common law public nuisance can fill] those interstices." *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d 309, 330 (2d Cir. 2009). Unless the Court reverses the Second Circuit's ruling, federal public nuisance litigation will become the preeminent tool for state attorneys general, private plaintiffs and issue groups to advance political agendas outside of the checks and balances of the political process. *See Native Vill. of Kivalina*, 663 F. Supp. 2d at 877 ("Plaintiffs are in effect asking this Court to make a political judgment[.]").

This brief urges the Court to not sanction such an unsound leap in the federal common law. In addition to the fact that similar efforts have largely been rejected in the states, allowing such an action would spur a rapid expansion of federal litigation to fill "gaps" and advance political agendas in many substantive areas of the law.

ARGUMENT

I. THIS CASE IS AN UNPRECEDENTED STEP IN THE DECADES-LONG PURSUIT TO TURN THE TORT OF PUBLIC NUISANCE INTO A CATCH-ALL ENVIRONMENTAL "SUPER TORT"

A. Public Nuisance Law Has Distinct Elements and Boundaries

The tort of public nuisance has centuries of jurisprudence defining its purpose, elements and boundaries. *See* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741 (2003) (describing how the tort originated in 12th Century English common law to enable the King to enjoin infringements on its land and force the repair any damages). In general terms, a public nuisance is an "unreasonable interference with a right common to the general public." *City of Milwaukee v. Illinois*, 451 U.S. 304, 348-49 (1981) (Blackmun, J., dissenting) (citing to the Restatement (Second) of Torts § 821B). While common law courts have applied the tort in slightly different ways, the essence of public nuisance liability has remained largely consistent, requiring four time-honored elements: (1) the existence of a "public right"; (2) unreasonable conduct by the alleged tortfeasor in interfering with that public right; (3) control of the nuisance; and (4) proximate cause between defendant's unreasonable conduct and the public nuisance, and any alleged injury. *See State v. Lead Indus. Ass'n*, 951 A.2d 428, 452-53 (R.I. 2009) (calling the four elements "essential to establish" a public nuisance claim).

For more than 200 years of American jurisprudence, the tort has been applied to a very narrow set of circumstances, namely when defendants are engaged in common law crimes. *See Tull v. United States*, 481 U.S. 412 (1987) (public nuisance provides "a civil means to redress a miscellaneous and diversified group of minor criminal offenses") (internal quotation omitted). When applied in the courts, the inquiry starts with whether there has been an injury to a public right and works backward to determine if a responsible party exists. If the four elements of the tort can be proved, the defendant must stop from engaging in the objectively wrongful behavior, and when appropriate, abate the nuisance. Abatement liability, therefore, can be unbounded.

The quintessential public nuisance is a barrier that stops the general public from being able to use a public road or pollution that infects a public waterway. If a person blocks the road for a reasonable purpose, such as landing a distressed plane, there is no liability. "If the conduct of the defendant is not of a kind that subjects him to liability . . . the nuisance exists, but he is not liable for it." Restatement (Second) of Torts § 821A cmt c. (1979). But, if a person unreasonably interferes with the public road, for example as part of an unauthorized protest, the *government* can enjoin the person from blocking the road and require him or her to abate any damage caused to the road. *See* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541, 570 (2006).

In concert with the tort's origins, governments generally are the only parties who can bring a public

nuisance action.[2] Further, their remedies are limited to injunctive relief and abatement. *See In re Lead Paint Litig.*, 924 A.2d 484, 498-99 (N.J. 2007). While the issue has yet to arise here, "there is no right either historically, or through the Restatement (Second) of Tort's formulation, for the public entity to seek to collect money damages" in public nuisance suits. *Id.* at 498-99 (citing Restatement (Second) of Torts § 821C(1)) (noting public nuisance actions are not compensatory or punitive in nature).

By contrast, private plaintiffs, such as the land trusts in the instant case, generally cannot bring public nuisance claims. The exception is only for when the public nuisance causes a special injury to a plaintiff that is "different [in] kind from that suffered by other persons exercising the same public right." Restatement (Second) of Torts § 821C cmt. b (1979). Even the most severe harm, if of the same type as suffered by the general public to a much lesser degree, is not actionable. *See id.* ("It is not enough that he has suffered the same kind of harm or interference but to a greater extent or degree."). To subject a defendant to liability for one's special damages, a private plaintiff must show that the defendant is liable for the public nuisance by proving the tort's four elements and, in addition, that she has suffered a different-in-kind injury. Further, the only remedy available in such actions is compensation for the special injury. Private plaintiffs, including the Plaintiff land trusts, cannot seek injunctive relief or require a

---

[2] Because public nuisance is a government tort, *parens patriae* standing is not needed. Whether Plaintiffs here have constitutional standing to bring this action is a separate inquiry and thoroughly discussed in the Defendants' brief.

defendant to abate a public nuisance. Those remedies are exclusive to the government.

As discussed herein, under these long-standing tenets of law none of the Plaintiffs can state a public nuisance claim. Each Defendant's GHG emissions are lawful, not unreasonable, and are not a proximate cause of Plaintiffs' alleged injuries. Further, the trusts have no cause of action because, even if their allegations are true, they have not sustained a harm different in kind than any other landowner.

B. There Has Been a Campaign to Recast Public Nuisance into a "Super Tort"

In the 1960s and 1970s, environmental interest group attorneys sensed the potential power of public nuisance law and campaigned to transform the tort from a restrained government enforcement tort into a tool for requiring businesses to remediate environmental conditions, regardless of fault. *See* Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 Ecol. L.Q. 755, 838 (2001). They tried to capitalize on the amorphous nature of the word "nuisance." *See* W. Page Keeton *et al.*, Prosser & Keeton on Torts 616 (5th ed. 1984) ("There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all people."). The tort also was associated with environmental harms, it had not been used much in the post-industrialized era, and many judges did not have a view of how to apply the tort in modern times.

When Professors William Prosser and John Wade captured public nuisance doctrine in the Restate-

ment (Second) Torts § 821B (1979), several plaintiff environmental lawyers pursued changes to the Restatement's public nuisance chapters that would have, in their words, "[broken] the bounds of traditional public nuisance." Antolini, *supra*, at 838. Three of those changes are embodied in this case. First, they tried to remove the wrongful conduct requirement so courts could establish liability and set their own standards even when federal, state and local laws permit the underlying conduct. *See id.* Second, they sought to get rid of the special injury rule so that "severe" harms would be compensable even when not different-in-kind from harms to the public. *See id.* Finally, they wanted private plaintiffs, including interest groups, to be able to form class actions and seek injunctive relief and abatement costs. *See id.*

Although fully presented, none of these specific changes were included in the black letter of the Restatement (Second). While some ambiguities appear in the Restatement (Second)'s comments, the vast majority of courts, as the next section will show, have rejected these changes.

C. Courts Have Rejected Efforts to Transform Public Nuisance Into a Catch-All "Super Tort"

Public nuisance has proven not to be a tort without boundaries. The first test case, *Diamond v. General Motors Corp.*, 97 Cal. Rptr. 639 (Cal. Ct. App. 1971), presented a scenario similar to the case at bar as plaintiffs pursued corporations for emitting gases that, when mixed together, allegedly contributed to smog in Los Angeles. Plaintiffs sued for billions of dollars in compensatory and punitive damages.

The California court, in dismissing the claims, appreciated their inconsistency with traditional public nuisance law, the political nature of the underlying issues, and the proper role of the legislature, not the judiciary, in making regulatory decisions: plaintiffs were "simply asking the court to do what the elected representatives of the people have not done: adopt stricter standards over the discharge of air contaminants in this country, and enforce them with the contempt power of the court." *Id.* at 645. The court noted that granting relief would "halt the supply of goods and services essential to the life and comfort of the persons whom plaintiff seeks to represent." *Id.* at 644.

During the 1980s and 1990s, several public attorneys and contingency fee lawyers attempted to morph public nuisance theory into a catch-all tort for their high-stakes, high-publicity lawsuits when no other tort would work. They have had occasional successes,[3] such as with the Second Circuit here, but all major attempts to morph public nuisance into a "super tort" have failed. In asbestos litigation, for instance, courts rejected cases from municipalities and school districts asserting state public nuisance claims against manufacturers to abate asbestos from public and private properties. *See, e.g., Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th

---

[3] For example, a court allowed a pollution claim against a business that did not contribute to the pollution and never controlled the polluted land. *See State v. Schenectady Chems., Inc.*, 459 N.Y.S 2d 971 (Sup. Ct 1983). The court admitted that determining responsibility was "a political question to be decided in the legislative arena," but allowed the claim, saying "[s]omeone must pay to correct the problem." *Id.* at 977

Cir. 1993) (public nuisance would "give rise to a cause of action . . . regardless of the defendant's degree of culpability"). In state attorney general litigation against tobacco manufacturers, the only court to address the public nuisance claim rejected it. *See Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956 (E.D. Tex. 1997). Such claims were also unsuccessful in a variety of other contexts, such as harms caused by guns, lead paint, and drunk driving. *See, e.g., City of Chicago*, 821 N.E.2d at 1099; *Lead Indus. Ass'n*, 951 A.2d at 428; *In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007); *St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007); *Goodwin v. Anheuser-Busch, Inc.*, No. BC310105, 2005 WL 280330, at *8 (Cal. Super. Ct. order Jan. 28, 2005).

Most of the rejected claims were filed by states, municipalities and other governments, and some by interest groups and private individuals.

II. PLAINTIFFS CANNOT STATE A VIABLE PUBLIC NUISANCE CLAIM UNDER THE FEDERAL COMMON LAW

As with the cases above, Plaintiffs have tried to amputate elements from public nuisance doctrine instead of pleading a case under its existing principles. The wrinkle Plaintiffs added, though, was to file their public nuisance claims under federal common law – an avenue around the growing body of state common law decisions rejecting their theories.[4]

---

[4] For another attempt to use federal common law public nuisance to regulate emissions see *North Carolina ex rel. Cooper v. TVA*, 615 F 3d 291 (4th Cir 2010).

A. Plaintiffs' Version of Public Nuisance is Unfounded in Federal and State Law

This Court should not permit the federal common law to be changed in the fundamental ways Plaintiffs suit requires in order to proceed beyond a motion to dismiss. First, the state attorneys general, municipal attorney and private land trusts all seek to eliminate the unreasonable conduct element of the tort. Second, they all seek to effectively eliminate causation, diluting this requirement so that mere contribution, regardless of amount, is sufficient to establish public nuisance liability. Third, the private trusts' claims violate the special injury rule. Their claims are based on future injuries, not actual special injuries, allege severe harm, not different harm, and seek injunctive relief, not damages.

1) Defendants Have Not Engaged in Objectively Wrongful Conduct

The Second Circuit misunderstood the "unreasonable interference" element of public nuisance theory. It removed any consideration of Defendants' conduct, holding that any known, continuing significant or long-lasting impact on a public right becomes unreasonable. *See AEP*, 582 F.3d at 352-353. The wrongfulness, acceptability or utility of the Defendants' conduct, therefore, is irrelevant to establish

federal liability.[5] In this way, the Second Circuit takes a giant leap from the tort's historical application that public nuisance liability arises only when a *defendant's conduct* is "contrary to common standards of decency" and akin to a "common law crime." *See* Restatement (Second) of Torts §821B cmt. b.[6]

Similar to removing the element of breach from negligence claims, removing unreasonable conduct from public nuisance theory broadly expands the federal tort and an actor's potential liability. *See City of Chicago v. Am. Cyanamid Co.*, 2003 WL 23315567, at *4 (Ill. Cir. Ct. Oct. 7, 2003) (noting plaintiffs will "deliberately frame[] [their] case as a public nuisance action" to get around constraints of the American legal system). It also removes a fun-

---

[5] In *Kivalina*, plaintiffs further stray from the unreasonable conduct requirement, arguing that the unreasonableness determination "is not one of whether the defendant's conduct is reasonable or unreasonable but rather one of who should bear the cost of that conduct." Brief of Appellants, *Native Village of Kivalina v. ExxonMobil Corp.*, No. 09-17490 (9th Cir. Mar. 10, 2010) at *25

[6] Unreasonable harm is a concept limited to the state common law tort of *private nuisance*, which is an action in equity always between conflicting uses of neighboring private properties. The injury is the intentional interference with the use of the property. No public right or collective harm is involved. *See* Restatement (Second) § 829A cmt. a (1979) (this rule "applies to conduct that results in a private nuisance"), W. Page Keeton, et al., Prosser and Keeton on Torts 651-52 (5th ed. 1984) (when the interference "affect[s] the plaintiff in a substantial way," it "constitute[s] a private nuisance"). Private and public nuisances are distinct torts; they "are quite unrelated except in the vague general way that each of them causes inconvenience to someone" and the two share a "common name." William L. Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 999 (1966)

damental requirement for all tort law: that defendants have notice that they are engaged in conduct that could give rise to liability and, accordingly, could take measures to avoid such liability. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 43 (1991) (O'Connor, J., dissenting) (vagueness doctrine applies to common law liability); *Eastern Enterprises v. Apfel*, 524 U.S. 498, 528-29 (1998) ("severe retroactive liability on a limited class of parties that could not have been anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience" stretches constitutional limits). In prototypical public nuisance cases, determining whether conduct is "reasonable" or "unreasonable" is rarely controversial because public nuisances have little to no public benefit. *See* Restatement (Second) of Torts § 821 cmt. e (1979).

Under an unreasonable conduct analysis, it becomes clear that Defendants cannot be liable in public nuisance law, which is presumably why Plaintiffs are trying to manipulate the tort. Conduct that is permitted by a regulatory framework is *per se* reasonable because it reflects the policy judgment of the legislature. For example, claims filed against railroads for noise and air pollution affecting the communities near tracks often fail for this reason.[7]

As Defendants and the Second Circuit have detailed, Congress and administrations have long considered climate change allegations along with affordability, national security and the many other issues

---

[7] "[T]he operation of the railroad . . . in accordance with the expectations of the legislature," is not an unreasonable conflict with a public right. Gifford, *supra*, at 803

that shape America's energy policy. *See* Pet. Brief at *5-10 (observing that Presidents George H.W. Bush, Clinton and Obama negotiated treaties on global emissions and Congress has considered numerous climate-related bills); *AEP*, 582 F.3d at 381-88. The Second Circuit, however, states with frustration that none of the legislative or executive actions resulted in binding emission caps. *See AEP*, 582 F.3d at 381-88 (requiring "research, planning and strategizing technology development, assessments, and monitoring, but no real action to abate emissions"). It concludes that "until" Congress or EPA caps GHG emissions, plaintiffs have a viable claim. *See id.* at 388.

The Second Circuit fails to recognize, however, that Congress and federal regulators have considered emission caps for thirty years and have thus far declined to impose them. *See City of Milwaukee*, 451 U.S. at 320 ("The question is whether the field has been occupied, not whether it has been occupied in a particular manner."). For example, in 1997 the United States Senate unanimously (95-0) voted that "the United States should not be a signatory to any protocol. . . which would (A) mandate new commitments to limit or reduce greenhouse gas emissions." S. Res. 98, 105th Cong. (1997). More recently, members of Congress in both political parties said they "would not be inclined to support any bill that attached a cost to carbon emissions." Jessica Dye, *Senate Punts Climate Bill to Fall, Puts Focus on BP*, Law 360, July 22, 2010 (reporting that legislation seeking a 17 percent reduction over ten years – nearly half that sought here – did not have support of Congress); Jessica Dye, *Lugar Floats New Energy Plan Minus Cap-And-Trade*, Law 360, March 10,

2010 (noting Congress is "scrap[ping] greenhouse gas emission reduction goals").

As Defendants also explain, since the Second Circuit's ruling, there has remained an active, continuing debate in Congress and the EPA regarding GHG emissions. These efforts are a testament to the complexity of setting such standards and the appropriateness of developing such limits, if at all, through the political process after adequate research and development. The activities underlying global climate change lawsuits involve producing energy necessary to modern life. The public relies on this energy for turning on lights, heating homes, running appliances, and meeting their most basic transportation needs. Balancing the benefits of producing energy with the cost of that energy is part of the delicate balancing in which Congress and administrative agencies engage when determining appropriate energy regulations.[8]

Plaintiffs clearly do not agree with Defendants' operations, but whether Defendants' conduct is unreasonable in the context of public nuisance law is not determined by Plaintiffs' personal preferences. There also is nothing objectively reasonable about the caps on carbon dioxide that the Plaintiffs seek.

---

[8] If energy prices included "costs" of alleged weather-related harms, the average American's utility bills would skyrocket *See* Affordable Power Alliance, Potential Impact of EPA Endangerment Finding on Low Income Groups and Minorities, at 92 (Mar. 2010). When gasoline soared past $4 per gallon in 2008, many people could not afford to drive to work, lost considerable income, or were laid off. *See* Congressional Budget Office. 110th Cong., Effects of Gasoline Prices on Driving Behavior and Vehicle Markets (2008).

See AEP, 582 F.3d at 318 (seeking to "cap[] carbon dioxide emissions" and "reduc[e]emissions by a specified percentage each year for at least ten years"). Judicial intervention to set emission standards under the mantle of federal common law "gap-filling," regardless of current efforts in Congress and the EPA, is directly contrary to the other two branches' long and detailed history in this area.

2) Plaintiffs' Allegations Belie Causation Between Defendants' Emissions and Plaintiffs' Injuries

The Second Circuit's ruling effectively eliminates the causation element from public nuisance doctrine. In order to allow the claim to continue, the Second Circuit ruled that any contribution to a public nuisance, regardless of how small, can be the basis for a federal common law public nuisance action. *See AEP*, 582 F.3d at 356 (citing Restatement (Second) of Torts § 840D that "the fact that other persons contribute to a nuisance is not a bar to the defendant's liability for his own contribution"). This misinterpretation of the Restatement violates the fundamental tort law principle that "there [must be] some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered." *See* Keeton, *supra*, at § 41, 263.

Plaintiffs' causation requirement under federal public nuisance law is the same as for any other federal or state common law cause of action. *See Camden County*, 273 F.3d at 541 (rejecting plaintiff's argument that proximate cause and remoteness are not essential to public nuisance claims). Plaintiffs must be able to show both factual and legal causation: but-for Defendants' emissions the alleged injuries would

not have occurred, and the injuries are closely related such that a reasonable person would see it as a likely result of her conduct. *See Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 380 (1996); *cf.* Fowler V. Harper, *et al.*, The Law of Torts § 20.2 (1986). As discussed below, Plaintiffs cannot meet either burden.

Plaintiffs' Rube Goldberg-esque causation allegations can be summarized as follows: each Defendant released GHGs; those GHGs combined with the many other sources of GHGs around the world and have accumulated in the earth's atmosphere for more than a century; this accumulation has formed a barrier that traps in the sun's heat; and, as a result, the earth's air and water temperatures have increased, thereby causing the alleged public nuisance of global climate change. *See AEP*, 582 F.3d at 314. The other half of Plaintiffs' causation allegations are that global climate change caused environmental and weather events that will cause a wide range of alleged future risks, including "increases in respiratory problems," "more droughts and floods," "wildfires," and "widespread loss of species and biodiversity." Pet. Brief at *10 (citing Plaintiffs' allegations).

Even taking Plaintiffs' causation allegations as true, no Defendant could be a cause of their alleged harms. First, the release of GHGs, which include carbon dioxide, methane, and other gases is not particular to any specific company or industry. *See Kivalina*, 663 F. Supp. 2d at 877 n. 4 (If "combustion of fossil fuels is causing global warming, it is evidence that any person, entity or industry which uses or consumes such fuels bears at least some responsibility for Plaintiffs' harm"). Numerous human activities and natural occurrences release these gases. *See*

Gen. Motors, 2007 WL 2726871, at *15 (observing "multiple worldwide sources of [GHGs] across myriad industries and multiple countries."). Man-made sources include fossil fuel combustion, power plants, manufacturing, and auto and airplane exhaust throughout the world. *See* Jane A. Leggett *et al.*, Cong. Research Serv. Rep. for Congress, China's Greenhouse Gas Emissions and Mitigation Policies 8 (2008) [hereinafter CRS Report]. Natural sources include volcanic outgassing, animal releases of gas, and breathing of all living aerobic organisms. *See* Natural Sources and Sinks of Carbon Dioxide, Climate Change – Greenhouse Gas Emissions, Environmental Protection Agency, *at* http://www.epa.gov/climatechange/emissions/co2_natural.html. Thus, no defendant can be a "but for" cause or even a substantial factor[9] of climate change or weather-related harms.

Second, based on the foregoing there also can be no proximate cause. When mixed in the earth's atmosphere, GHGs from one source cannot be distinguished from others, let alone from any other time period. *See AEP*, 582 F.3d at 345. Just taking a snapshot of current emissions, sources originating outside the United States constitute an estimated 83% of the world's GHG emissions. *See* CRS Report, *supra*, at 8, fig. 2. Plaintiffs' alleged harms are far too remote from any of the Defendants' emissions. *See Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268-69 (1992) ("harm flow[ed] merely from the mis-

---

[9] The substantial factor test requires that "each of two separate causal chains [were] sufficient to bring about the plaintiff's harm." Restatement of the Law (Third) of Torts Liab. for Physical & Emotional Harm § 26 cmt. j (2010).

fortunes visited upon a third person by the defendant's acts [are] generally said to stand at too remote a distance to recover"). Consequently, no Defendant could have reasonably foreseen Plaintiffs' alleged injuries such that it "should have avoided the injury" by acting differently on its own. Dan B. Dobbs, *The Law of Torts* § 180, 444 (2000) (stating requirements for proving proximate causation); John L. Diamond, Cases and Materials on Torts 256 (West Grp., 1st ed. 2001) (discussing superseding factors).

Presumably in recognition of these facts, Plaintiffs seek to replace traditional causation standards with a mere "contribution" test that is unsupported by state tort law or prior explanations of federal common law. *See, e.g., Texas Carpenters Health Benefit Fund, IBEW-NECA v. Philip Morris, Inc.*, 21 F. Supp. 2d 664, 668 (E.D. Tex. 1998) (In industry suits, "the nexus between cause and effect [for each defendant] is too attenuated to justify liability"). This mere contribution test may have some surface level appeal, but much like other less conventional causation theories as the "single indivisible injury" test and burden-shifting theories as market-share, risk contribution, or enterprise liability, it must be rejected. *See* Restatement (Second) of Torts § 432 (1979). Such experimental theories, which have been disallowed by most common law courts, have very limited application even in the small handful of jurisdictions where they have been accepted. *See id.*; *Gibson v. Am. Cyanamid Co.*, 719 F. Supp. 2d 1031 (E.D. Wis. 2010) (risk contribution test violates constitutional due process rights). They have only been applied where a discrete, identifiable number of independent actors caused a discrete, identifiable harm or when defendants are uniquely positioned to excul-

pate themselves from liability. *See, e.g., Landers v. E. Tex. Salt Water Disposal Co.*, 248 S.W.2d 731, 734 (Tex. 1952); *Sindell v. Abbott Labs.*, 607 P.2d 924, 937 (Cal. 1980); *but see Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 245-46 (Mo. 1984).

Restatement Section 840D, which the Second Circuit took out of context, was never intended to dilute causation along these lines. Rather, it sought to assure that a tortfeasor cannot escape liability just because a limited number of others contributed to the harm, particularly when the tortfeasor was aware of those contributions. As the Restatement (Second) explains, otherwise "there may be so large a number of actors, each of whom contributes a relatively small and insignificant part to the total harm, that the application of the rule may cause disproportionate hardship to defendants." Restatement (Second) of Torts § 433B cmt. e (1979). The Restatement continues: "[I]f a hundred factories each contribute a small, but still uncertain, amount of pollution to a stream, to hold each of them liable . . . because he cannot show the amount of his contribution may perhaps be unjust." *Id.* Here, Plaintiffs allege that billions of potential sources for GHGs over decades caused global climate change. Basic justice would be subverted if anyone were deemed responsible for the acts of all others.

Because cause-in-fact and legal causation cannot be established in this case, regardless of discovery, this case must be dismissed as a matter of law. *See Lead Indus. Ass'n*, 951 A.2d at 435 ("[T]he trial justice erred by denying defendants' motion to dismiss. . . . The state has not and cannot allege facts that would fall within the parameters of what would

constitute public nuisance."). The Court should not permit the Second Circuit to perfunctorily put off consideration of causation until summary judgment simply because causation is generally considered an issue of fact. *See AEP*, 582 F.3d 347. Unlike traditional litigation, these cases will not hinge on discovery or dramatic testimony, as Plaintiffs can uncover no facts during discovery that can lead to a finding that any single source, or collection of sources, is the cause of global climate change and the alleged injuries upon which the lawsuits are based. *See Kivalina*, 663 F. Supp. 2d at 880 ("[T]here is no realistic possibility of tracing any particular alleged effect of global climate change to any particular emissions by any specific person, entity, [or] group at any particular point of time.").

When causation can never be shown, forcing parties to spend years producing time-consuming, expensive discovery requests so that plaintiffs' can go on fishing expeditions in dry river beds makes no sense. This was the policy behind the rulings of the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), which require plausible evidence that a case can succeed even at the motion-to-dismiss stage. As this Court can appreciate, for politically driven lawsuits such as this one, simply getting past a motion to dismiss and into discovery can be the victory Plaintiffs seek.

3) The Trusts' Claims Violate the Special Injury Rule

In delving further into the nuances of public nuisance doctrine, the Court should hold that the

claims filed by the nongovernmental Plaintiffs fail because they violate the special injury requirement for standing to bring a public nuisance claim. "The Trusts do not allege any current injury," only potential future injury, *i.e.*, "the ecological value of their properties will be diminished" by climate change. *AEP*, 582 F.3d at 341-42.

The Restatement (Second) and centuries of jurisprudence on the special injury rule dictate that a private plaintiff can recover for its special injuries only if it has *already* suffered those injuries. *See* Restatement § 821C ("one *must have suffered* harm") (emphasis added); Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After* Boomer, 54 Alb. L. Rev. 359, 362-63 (1990). Without the injury, there is no basis for assessing one's special damages. Expanding special injury liability to include speculative future damages would go beyond even the doctrine's broadest assertions. *See U.S. Steel Corp. v. Save Sand Key, Inc.*, 303 So. 2d 9, 13 (Fla. 1974) (nonprofit seeking to stop business conduct had not suffered a special injury).

Further, even if the harm alleged were to occur, diminished future property value does not qualify as a special damage unique to the trusts. Large and small owners of properties of all kinds and in all places would be affected by climate change in the same way the trusts allege. The fact that the trusts own a significant amount of land only means that they may be more severely injured than some, not that they have a harm that is different-in-kind. The Second Circuit evades this fact by suggesting that §821C allows severe harm, even if not special, to

form the basis of a special injury claim. *See AEP*, 582 F.3d at 367. Courts have widely held that severity alone is not a surrogate for the "different in kind" requirement. *See, e.g., Alaska Native Class v. Exxon Corp.*, 104 F.3d 1196, 1198 (9th Cir. 1997) ("spill may have affected Alaskan Natives more severely than other members of the general public, [but] their right to [culture and lifestyle] is shared by all Alaskans.").

Again, the Second Circuit has taken common law public nuisance down unwise paths not endorsed by the majority of state common law judges. Its ruling is not a slight extension of a single element to account for facts not previously considered. *See generally* Victor E. Schwartz, *et al.*, *Neutral Principles of Stare Decisis in Tort Law*, 58 S.C. L. Rev. 317 (2006) (discussing parameters when common law courts depart from precedent). It fundamentally misstates foundational elements of public nuisance law.

B. Federal Common Law Does Not Provide a Basis for Plaintiffs' Public Nuisance Claims

Plaintiffs' casting of their claims in federal common law should be rejected. *See* Theodore J. Boutrous, Jr. and Dominic Lanza, *Global Warming Tort Litigation: The Real "Public Nuisance,"* 35 Ecology L. Currents 80, 87-88 (2008). The Second Circuit's notion of a robust federal common law for gap-filling federal statutes violates this Court's long-standing disposition against expansive federal tort actions. *See United States v. City of Las Cruces*, 289 F.3d 1170, 1186 (10th Cir. 2002) (stating the "reluctance to create common law is a core feature of federal court jurisprudence").

As this Court held in *Erie Railroad v. Tompkins*, 304 U.S. 64, 78 (1938), "there is no federal general common law." *See also City of Milwaukee*, 451 U.S. at 314 n.7 ("If state law can be applied, there is no need for federal common law."). In the post *Erie*-era, the Court has identified only a few areas in which federal common law can develop, namely admiralty and maritime cases, interstate disputes, and cases concerning international relations or the legal relations and proprietary interests of the United States. *See* Jack H. Friedenthal *et al.*, Civil Procedure 223 (1985). Accordingly, federal public nuisance cases have largely involved disputes between governments where constitutional necessity requires that neither of the states' public nuisance laws should apply to the dispute. *See, e.g., Illinois v. City of Milwaukee*, 406 U.S. 91, 104 (1972) (Illinois sought to require Wisconsin cities to abate a nuisance in interstate waters); Richard A. Epstein, *Federal Preemption, and Federal Common Law, in Nuisance Cases*, 102 N.W.U. L. Rev. 551, 562-63 (2008) (federal common law is used if it is inappropriate to apply one state's law over another).

The Second Circuit relies on the pre-*Erie* case of *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907) as the basis for permitting instant action. In that case, the Court resolved a discrete public nuisance claim in which Georgia alleged that pollutants directly attributable to a Tennessee company caused the public nuisance of acid rain that harmed properties in Georgia. *See id.* at 236. While the instant case may optically appear similar to *Tenn. Copper*, the current allegations present a far broader use of federal public nuisance law, both qualitatively and quantitatively, than permitted even before *Erie*. This case

represents much more than a few states suing a half-dozen businesses; global climate change allegations are not jurisdiction or source specific. Every territory and alleged GHG source in the world is equally situated with respect to the claims at bar.

As a result, the subject matter of Plaintiffs' allegations falls far outside of the limited reach of federal common law. This case is a prominent example of how federal common law can become a runaway horse if not properly restrained.

III. THIS LAWSUIT USHERS IN A NEW ERA OF FEDERAL LITIGATION

If this Court were to allow this case to proceed beyond a motion to dismiss it would swing federal courthouse doors wide open to political lawsuits. With respect to global climate change cases, governments would have nearly limitless ability to impose liability on companies associated with energy use and production. Every hurricane, flood, drought, and heat-related condition would spawn federal climate change claims. In addition, the Court's approval of such actions would undoubtedly revive other "political" public nuisance cases, including those already rejected at the state level that have sought "to mandate the redesign of" products and regulate business methods. *Penelas v. Arms Tech., Inc.*, 778 So. 2d 1042, 1045 (Fla. Dist. Ct. App. 2001). The result would be the exact catch-all tort that state courts have rejected for decades.

A. Plaintiffs Are Attempting to "Regulate" Emissions Through the Courts

This lawsuit, born out of frustration with the political process, is part of a broader attempt to take the campaign to cap emissions to a new arena: the courts. *See* Environmental Litigation: Law and Strategy 1 (Cary R. Perlman, ed. 2009) ("[F]our years ago, the issue had no significant legal footprint in the United States. Since then, however, the issue has exploded onto the legal scene, resulting in enormous social and economic shockwaves.").

Massachusetts v. EPA, which settled an issue of administrative law, directed the Bush EPA to respond to a rulemaking petition that asked it to consider whether GHG emissions from certain light duty vehicles "endanger public health or welfare" and should be regulated under the Clean Air Act. *See id.* at 529-35 (quoting 42 U.S.C. § 7521(a)(1)). *Massachusetts* did not directly or indirectly endorse regulation through tort litigation subjecting private entities to liability for not adopting the emission preferences of state attorneys general and private land-trusts.

Nevertheless, four lawsuits, including this one, have been filed against private sector interests associated with producing and using energy products to adopt such limits. *See generally* Victor Schwartz *et al.*, *Why Trial Courts Have Been Quick to Cool 'Global Warming' Suits*, 77 Tenn. L. Rev. 803 (2010); *see also* John Carey & Lorraine Woellert, *Global Warming: Here Come the Lawyers*, Bus. Week, Oct. 30, 2006, at 34 (observing this "ambitious legal war on oil, electric power, auto, and other companies"). In

addition to the instant case, California's attorney general filed *Gen. Motors*, 2007 WL 2726871, against car-makers for making cars that emit exhaust. Two other cases, *Kivalina*, 663 F. Supp. 2d at 877, and *Comer*, 585 F.3d at 855, sought recovery for specific injuries from weather events allegedly caused or made worse by global climate change.

All four federal trial courts recognized the naked political nature and purpose of these suits and dismissed them. *See Kivalina*, 663 F. Supp. 2d at 877 ("allocation of fault – and cost – of global warming is a matter appropriately left for determination by the executive or legislative branch"); *Gen. Motors*, 2007 WL 2726871 at *13 (claim "expos[es] automakers, utility companies, and other industries to damages flowing from a new judicially-created tort for doing nothing more than lawfully engaging in their respective spheres of commerce"); *Comer*, 585 F.3d at 860 n.2 (citing district court's ruling that the global warming debate "has no place in the court"); *AEP*, 406 F. Supp. 2d at 274 ("Because resolution of the issues presented here requires identification and balancing of environmental, foreign policy, and national security interests, an initial policy determination of a kind clearly for non-judicial discretion is required.") (internal citation omitted). Political cases masquerading as tort suits provide no "judicially discoverable and manageable standards" for assessing liability. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

B. The Litigation's Sponsors Admit this Case Represents Frustration With the Legislative Process

Rather than fight this characterization of their suits, the litigation's sponsors have acknowledged outside of the courtroom that the purpose of these lawsuits are, indeed, political. They are not seeking to win any verdicts, but to leverage the threat of massive liability to pressure Defendants, Congress and the Administration to set emission caps. *See* Robert Meltz, Cong. Research Serv. Rep. for Cong., Climate Change Litigation: A Growing Phenomenon 33 (2008) (Proponents "freely concede that such initiatives are make-do efforts that . . . may prod the national government to act").

Then-Connecticut Attorney General and now United States Senator Richard Blumenthal, the lead plaintiff in the instant case, stated, "this lawsuit began with a lump in the throat, a gut feeling, emotion, that CO_2 pollution and global warming were problems that needed to be addressed. They were urgent and immediate and needed some kind of action, and it wasn't coming from the federal government. . . . [We were] brainstorming about what could be done." Symposium, *The Role of State Attorneys General in National Environmental Policy: Global Warming Panel, Part I*, 30 Colum. J. Envtl. L. 335, 339 (2005).

Matthew Pawa, Plaintiffs' lead contingency fee lawyer, explained his reason for picking these Defendants: "The electric power sector is the obvious place to begin such emissions reductions because, economically, it is the low-hanging fruit." Matthew F. Pawa & Benjamin A. Krass, *Global Warming as a*

Public Nuisance: Connecticut v. American Electric Power, 16 Fordham Envtl. L. Rev. 407 (2005).

Even Second Circuit Judge Peter Hall, who authored the opinion allowing this case to continue, has since conceded that "[y]ou really don't want a district judge supervising your relief in all of this stuff" but "[t]o the extent there is out there . . . some opportunity to pursue or continue to pursue a nuisance action, that may help in a political sense." *Key Judge Downplays Prospects for Successful Climate Change Suits*, Clean Air Report, Vol. 21 Iss. 5, Mar. 2, 2010.

These comments echo those made by plaintiff attorneys in the other global climate change cases. *See, e.g.*, Mark Schleifstein, *Global Warming Suit Gets Go-Ahead*, Times-Picayune, Oct. 17, 2009 (quoting Gerald Maples, lead plaintiffs' attorney in *Comer*, that his "primary goal was to say [to defendants] you are at risk within the legal system and you should be cooperating with Congress, the White House and the Kyoto Protocol"); *Symposium*, *supra*, at 343 (quoting Maine Attorney General Rowe: "[I]t's a shame that we're here . . . trying to sue [companies] . . . because the federal government is being inactive").

Such end-games may entice those sympathetic to a particular political agenda, but they do not give rise to federal common law liability. Article III does not provide federal courts with authority to settle the national climate change policy debate.

C. The Court Should Not Change the Tort of Public Nuisance to Allow State Attorneys General to Bring Political Lawsuits

Political agendas over whether to cap emissions, and if so, by how much, should not sway the Court to expand federal common law in ways that would allow the state attorneys general to bring this lawsuit. *See* Phil Goldberg, *Why Progressives Should Cool to "Global Warming" Lawsuits*, Progressive Pol'y Inst., Nov. 2010. In permitting Massachusetts to pursue an administrative law remedy in *Massachusetts v. EPA*, the Court "stress[ed] . . . the special position and interest" of the state "for the purposes of invoking federal jurisdiction." *See* 549 U.S. at 498, 518. The dynamics that may have been present in *Massachusetts v. EPA* do not exist in a case over private sector liability. Federal common law liability should not be broadly expanded in the name of addressing a societal issue just because a defendant violates a government attorney's own moral judgment that an activity should be condemned. *See Hawaii v. Standard Oil Co.*, 405 U.S. 251, 259 (1972) (stating even when a government has standing to file a lawsuit, it must have a legitimate cause of action).

When state and local government attorneys argued that their states' public nuisance laws should be relaxed to aid their lawsuits, the state high courts said, "No." For example, the Rhode Island Attorney General argued that it should not have to satisfy the traditional proximate cause requirement because its suit was for injuries to the public as a whole, not for a specific person's injury. *See State v. Lead Indus. Ass'n*, C.A. No. PC 99-5226, 2007 R.I. Super. LEXIS

32, at *24–25 (Feb. 26, 2007). He tried to further justify the case's legal shortcomings by stating that the state and its residents "incurred costs and ha[ve] suffered harms due to" defendants' conduct and that "many of those harms will go uncompensated." *Id.* at *172. The City of St. Louis based its lead-paint lawsuit on a similar premise. *See City of St. Louis v. Benjamin Moore & Co.*, No. ED-87702, 2006 WL 3780785, at *3 (Mo. Ct. App. Dec. 26, 2006) (summarizing government's position that "while perhaps private individuals should not be permitted to rely on market-share evidence, perhaps governmental entities bringing public nuisance claims should be"). As detailed earlier, the courts rejected these theories.

These courts appreciated that "public risk" cases, even when brought by governments, expose the weakness of the judiciary to administer cases where there is no objectively wrongful conduct. *See* 2 Am. Law Inst., Enterprise Responsibility for Personal Injury: Reporter's Study 87 (1991). Government attorneys may have a political incentive to target specific companies, such as producers of lead paint, firearms, and energy, because they are considered unpopular by some constituencies or their services or products have external costs.

Here, the state attorneys general made a *political* decision to blame global climate change on Defendants. As Mr. Pawa said, they were the "low-hanging fruit." Yet, as Defendants explain in their brief, even if they scrupulously adhered to Plaintiffs' emissions caps, the alleged public nuisance would not be abated and Plaintiffs' alleged future injuries would not be avoided. *See* Pet. Brief at *23. Thus, they are no differently situated than anyone else.

See Kivalina, 663 F. Supp. 2d at 887 n. 4 (calling the selection of defendants "seemingly arbitrary").

If this Court were to allow state attorneys general to disregard these facts and alter a federal cause of action to impose new duties on American companies, it would create limitless, unpredictable liability. State attorneys could convert almost any perceived environmental or social harm into a liability event, deciding who to "tax" through federal public nuisance litigation to remediate those harms. Future government tort actions, for example, could require alcohol beverage manufacturers to pay for drunk driving costs, pharmaceutical companies for mental-health programs for prescription-drug abuse, and the food industry for health care costs related to obesity, tooth-decay and heart conditions.

Weighing costs, benefits and social value of producing and using essential resources and factoring in any adverse effects of their production or use is part of the delicate balancing for which only Congress and administrative agencies are suited. They can conduct public hearings, commission research, engage in meaningful discourse with foreign nations, and consider all the stakeholders' interests – not just the state attorneys general and the parties they chose to bring into the lawsuit. The other government branches also have the constitutional authority and tools to investigate the impact of their decisions, transition to new regulatory schemes, and, in this instance, put emission limits into the broader context of a cohesive national energy policy. They could then determine whether emissions should be reduced, by how much, and for which industries.

Liability can complement this regime by holding companies responsible if they cause harm by operating outside of those duly enacted laws.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court find that Plaintiffs, in addition to not having constitutional grounds for this lawsuit, have failed to state a federal cause of action.

Respectfully submitted,

Victor E. Schwartz*
Phil S. Goldberg
Christopher E. Appel
SHOOK, HARDY & BACON L.L.P.
1155 F Street, N.W., Suite 200
Washington, D.C. 20004
(202) 783-8400
vschwartz@shb.com

Attorneys for Amici Curiae
** Counsel of Record*

Karen R. Harned
Elizabeth Milito
NFIB SMALL BUSINESS LEGAL CENTER
1201 F Street, N.W., Suite 200
Washington, D.C. 20004
(202) 314-2061

H. Sherman Joyce
AMERICAN TORT REFORM
ASSOCIATION
1101 Connecticut Avenue, N.W.,
Suite 400
Washington, D.C. 20036
(202) 682-1163

Douglas T. Nelson
Joshua B. Saltzman
CROPLIFE AMERICA
1156 15th Street, NW, Suite 400
Washington, D.C. 20005
(202) 296-1585

Of Counsel

Dated: February 7, 2011

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
MAR 1 9 2011
OFFICE OF THE CLERK

No. 10-174

In the
Supreme Court of the United States

AMERICAN ELECTRIC POWER CO., INC. ET AL.,
Petitioners,

v.

STATE OF CONNECTICUT ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE STATES OF NORTH CAROLINA, ILLINOIS, MARYLAND AND MASSACHUSETTS AS *AMICI CURIAE* FOR THE RESPONDENTS

ROY COOPER
Attorney General of North Carolina

Christopher G. Browning, Jr.*
Solicitor General of North Carolina

James C. Gulick
Senior Deputy Attorney General

Marc D. Bernstein
Special Deputy Attorney General

North Carolina Dep't of Justice
Post Office Box 629
Raleigh, NC 27602-0629
(919) 716-6900
cbrowning@ncdoj.gov

* Counsel of Record
(Additional Counsel Listed on Inside Cover)

March 2011

LISA MADIGAN
ATTORNEY GENERAL
STATE OF ILLINOIS

DOUGLAS F. GANSLER
Attorney General
State of Maryland

MARTHA COAKLEY
Attorney General
Commonwealth of Massachusetts

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 6

I. COMMON LAW NUISANCE IS AN ESSENTIAL TOOL IN MODERN ENVIRONMENTAL LAW. 6

II. THE STATES HAVE STANDING UNDER ARTICLE III TO BRING THIS ACTION AS *PARENS PATRIAE*. 16

CONCLUSION 37

TABLE OF AUTHORITIES

CASES

Acme Fertilizer Co. v. State,
72 N.E. 1037 (Ind. Ct. App. 1905) 9

Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592 (1982) . . . . . *passim*

Am. Farm Bureau Fed'n v. EPA,
559 F.3d 512 (D.C. Cir. 2009) 12

Andrews v. Western Asphalt Paving Corp.,
188 N.W. 900 (Iowa 1922) 8

Appalachian Power Co. v. EPA,
249 F.3d 1032 (D.C. Cir. 2001) 14

Baltimore & Potomac R.R. Co. v. Fifth Baptist Church, 108 U.S. 317 (1883) 6, 7

Bonewitz v. Parker, 912 N.E.2d 378
(Ind. Ct. App. 2009) 10

Fed. Election Comm'n v. Akins,
524 U.S. 11 (1998) 27

Galaxy Carpet Mills, Inc. v. Massengill,
338 S.E.2d 428 (Ga. 1986) 10

Georgia v. Pennsylvania R.R. Co.,
324 U.S. 439 (1945) 21, 26

Georgia v. Tennessee Copper Co.,
206 U.S. 230 (1907) . . . . . *passim*

Hawaii v. Standard Oil Co.,
405 U.S. 251 (1972) 17

Illinois Cent. R.R. Co. v. Illinois,
146 U.S. 387 (1892) 18

Int'l Paper Co. v. Ouellette,
479 U.S. 481 (1987) 10, 11, 15

Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund, 500 U.S. 72 (1991) . . . 35, 36

Kansas v. Colorado, 185 U.S. 125 (1902) 8

Kansas v. Colorado, 206 U.S. 46 (1907) 7, 8

Lewis v. Casey, 518 U.S. 343 (1996) 25

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) . . . . . *passim*

Martin Bldg. Co. v. Imperial Laundry Co.,
124 So. 82 (Ala. 1929) 8

Maryland v. Louisiana, 451 U.S. 725 (1981) . . 29, 30

Massachusetts v. EPA,
549 U.S. 497 (2007) . . . . . *passim*

Mayor of Georgetown v. Alexandria Canal Co.,
37 U.S. 91 (1838) 20, 35

Miller v. French, 530 U.S. 327 (2000) 25

Miller v. Rohling, 720 N.W.2d 562
(Iowa 2006) 10

Missouri v. Illinois, 180 U.S. 208 (1901) . . . 8, 19, 24

Missouri v. Illinois, 200 U.S. 496 (1906) 21

New Jersey v. New York, 283 U.S. 473 (1931) 7

New York v. New Jersey, 256 U.S. 296 (1921) 7

North Carolina v. EPA, 531 F.3d 896,
modified, 550 F.3d 1176
(D.C. Cir. 2008) 14, 36

North Carolina ex rel. Cooper v. TVA,
515 F.3d 344 (2008) 33

North Carolina ex rel. Cooper v. TVA,
593 F. Supp. 2d 812
(W.D.N.C. 2009), *rev'd on other grounds*,
615 F.3d 291 (4th Cir. 2010),
cert. pending, No. 10-997 36

North Dakota v. Minnesota,
263 U.S. 365 (1923) 7

Ohio v. Wyandotte Chems. Corp.,
401 U.S. 493 (1971) 22

Ouellette v. Int'l Paper Co.,
666 F. Supp. 58 (D. Vt. 1987) 10

Pennsylvania v. West Virginia,
262 U.S. 553 (1923) 31

People v. Detroit White Lead Works,
46 N.W. 735 (Mich. 1890) 9

Sierra Club v. Johnson,
444 F. Supp. 2d 46 (D.D.C. 2006),
further proceedings, 2011 U.S. Dist.
LEXIS 5316 (D.D.C. Jan. 20, 2011) 13

*State ex. rel Bd. of Health of the Twp. of
Lyndhurst v. United Cork Cos.*,
172 A. 347 (N.J. Ch. 1934) 8

State ex rel. Renfrow v. Serv. Cushion Tube Co.,
291 S.W. 106 (Mo. 1927) 8

*State v. Chicago, Milwaukee & St. Paul
Ry. Co.*, 130 N.W. 545 (Minn. 1911) 9

State v. Uvalde Asphalt Pav. Co.,
53 A. 299 (N.J. 1902) 9

Union Elec. Co. v. EPA, 427 U.S. 246 (1976) 11

Valley Forge Christian Coll. v. Americans United for Separation of Church & State, 454 U.S. 464 (1982) 30, 31

Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001) 12

Wyoming ex rel. Crank v. United States, 539 F.3d 1236 (10th Cir. 2008) 33

Wyoming v. Colorado, 259 U.S. 419 (1922) 7

Wyoming v. Oklahoma, 502 U.S. 437 (1992) . . 31, 32

CONSTITUTION AND STATUTES

U.S. Const., art. III, cl. 2 26

Clean Air Act, 42 U.S.C. § 7401 *et seq* (2006) 6

42 U.S.C. § 7401(a)(2) (2006) 32

42 U.S.C. § 7401(a)(3) (2006) 1

42 U.S.C. § 7409 (2006) 11, 12

42 U.S.C. § 7409(d)(1) (2006) 12

42 U.S.C. § 7410 (2006) 12

42 U.S.C. § 7412 (2006) 13

42 U.S.C. § 7416 (2006) 10, 15

42 U.S.C. § 7426 (2006) 13

42 U.S.C. § 7426(b) (2006) 13

33 U.S.C. § 1251(b) (2006) 1

Conn. Gen. Stat. Ann. § 16-245a (West 2007) 29

Md. Code Ann., Envir. §§ 2-1201-2-1211 (LexisNexis Supp. 2010) 2

REGULATORY MATERIALS

40 C.F.R. Part 50 (2010) 12

Interstate Pollution Abatement; Final Determination, 47 Fed. Reg. 6624 (1982) 14

National Ambient Air Quality Standards for Ozone, 73 Fed. Reg. 16,436 (2008) 12

National Ambient Air Quality Standards for Ozone, 75 Fed. Reg. 2938 (proposed Jan. 19, 2010) 12, 13

National Ambient Air Quality Standards for Particulate Matter, 71 Fed. Reg. 61,144 (2006) 12

Notice of Proposed Consent Decree,
70 Fed. Reg. 10,088 (2005) 14

Rulemaking on § 126 Petition from N.C. to
Reduce Interstate Transport of Fine
Particulate Matter & Ozone,
71 Fed. Reg. 25,328 (2006) 13, 14

310 Mass. Code Regs. § 7.70 (2011) 2

15A N.C. Admin. Code 2D .1104 (2011) 11

N.Y. Pub. Serv. Comm'n, Order Regarding
Retail Renewable Portfolio Standard
(Case 03-E-0188, Sept. 24, 2004) 29

Regional Greenhouse Gas Initiative, Inc.,
Program Design, State Statutes & Regs.,
http://www.rggi.org/design/regulations
(March 18, 2011) 28

TREATISES AND OTHER MATERIALS

N.C. Legislative Comm'n on Global Climate
Change, Final Rep. to the General Assembly
& the Envtl. Rev. Comm'n (May 2010) 2

Order Granting Mot. to Approve Consent
Judgment, *Am. Lung Ass'n v.*
Whitman, No. 05-cv-01814
(D.D.C. July 31, 2003) 12

Restatement (Second) of Torts § 821B (1979) 35

Restatement (Second) of Torts § 821C (1979) 35

Richard A. Epstein, *Ordering State-Federal Relations Through Federal Preemption Doctrine: Federal Preemption & Federal Common Law in Nuisance Cases*, 102 Nw. U.L. Rev. 551 (2008) 6

Robert V. Percival, *The Clean Water Act and the Demise of the Federal Common Law of Interstate Nuisance*, 55 Ala. L. Rev. 717 (Spring 2004) 8

William H. Rodgers, Jr., Environmental Law (2d ed., 1994) 6

INTEREST OF THE *AMICI CURIAE*

Pollution control is, as Congress has recognized, the "primary responsibility of States." 42 U.S.C. § 7401(a)(3) (2006) (regarding air pollution); 33 U.S.C. § 1251(b) (2006) (similar regarding water pollution). The *amici* States have exercised their police powers to regulate pollution within their borders and maintain comprehensive enforcement programs. However, States cannot directly control sources of pollution in neighboring and distant States. Interactions between States and facilities in other States implicate federal concerns. But the Environmental Protection Agency ("EPA") often has not and cannot always respond to the States' needs. Therefore the *amici* States retain an interest in maintaining the full panoply of tools available to them, which includes common law causes of action and resort to the federal courts. To this end, the *amici* States seek to ensure that the Court takes into account the States' unique role in the federal scheme when construing Article III standing as it relates to state access to federal remedies.

Additionally, the *amici* States have an obligation to safeguard their citizenry and their environments within their respective jurisdictions, which includes supporting the physical and economic well-being of their residents and assuring the continued existence and quality of their natural resources. Climate change that is related to ambient carbon dioxide threatens the *amici* States on several levels. These adverse impacts have been set forth in detail by the Respondent States, Resp. States Br. 4 (discussing impacts to the Respondent States that will likely also occur at least to

some degree in the *amici* States), and discussed previously by this Court, *Massachusetts v. EPA*, 549 U.S. 497, 521 (2007) ("The harms associated with climate change are serious and well recognized."); *see also* N.C. Legislative Comm'n on Global Climate Change, Final Rep. to the General Assembly & the Envtl. Rev. Comm'n 20-29 (May 2010) (reviewing potential climate change impacts to North Carolina). The *amici* States are taking steps to address and combat these harms. *E.g.*, *id.* at 40-63; *see also*, *e.g.*, Md. Code Ann., Envir. §§ 2-1201-2-1211 (LexisNexis Supp. 2010) (mandating a 25% reduction in greenhouse gas emissions by 2020); 310 Mass. Code Regs. § 7.70 (2011) (establishing the "Massachusetts CO_2 Budget Trading Program, which is designed to stabilize and then reduce anthropogenic emissions of CO_2"). Slowing the pace of global climate change is one part – albeit a very important part – of minimizing the impacts to the *amici* States. Therefore, the *amici* States support the efforts of the Respondent States to address this issue.

SUMMARY OF THE ARGUMENT

The cause of action for nuisance under the common law has historically served as an important tool in the protection of the public health and welfare and natural resources from pollution. This Court has adjudicated common law nuisance actions covering a variety of environmental ills, including such local harms as smoke and noise from a rail yard, to the potentially devastating and widespread impacts of waterborne

diseases emanating from sewage discharges to a river. These matters have ranged from local disputes, involving only private parties, to interstate battles in the Court's original jurisdiction.

Despite the advent of modern pollution control statutes, common law nuisance claims persist, and for good reason. The federal government, under statutes such as the Clean Air Act, does not regulate all pollutants nor all sources of pollution. Moreover, even in areas where EPA is regulating, too many times States have seen EPA fail to meet congressional deadlines to promulgate or update pollution control standards and adjudicate interstate pollution disputes, thus necessitating resort to state common law. Even if resort to public nuisance actions may only be sporadic, it is nonetheless vital when it is needed.

When a State brings such a public nuisance action, it often is acting as *parens patriae*. When these disputes have an interstate dimension, special concerns come into play. This Court has repeatedly recognized that the States formed the Union in part by surrendering their rights to resolve disputes with other States and their citizens by war and diplomacy. In the stead of those sovereign tools of war and diplomacy stands the federal judiciary. Thus, States retain a unique status as litigants and enter the courts with a different dignity than private parties.

Historically this Court has not even questioned standing when States have brought public nuisance

actions in their *parens patriae* capacity. Similarly no such analysis is warranted here. Further, to engage in such an inquiry at this stage would improperly hasten a review of the merits of the case.

Nevertheless, under any proper analysis the States have standing in this case. Article III standing respects the States' quasi-sovereign role. In *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 609 (1982), this Court affirmed "*parens patriae* standing" and set forth a framework to analyze a State's claim to this alternative means of demonstrating standing. To proceed as *parens patriae*, a State must establish an interest apart from the interests of an identifiable group of its citizens; the interest must not be merely proprietary, nor strictly sovereign; and the interest must be adversely affected by the challenged behavior of the defendants. It is also significant whether the plaintiff State can demonstrate that it would address the harm by legislation if it could. At least some of the Respondent States here have adopted programs to control greenhouse gas emissions from the very same types of sources that are operated by the Petitioners. Thus, these States have demonstrated a deliberate, considered, and self-controlling judgment that the emissions sources at issue in this case contribute to the injuries the Respondent States assert and that those harms can be remedied, at least in part, by reductions of emissions from those sources.

Parens patriae standing under *Alfred L. Snapp* is separate from the standard three-part analysis of *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). *Lujan* itself recognized that standing is not a one-size-fits-all doctrine. *See id.* at 572 n.7. Moreover, this Court's precedents have consistently and carefully distinguished between standing under *Lujan* and *parens patriae* standing in cases involving State plaintiffs. Nevertheless, *Alfred L. Snapp* and *Lujan* are not at cross purposes. Both implement the requirement of an "actual controversy."

Massachusetts also is not to the contrary. When a State asserts *parens patriae* standing against the federal government, the United States may also claim to be acting as *parens patriae*. In such cases, it may be appropriate to adjudge the State's standing under *Lujan*.

The Petitioners' contention that a finding of standing would open the courthouse doors to a limitless parade of plaintiffs against innumerable defendants is baseless. The Respondent States' *parens patriae* standing is buttressed by the demonstration that certain Respondent States have regulated their own large coal-fired power plants. Any lack of regulation of other categories of sources weighs against *parens patriae* standing as to those sources. Moreover, by law States are favored plaintiffs in public nuisance actions. Private parties have a higher standing hurdle to clear, as they must aver and prove special injury. Finally, as a practical matter, the likelihood of

interstate litigation of this magnitude is inherently low because it is resource intensive and States generally seek to avoid conflict with sister States.

ARGUMENT

I. COMMON LAW NUISANCE IS AN ESSENTIAL TOOL IN MODERN ENVIRONMENTAL LAW.

"Nuisance theory and case law is the common law backbone of modern environmental and energy law." William H. Rodgers, Jr., Environmental Law 113 (2d ed., 1994). Prior to the enactment of the federal Clean Air Act, 42 U.S.C. § 7401 *et seq.*, and its analogs covering other environmental media, the public health and the environment were primarily protected through the state police power. This includes state statutory and common law remedies. Nuisance law was an integral part of that formula. Richard A. Epstein, *Ordering State-Federal Relations Through Federal Preemption Doctrine: Federal Preemption & Federal Common Law in Nuisance Cases*, 102 Nw. U.L. Rev. 551, 555 (2008) ("It has long been understood that the discharge of noxious substances into the air or the water lay at the core of the law of nuisance.").

The use of nuisance law to protect the public health and the environment is an accepted part of the American legal landscape. In *Baltimore & Potomac Railroad Co. v. Fifth Baptist Church*, 108 U.S. 317 (1883), the operations of a rail yard were held to be a

nuisance due in part to "the smoke from the chimneys, with its cinders, dust, and offensive odors." *Id.* at 329. The defendant was not saved by the fact that its smokestacks complied with local law regulating stack heights because "[i]n requiring that chimneys should have a certain height, the regulations did not prohibit their being made higher." *Id.* at 334-35. This "rule," the Court held, was "so obvious" it barely warranted citation. *Id.* at 335; *see also New Jersey v. New York*, 283 U.S. 473, 482 (1931) (rejecting contention "that compliance with the supervisor's permits . . . leaves the Court without jurisdiction to grant the injunction prayed and relieves defendant in respect of the nuisance"). Nor was the defendant aided by evidence that its locomotives were allegedly "the best known in the business" and that it took significant precautions against offsite impacts. *Baltimore & Potomac R.R.*, 108 U.S. at 320. This Court held that, if necessary, "the engine house and workshop should be . . . remodelled" or the entire facility "removed to some other place." *Id.* at 334.

This and other private nuisance actions were followed by "a line of cases . . . in which States . . . represent[ed] the interests of their citizens in [seeking to] enjoin[] public nuisances." *Alfred L. Snapp*, 458 U.S. at 603 (citing *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (action to abate flooding of farmland); *Wyoming v. Colorado*, 259 U.S. 419 (1922) (action to abate diversion of river); *New York v. New Jersey*, 256 U.S. 296 (1921) (action to abate discharge of sewage); *Kansas v. Colorado*, 206 U.S. 46 (1907) (action to abate

deprivation of flow of river); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (action to abate air pollution); *Kansas v. Colorado*, 185 U.S. 125 (1902) (action to abate deprivation of water); *Missouri v. Illinois*, 180 U.S. 208 (1901) (action to abate pollution of drinking water). These types of cases "help[ed] stimulate the development and implementation of improved pollution control technologies" and "ultimately improved environmental conditions." Robert V. Percival, *The Clean Water Act and the Demise of the Federal Common Law of Interstate Nuisance*, 55 Ala. L. Rev. 717, 773 (Spring 2004).

In the state courts as well, as the industrial revolution progressed, nuisance actions both public and private became an important mechanism to vindicate the rights of those adversely affected by environmental harms. *See, e.g., State ex. rel Bd. of Health of the Twp. of Lyndhurst v. United Cork Cos.*, 172 A. 347, 348 (N.J. Ch. 1934) (public nuisance of "dust, odors, fumes and gases" from cork factory); *Martin Bldg. Co. v. Imperial Laundry Co.*, 124 So. 82, 83 (Ala. 1929) (private nuisance of "smoke and soot" from industrial coal boiler); *State ex rel. Renfrow v. Serv. Cushion Tube Co.*, 291 S.W. 106, 108, 109 (Mo. 1927) (public nuisance of "great volumes of black smoke" that "pervaded a community"); *Andrews v. Western Asphalt Paving Corp.*, 188 N.W. 900, 901 (Iowa 1922) (private nuisance of "smoke, soot, fumes, cinders, ashes, and dirt" from asphalt plant).

Pursuant to the States' police power, the States, usually through their attorneys general, historically prosecuted public nuisances affecting broader populations. *See, e.g.*, *State v. Chicago, Milwaukee & St. Paul Ry. Co.*, 130 N.W. 545 (Minn. 1911) (affirming fine for firing bituminous coal in violation of an ordinance declaring such to be a public nuisance); *Acme Fertilizer Co. v. State*, 72 N.E. 1037, 1038 (Ind. Ct. App. 1905) (affirming conviction for public nuisance upon showing that defendant's facility released "poisonous smells, so that the air for a great distance . . . was . . . rendered . . . injurious to the health, comfort and property of many citizens"); *State v. Uvalde Asphalt Pav. Co.*, 53 A. 299 (N.J. 1902) (affirming indictment for public nuisance against asphalt plant that released "noxious and unwholesome smokes, vapors, smells and stenches which impregnate the air, rendering it corrupt, offensive and unwholesome"); *People v. Detroit White Lead Works*, 46 N.W. 735, 737 (Mich. 1890) (adjudicating paint facility that caused "odors, smoke, and soot of . . . a noxious character" to be a public nuisance despite the fact that it was operated in a "prudent manner").

There is no doubt that the number of nuisance cases prosecuted regarding environmental and public health matters has declined in recent decades. It is equally evident that this has resulted, in large measure, from the success of Congress and the administrative state in addressing these matters. Even before Congress enacted the major environmental statutes of the early 1970s, state

legislatures had codified and/or superseded some common law public nuisance actions. These state and federal statutes facilitated enforcement because they were more industry- and pollutant-specific, and because they established tailored enforcement procedures. But the advent of the modern environmental law structure has by no means eliminated the common law nuisance action. *E.g.*, *Bonewitz v. Parker*, 912 N.E.2d 378, 380, 385 (Ind. Ct. App. 2009) (allowing damages or "total, permanent injunction" against mycelium drying facility due in part to "emissions of smoke" and "sawdust" creating a nuisance); *Miller v. Rohling*, 720 N.W.2d 562, 566 (Iowa 2006) (affirming that grain operation was a nuisance due in part to "emissions" of "fugitive dust"); *Ouellette v. Int'l Paper Co.*, 666 F. Supp. 58 (D. Vt. 1987) (denying motion to dismiss claim that paper mill caused common law air pollution nuisance); *Galaxy Carpet Mills, Inc. v. Massengill*, 338 S.E.2d 428, 429 (Ga. 1986) (affirming that coal-fired boiler was a nuisance due in part to emissions of "large amounts of soot and ash" and despite the fact that the facility had secured a permit).

This comes as no surprise regarding air pollution. The Clean Air Act has hardly eliminated the need for the common law public nuisance cause of action to address air pollution. As an initial matter, the fact that Congress included in the Clean Air Act a specific savings clause for state law, 42 U.S.C. § 7416, is proof enough that Congress was aware that the standards and plans required by the Act were not the end of the

matter. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987). The Clean Air Act is generally premised on mandating minimum – not maximum – air quality standards. *Union Elec. Co. v. EPA*, 427 U.S. 246, 256-57 (1976) (The Act "place[s] the primary responsibility for formulating pollution control strategies on the States, but nonetheless subject[s] the States to strict minimum compliance requirements."). The Act's National Ambient Air Quality Standards ("NAAQS") establish an upper bound of pollutant concentrations in the ambient air for select pollutants, *see* 42 U.S.C. § 7409, but nothing prohibits a State from, in its judgment, seeking to reduce levels of pollutants to well below those standards. The Act requires regulation of hazardous air pollutants but nothing bars any State from adopting supplemental programs to further protect its citizens. *See, e.g.*, 15A N.C. Admin. Code 2D .1104 (2011) (state toxic air pollutant limits that supplement the Clean Air Act's toxics program). After all, it is "the State" that "has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air." *Tennessee Copper*, 206 U.S. at 237.

The Clean Air Act additionally suffers from major implementation delays that limit its utility and demonstrate the continued vitality of public nuisance actions under the laws of the source state, as this Court allowed in *Ouellette*. For example, at the heart of Title I of the Clean Air Act are the NAAQS. These standards dictate the maximum concentrations of a handful of "criteria" pollutants that are allowed in the

ambient air. *See* 42 U.S.C. § 7409 (2006); 40 C.F.R. Part 50 (2010). A significant amount of state-level planning focuses on meeting these standards. *See, e.g.*, 42 U.S.C. § 7410 (2006). EPA is required to complete a "thorough review" of the science underlying these standards and the standards themselves "at five-year intervals." 42 U.S.C. § 7409(d)(1) (2006); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 462-63 (2001). EPA completed a cycle of reviews for two of the six criteria pollutants – ozone and particulate matter – in July 1997. *Whitman*, 531 U.S. at 463.

By 2003, EPA was subject to a consent decree spelling out the schedule for completing subsequent reviews regarding these pollutants because EPA failed to abide by Congress' five-year deadline. Order Granting Mot. to Approve Consent Judgment, *Am. Lung Ass'n v. Whitman*, No. 05-cv-01814 (D.D.C. July 31, 2003). The revised particulate matter standard became effective in December 2006, National Ambient Air Quality Standards for Particulate Matter, 71 Fed. Reg. 61,144 (2006), and the ozone revision was not effective until May 2008, National Ambient Air Quality Standards for Ozone, 73 Fed. Reg. 16,436 (2008). Although the particulate NAAQS is currently effective, the D.C. Circuit Court of Appeals granted petitions for review on the central issue of whether EPA's decision not to change the primary standard was adequately supported. *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512 (D.C. Cir. 2009). EPA is currently reconsidering the ozone NAAQS. The agency has proposed, but not finalized the ozone standard. National Ambient Air

Quality Standards for Ozone, 75 Fed. Reg. 2938 (proposed Jan. 19, 2010). What should have been a five-year process has taken nine years for particulate matter and twelve years for ozone and counting. *See also, e.g.*, *Sierra Club v. Johnson*, 444 F. Supp. 2d 46 (D.D.C. 2006) (ordering EPA to promulgate dozens of rules for hazardous air pollutants under Section 112 of the Clean Air Act, 42 U.S.C. § 7412, that were required to be promulgated by 2000), *further proceeding*, 2011 U.S. Dist. LEXIS 5316, at *3 (D.D.C. Jan. 20, 2011) (further extending deadline for EPA action and noting that the court had "granted a number of EPA's motions to extend the deadlines").

These delays are not limited to EPA's duties to promulgate generally applicable standards, but extend also to its dispute resolution functions. The Clean Air Act provides an avenue for EPA to resolve interstate air pollution controversies regarding a few specific regulated pollutants upon the petition of an impacted State. *See* 42 U.S.C. § 7426 (2006). Although the Act requires EPA to grant or deny any such petition "[w]ithin 60 days after receipt," 42 U.S.C. § 7426(b) (2006), to the *amici*'s knowledge EPA has *never* made a decision within the time frame demanded by Congress. Delays range to several years and often require judicial intervention to compel EPA action. *See, e.g.*, Rulemaking on § 126 Petition from N.C. to Reduce Interstate Transport of Fine Particulate Matter & Ozone, 71 Fed. Reg. 25,328 (2006) [hereinafter "§ 126 Rule"] (resolution of petition over two years after filing); *Appalachian Power Co. v. EPA*,

249 F.3d 1032 (D.C. Cir. 2001) (resolution of petition one year and nine months after filing); Interstate Pollution Abatement; Final Determination, 47 Fed. Reg. 6624 (1982) (resolution of petition nearly three years after filing); Notice of Proposed Consent Decree, 70 Fed. Reg. 10,088 (2005) (providing public notice of consent decree to compel EPA to issue final decision in March 2006 regarding petition filed in March 2004).

Timing, of course, is significant when dealing with public health matters. A plaintiff in a contract action seeking money damages who is forced to wait for years for relief can be made whole with post-judgment interest and other remedies. A citizen who suffers a fatal heart attack, or a child whose education is impaired due to frequent bouts of asthma, can never be made whole.[1] *Cf. North Carolina v. EPA*, 531 F.3d 896, 911-12 (ordering EPA to expedite air pollution control program to help States attain air quality standards according to Congress' schedule), *modified*, 550 F.3d 1176 (D.C. Cir. 2008).

The *amici* States do not suggest that common law claims are or should be used simply to differ with EPA's decisions. For regulated pollutants, a downwind

---

[1] Although such a plaintiff or her estate could be awarded money damages, which would make the plaintiff whole as a matter of law, money damages are no substitute for loss or significant impairment of life, or irreparable or long-term damage to natural resources. Much of the harm caused by pollution is not merely economic.

party is protected by federal statutory and regulatory law and by state law, including state common law. *See* 42 U.S.C. § 7416 (2006). A suit under state common law relies on a policy choice made by the State with jurisdiction over the pollution source to afford greater protection than federal law. *See Ouellette*, 479 U.S. at 497 (concluding that the Clean Water Act allows a State to "impose higher common-law . . . restrictions" on sources within its jurisdiction). The governing State may end that policy whenever it wishes. On the other hand, where there are no governing federal statutes or regulations, federal common law may provide relief exactly because there is no EPA decision with which to differ. In either case, for reasons discussed later, common law nuisance actions are relatively infrequent and affirmation of a federal common law claim here would not result in a flood of such claims. *See infra* pp. 34-37.

Nevertheless, despite the relative infrequency with which a State might need to resort to a public nuisance cause of action today, it makes little sense to deny the State this tool, particularly on the theory that nuisance law is somehow inherently defective, as the Petitioners and their *amici* contend here. Public nuisance actions have been and should continue to be allowed to work in concert with regulatory and statutory remedies in order to allow States to best protect the health and welfare of their citizens and their environments. Any other result would be contrary to Congress' intent to safeguard States' traditional jurisdiction and protect the environment.

II. THE STATES HAVE STANDING UNDER ARTICLE III TO BRING THIS ACTION AS *PARENS PATRIAE*.

The Petitioners (which exclude defendant Tennessee Valley Authority[2] ("TVA")) attack the Respondent States' standing on Article III grounds. In doing so, the Petitioners misapply the Court's precedents and fail to understand the significance of the nature of the States as sovereigns. The history of States as litigants before this Court makes clear that an injury to a State's *parens patriae* interest generally confers Article III standing upon the State, as it does in this case.

This Court stated long ago in the seminal interstate air pollution case of *Tennessee Copper*, that "[t]he States by entering the Union did not sink to the position of private owners subject to one system of private law." 206 U.S. at 237-38. In that matter, the Court focused its attention not on the State's proprietary interest – which it termed merely a "makeweight" – but instead on its "interest independent of and behind the titles of its citizens, in all the earth and air within its domain," that is, its "quasi-sovereign" interest. *Id.* at 237. It is such a "quasi-sovereign" interest that the State may vindicate

---

[2] TVA – a defendant but also a Respondent – concedes the States' Article III standing. TVA Br. 25-33. Any reference to the Petitioners in this argument does not include TVA.

in a suit as *parens patriae*. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258 (1972) (A State may "sue as *parens patriae* to prevent or repair harm to its 'quasi-sovereign' interests.").

Advancing forward three-quarters of a century, the Court bore into the question of *parens patriae* standing in *Alfred L. Snapp*. In order to lend a measure of clarity to the concept of quasi-sovereign interests, the Court reviewed several cases, including *Tennessee Copper*, in which it had allowed a State to sue based on what the Court termed "*parens patriae* standing." 458 U.S. at 602-06, 609. From this analysis, the Court distilled two quasi-sovereign interests that support *parens patriae* standing. "First, a State has a quasi-sovereign interest in the health and well-being – both physical and economic – of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system." *Id.* at 607. But the Court admitted that this was not a "definitive list" and that it could not establish an "exhaustive formal definition." *Id.*

Doubtless, if "a State has a quasi-sovereign interest in the health and well-being . . . of its residents in general," it has a similar interest in maintaining its natural resources. *Tennessee Copper* proves that much. 206 U.S. at 237 (relying on Georgia's quasi-sovereign "interest . . . in all the earth and air within its domain"). Individuals have an interest in "all the earth and air" as well. But the

State has public trust rights and obligations regarding the care of the earth, air and water within its jurisdiction for its current citizens and future generations. *See, e.g., Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452-54 (1892). These rights and obligations go beyond the rights and duties of any individual citizen and beyond even the aggregate rights and obligations of all its citizens. In the words of *Tennessee Copper*, the State "has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air." 206 U.S. at 237. This "word" is the States' "final power" on the matter. *Id.* This "word" is part and parcel of the State's "quasi-sovereign" interest in this case.[3] *Id.* This assuredly renders the State's "interest . . . in all

---

[3] The *amici* States are not here suggesting that a separate public trust right is determinative regarding the existence of a quasi-sovereign interest. The Court itself has indicated that no such talismanic test exists for quasi-sovereign interests and a case-by-case inquiry is necessary. *See Alfred L. Snapp*, 458 U.S. at 602. Additionally, although a State has a quasi-sovereign interest in maintaining the "last word" on the quality of its natural resources, it also has a sovereign interest in creating and maintaining a legal code to that end. *See id.* at 601. In large part, except when the State is acting in its sovereign capacity to protect its natural resources, *e.g.*, by enacting domestic statutes, it is acting in its quasi-sovereign capacity, *e.g.*, by pursuing similar goals through the common law in the courts of the United States. *See id.* at 600-02.

the earth[, water] and air within its domain" quasi-sovereign.

It is of no moment whether these resources are publicly owned, as in the publicly-held lands discussed in *Massachusetts*, or whether they are, for example, the aggregate public and private shore lands within the States' borders. The States have jurisdiction over all of these resources, in one capacity or another. The State – simply because it is the State – is tasked with the protection of these resources no matter in whose ownership they may be. The States have a quasi-sovereign interest in assuring the continued existence of resources within their territorial jurisdictions, maintaining the quality of those resources, and continuing their authority over those resources.

The fact that a State has a quasi-sovereign interest does not mean that it has *parens patriae* standing under Article III in all such cases. But historically this Court has not questioned the existence of a jurisdictional controversy once the complaining State has established its *parens patriae* interest in abating a public nuisance. *E.g.*, *Missouri*, 180 U.S. at 240-41 (finding a "controvers[y]" to exist in a public nuisance action after concluding that the State had alleged a *parens patriae* interest). That is, standing in such cases appears to be self-evident. The State is the proper entity to prosecute a public nuisance action (without a showing of special injury). *See, e.g.*, *Mayor of Georgetown v. Alexandria Canal Co.*, 37 U.S. 91, 97-

99 (1838). The nature of the action inherently encompasses allegations of public harm and causation. To require a separate standing analysis would necessitate review of the merits of the case and should not be undertaken. A State's properly pled complaint seeking to vindicate a clear public right from invasion by a public nuisance emanating from outside the State is, as it has been historically viewed, sufficient to establish a controversy for the federal courts to resolve.

Nevertheless, a rigorous standing analysis further supports the Respondent States' standing. In *Alfred L. Snapp* the Court stated that quasi-sovereign interests, due to their breadth, "risk[] being too vague to survive the standing requirements of Art. III: A quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant." 458 U.S. at 602. The Court's review of the history of *parens patriae* standing led it to the following conclusions: To demonstrate *parens patriae* standing, "the State must articulate an interest apart from the interest[] of particular private parties." *Id.* at 607. That is, "[t]he State must express a quasi-sovereign interest." *Id.* When that interest is based on "health and well-being – both physical and economic – of its residents in general," then the State must allege that more than an "identifiable group" is "adversely affected by the challenged behavior." *Id.* In making this allegation, the Court must consider the "indirect effects of the injury." *Id.*

The Petitioners and a few of their *amici* assume, without any analysis, that the States must demonstrate standing under *Lujan*. *E.g.*, Pet. Br. 17; Wash. Legal. Found. Br. 10-11; Nat'l. Ass'n of Home Builders Br. 3-4; Chevron U.S.A. Inc. Br. 10-11. The contention is incorrect. *Parens patriae* standing under *Alfred L. Snapp* is independent of *Lujan*.

The special status of States when proceeding as *parens patriae* is firmly rooted in this Court's jurisprudence. *See, e.g., Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 447 (1945) ("Suits by a State, *parens patriae*, have long been recognized."). Many of the earliest *parens patriae* decisions of this Court resulted from cross-border pollution disputes and similar controversies over natural resource allocation. As the ability of man to affect larger and larger areas of the environment progressed, interstate disputes became more common. *See, e.g., Alfred L. Snapp*, 458 U.S. at 603 (collecting cases). And as the science available to trace the origins of environmental impacts evolved, it became more feasible for parties at a distance to demonstrate proximate cause. *See Missouri v. Illinois*, 200 U.S. 496, 522 (1906) (indicating, with reference to the scientific evidence, that "if this suit had been brought fifty years ago it almost necessarily would have failed"). These factors were doubtless at the center of the uptick in interstate environmental litigation that occurred just after the turn of the last century.

A salient feature of those early public nuisance cases brought by States is not necessarily what the Court said, but what it did not say. In a string of cases where States sought to protect their citizenry and their resources from out-of-state interference, the Court never seriously, if at all, questioned any State's Article III standing to bring the claim. In *Tennessee Copper*, for example, the defendants contended that "[i]n order to prosecute an original suit in the Supreme Court, a State must show just such interest in the controversy in question as an individual must show to maintain a suit in a proper jurisdiction." 206 U.S. at 235. Essentially, the defendant was arguing that the State was subject to the same standing requirements that applied to a private individual. The Court dismissed that notion, concluding instead that this was "a suit by a State for an injury to it in its capacity as quasi-sovereign." *Id.* at 237. Because the State was, by its very nature, not a private citizen, it was not held to the same standard for entry into the courts as would be required of a private citizen. The entire case is premised on this distinction.[4]

---

[4] *Tennessee Copper* was an original jurisdiction case. A State may seek relief against a private party from another State originally in either this Court or the district courts, although this Court's jurisdiction is not mandatory. *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 499 (1971). Certainly, the Article III standing requirements cannot vary by court. But the Court, in its discretion, may impose a higher hurdle for a State to bring an action in the Court's original jurisdiction. *Alfred L. Snapp*, 458 U.S. at 604 n.12

In *Massachusetts* the Court observed that "[i]t is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual." 549 U.S. at 518. The Court also indicated that the "special solicitude" owed to the States additionally resulted from the procedural statute under which the States were proceeding. But the standing requirements for plaintiffs vindicating procedural rights under federal statutes already depart from the typical *Lujan* analysis regardless of whether the plaintiff is a State acting as *parens patriae*. *Lujan*, 504 U.S. at 572 n.7; *see also Massachusetts*, 549 U.S. at 536 (Roberts, C.J., dissenting) (observing that the "general judicial review provision cited by the Court" applies to both private litigants and States). There is no reason discernible in *Massachusetts* or elsewhere that the impact a State's nature has on the standing analysis is necessarily limited to federal statutory cases or cases where a procedural right is at stake. Nor should it be. A State's quasi-sovereign interest is not diminished by the nature of the case (*e.g.*, common law versus statutory) in which the State seeks to vindicate that interest. Nor is it lessened by the nature of the right

---

("There may indeed be special considerations that call for a limited exercise of our jurisdiction in" *parens patriae* original jurisdiction cases that "may not apply to a similar suit brought in federal district court."). Therefore, the showing for the Respondent States to access the district court can be no greater than it was for the plaintiff State in *Tennessee Copper* and may be considerably less.

(*e.g.*, substantive versus procedural) that it asserts. Therefore, *Massachusetts* confirmed that a State is a litigant of an entirely different order than is a private party and that status affects the standing analysis.

The reason for this is clear. "When a State enters the Union, it surrenders certain sovereign prerogatives." *Massachusetts*, 549 U.S. at 519. Most notably for the matter at hand, States no longer may settle differences with other States by force or reach out to foreign nations and negotiate a treaty. *Id.* The rights relinquished were not limited to disputes with other sovereigns but also included the subjects of those sovereigns. Whereas a sovereign may resort to force to affect the behavior of a foreign subject, the States have foregone that path with respect to actions of citizens of another State that occur on that other State's soil. The Constitution specifically provides the States with the right to resolve such disputes in the federal judiciary. *See Missouri*, 180 U.S. at 241 (exercising original jurisdiction to adjudicate interstate public nuisance claim because, "[d]iplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy"); *see also Alfred L. Snapp*, 458 U.S. at 603-04; *Tennessee Copper*, 206 U.S. at 237. This unique consideration militates in favor of a standing requirement that recognizes that a federal lawsuit is a substitute for the rights that the States surrendered in order to form the Union that gave rise to the federal judiciary in the first place.

The fact that States may be subject to a standing analysis that is specific to them is not contrary to Article III. Article III standing is not isolated within the Constitution. This Court has held that it is imbued with separation-of-powers principles, *e.g.*, *Lewis v. Casey*, 518 U.S. 343, 353 n.3 (1996) (recognizing that the standing "doctrine has a separation-of-powers component"), which spring from Articles I, II, and III taken together and not from Article III alone, *Miller v. French*, 530 U.S. 327, 341 (2000). Therefore standing should be responsive as well to the particular constitutional status of the States. Further, in *Lujan* itself the Court recognized that Congress can create classes with differing Article III standing requirements. *See* 504 U.S. at 572 n.7; *see also* Pet. Br. 25 (Congress may permit plaintiffs to proceed under certain circumstances even if plaintiffs cannot meet some of the "normal [Article III] standards." (quoting *Massachusetts*, 549 U.S. at 517)). Thus, Article III standing is not a one-size-fits-all doctrine. There is good reason, grounded in the Constitution, to apply to States acting as *parens patriae* a unique Article III standing analysis.

Nevertheless, *Lujan* and *Alfred L. Snapp* share the same constitutional goal: to ensure that federal jurisdiction extends only to matters in which the parties are sufficiently adverse to create a "case" or "controversy" within the meaning of Article III. The Court in *Alfred L. Snapp* confirmed that "[a] quasi-sovereign interest must be sufficiently concrete

to create an actual controversy between the State and the defendant." 458 U.S. at 602.

Although the *Alfred L. Snapp* analysis is specifically tailored to the States' *parens patriae* standing, it is not far removed from the Court's three-prong test that applies in private party litigation under *Lujan*. *Alfred L. Snapp*'s "adverse[] affect[]" requirement is analogous to *Lujan*'s injury prong. But *parens patriae* standing has never specifically imported the requirements from *Lujan* that the "invasion of a legally protected interest" be "(a) concrete and particularized, . . . and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (citations and quotation marks omitted). This, again, can be traced back to the judiciary's role in resolving disputes to which a State is a party and regarding which States surrendered their rights to "diplomacy and war." *Penn. R.R.*, 324 U.S. at 450. Any such dispute that would have led to diplomacy or war certainly would qualify as a "controvers[y] between two or more states" or "between a state and the citizens of another state," U.S. Const., art. III, cl. 2, in the common sense of the term even if it did not meet *Lujan*'s specific "injury in fact" requirements. Some measure of respect is owed to the State in the determination of whether the integrity of its right to protect its citizens and resources has been injured. As

such, *Alfred L. Snapp* only requires that the State's interest be "adversely affected."[5]

Alfred L. Snapp requires that the "adverse[] affect[]" be visited upon the State "by the challenged behavior." 458 U.S. at 607. This causation requirement is similar to the "fairly traceable" prerequisite of *Lujan*. But the causation requirement is given unique treatment in *parens patriae* matters. In *Alfred L. Snapp*, the Court found that "[o]ne helpful indication in determining whether an alleged injury to

---

[5] Standing also limits the federal courts from addressing "generally available grievance[s]." *Lujan*, 504 U.S. at 573. Regardless of whether this is an Article III requirement or a"prudential" concern, *see Fed. Election Comm'n v. Akins*, 524 U.S. 11, 23 (1998); *see also* Pet. Br. 30, it is not implicated here. *Parens patriae* matters by their nature may involve harms to large segments – sometimes the entirety – of a State's population. But the harm to the State is differentiated because no private party or group shares the State's unique quasi-sovereign interests. Additionally, the "generalized grievances" for which standing requirements forbid federal court review are those that are "also of an abstract and indefinite nature." *Akins*, 524 U.S. at 23. "[W]here a harm is concrete, though widely shared, the Court has found 'injury in fact.'" *Id.* at 24. As applied to climate change issues, this Court already has found that the fact that "climate-change risks are 'widely shared' does not minimize [the States'] interest in the outcome of this litigation." *Massachusetts*, 549 U.S. at 522.

the health and welfare of its citizens suffices to give the State standing to sue as *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers." 458 U.S. at 607. Assuming that a State can demonstrate that it "would likely attempt to address [the injury] through its sovereign lawmaking powers" "if it could," the State may, from the same showing, confirm that it has made a rational determination that the damage to its interests has been caused at least in part by the challenged actions of the Petitioners. This same demonstration by the State would also go to the redressability aspect of standing.

This case exemplifies how *Alfred L. Snapp* resolves the causation and redressability issues with appropriate deference to the States. There is no question that, if the Respondent States could regulate the Petitioners' greenhouse gas emissions, they would. Respondents Connecticut, New York, Rhode Island, and Vermont all have adopted regulations for, and participate in, the Regional Greenhouse Gas Initiative, which caps power sector carbon dioxide emissions and will reduce those emissions by ten percent by 2018. *See* Regional Greenhouse Gas Initiative, Inc., Program Design, State Statutes & Regs., http://www.rggi.org/design/regulations (March 18, 2011) (citing implementing statutes and rules). Moreover, several of the Respondent States have also adopted renewable portfolio standards that are increasing the amount of the States' energy needs that are satisfied from carbon dioxide-free sources. *See*,

e.g., Conn. Gen. Stat. Ann. § 16-245a (West 2007); N.Y. Pub. Serv. Comm'n, Order Regarding Retail Renewable Portfolio Standard (Case 03-E-0188, Sept. 24, 2004). The States have made it plain, through the exercise of their sovereign authority, that they view the actions of the Petitioners to contribute to the injuries they allege. Further, they have indicated that the remedy they seek – emissions reductions – will, in their view, redress that harm (at least in part). The States assuredly did not impose carbon dioxide reduction programs on their power plants lightly. There is no suggestion that these in-state controls were not imposed, at least in part, in order to implement the States' considered judgment that carbon dioxide emissions are contributing to climate change, which visits harm upon the Respondent States. Nor can it be seriously contended that the Respondent States' control programs are a constitutionally irrational exercise of State power. Therefore, a finding that "the State, if it could, would likely attempt to address [the harm in this case] through its sovereign lawmaking powers" imports a measure of the causation and redressability components of the *Lujan* test.

Although *Lujan* and *Alfred L. Snapp* share a common purpose, the Court has been careful to maintain the distinct applicability of each. As with *Tennessee Copper* and other early twentieth century cases, there is a conspicuous absence in *Alfred L. Snapp* of any follow-on analysis remotely resembling *Lujan*'s three-part test. *See Alfred L. Snapp*, 458 U.S.

at 600-10; *compare Maryland v. Louisiana*, 451 U.S. 725, 736 (1981) (assessing whether the injury to the States' proprietary interest as direct consumers of natural gas "fairly can be traced to the challenged action of the defendant" and therefore can support the States' "[s]tanding to sue"), *with id.* at 737-38 (separately assessing the same States' right to proceed in their *parens patriae* capacity without reference to any of aspect of the *Lujan*-type standing test). The reason is simple enough: A proper *parens patriae* suit ensures that the State's interest is not "too vague to survive the standing requirements of Art. III" and that the State's interest is "sufficiently concrete to create an actual controversy." 458 U.S. at 602. That is, in the context of *parens patriae* standing, if the State satisfies the *Alfred L. Snapp* test, the State has demonstrated the existence of a sufficient "case" or "controversy" within the meaning of Article III.

Of course, *Alfred L. Snapp* was decided in July 1982 and *Lujan* was not authored until 1992, so *Alfred L. Snapp* could not have relied on *Lujan* directly. However, the three-part *Lujan* test was already crystallizing in *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464 (1982). In that matter, which involved only private parties, the Court held: "Art. III requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury fairly can be traced to the challenged action and is likely to be

redressed by a favorable decision." *Id.* at 472 (citations and quotation marks omitted). *Valley Forge* was decided six months before *Alfred L. Snapp.* It is remarkable that the Court in *Alfred L. Snapp*, in discussing standing and specifically referencing Article III, never once mentioned *Valley Forge* or the three-part standing test that it assessed in the context of private party litigation just months earlier. The simplest explanation for this is that the *Valley Forge* analysis, *i.e.*, the *Lujan* framework, just does not apply to States asserting a quasi-sovereign interest. In fact, the Court has never applied the *Lujan* factors to a State suing as *parens patriae* against a party other than the federal government, *see infra* pp. 32-33, but it has many times allowed States to proceed to vindicate their *parens patriae* interests against such parties.

For example, in *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), two States – Ohio and Pennsylvania – were permitted to sue West Virginia regarding the latter's attempts to curtail natural gas sales to the former. The Court cited the plaintiff States' "two-fold interest" as "proprietor" and as "representative of the consuming public whose supply will be similarly affected." *Id.* at 591. "Both interests are substantial and both are threatened with serious injury." *Id.* Accordingly, the States had demonstrated "*every element* of" a "controversy between States in the sense of the Judiciary Article of the Constitution." *Id.* (emphasis added); *compare id. with Wyoming v. Oklahoma*, 502 U.S. 437, 447 (1992) (affirming that, where Wyoming was asserting a proprietary injury and

not acting as *parens patriae*, the State "had standing to bring th[e] action" because the "loss of severance tax revenues fairly can be traced to" Oklahoma's legislation (quotation marks omitted)).

Parens patriae standing is not without its limits. The federal government, in enacting a statute or promulgating a regulation, may very well be acting as *parens patriae* itself. Therefore, as against the federal government in such a case, a State's need to proceed as *parens patriae* to protect the health and welfare interests of its citizens and its natural resources is lessened. It is reasonable that in such context the Court would require a greater showing from the State to demonstrate standing.

The Court's 2007 decision in *Massachusetts* follows that pattern. The respondent there was EPA – a federal agency – not a private party. The matter involved the Clean Air Act, which was designed to protect the Nation's health and welfare, including its natural resources. *See* 42 U.S.C. § 7401(a)(2) (2006) (citing, as a basis for the Act, "mounting dangers to the public health and welfare" from air pollution, including "damage to and the deterioration of property"). The Court applied the "most demanding standards of the adversarial process," *i.e.*, the *Lujan* test. Although the Court explained that the States were entitled to "special solicitude," the Court still applied the *Lujan*

factors and not the *Alfred L. Snapp* test.[6] There is no need for the Court to revisit that issue here because this case does not implicate the competing claims to *parens patriae* representation that obtain when a State sues the federal government.[7]

The Petitioners fail entirely to address the States' quasi-sovereign interest. Instead, they focus on a more proprietary interest that is similar to that which was found sufficient to support standing in *Massachusetts*. Pet. Br. 17-24. Therefore, the Petitioners cannot demonstrate that the States lack standing.

For its part, TVA at least recognizes that the States' claim to *parens patriae* standing presents a separate question. But TVA declines to address the

---

[6] Because *Lujan* applies to state *parens patriae* plaintiffs when the federal government is also acting as *parens patriae*, *amicus* Washington Legal Foundation's cite to *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236 (10th Cir. 2008), for the proposition that courts have applied *Lujan* strictly to State plaintiffs, Wash. Legal. Found. Br. 10 n.2, is inapposite. Moreover, there is no indication that the plaintiff State in that case even claimed *parens patriae* standing.

[7] Although TVA is a federal entity, it has no claim to a superior *parens patriae* interest because it is "far removed from the control of the Executive Branch" and "operat[es] as the functional equivalent of a private corporation." *North Carolina ex rel. Cooper v. TVA*, 515 F.3d 344, 349 (2008).

question because it concludes that the States can maintain Article III standing based on their proprietary interest. TVA Br. 27 n.11.

The Petitioners protest that, due to the pervasive and persistent nature of greenhouse gases, a finding of standing in this matter would open the courthouse doors to virtually anybody to sue any of billions of sources, effectively eliminating the standing requirement altogether. Pet. Br. 18-19. The *amici* States take no position on whether an individual on the coast of North Carolina could sue a single small business in Alaska for rising sea levels that threaten to inundate property on the Outer Banks of North Carolina. The *amici* only address whether a State can demonstrate standing. An important inquiry in such situations was stated in *Alfred L. Snapp*: whether "the State, if it could, would likely attempt to address [the harms] through its sovereign lawmaking powers." 458 U.S. at 607. In this case, the answer is clear because at least some of the Respondent States have in fact regulated within their jurisdictions sources that are substantially similar to the Petitioners' facilities. *See supra* pp. 28-29. If the State of New York named a single small business in Idaho as a defendant, a further showing may be needed to demonstrate *parens patriae* standing.

Moreover, the States' action is rooted in the common law of public nuisance – a law under which States not only are authorized plaintiffs, but are favored plaintiffs. When the harms from a nuisance

are widespread, the nuisance is "public" and either a State or a private plaintiff can maintain an action. But, "in [a] case of a public nuisance, where a bill is filed by a private person, asking for relief by way of prevention, the plaintiff cannot maintain a stand in a court of equity; unless he avers and proves some special injury." *Mayor of Georgetown*, 37 U.S. at 99. In contrast, a State has standing to abate a public nuisance without showing special damage. *See generally* Restatement (Second) of Torts § 821C (1979). As the Court has indicated, "standing is gauged by the specific common-law, statutory or constitutional claims that a party presents." *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991). The "special injury" requirement for public nuisances further distinguishes State plaintiffs from private plaintiffs and provides a specific limitation on the indiscriminate filing of nuisance claims that the Petitioners decry.

The Petitioners' argument also proves too much. This Court has already allowed many State-prosecuted public nuisance actions to proceed. Public nuisance is an action that was and is still known at common law, and is a well-used tool in environmental disputes. *See supra* pp. 6-10. By definition a public nuisance is one that impacts the general public. Restatement (Second) of Torts § 821B (1979). The Petitioners' contention would have standing swallow the cause of action based on a necessary prerequisite to the prosecution of that cause of action. Because "standing is gauged by the specific common-law . . . claims that a party presents,"

Int'l Primate Prot. League, 500 U.S. at 77, it is illogical that standing would entirely preclude a cause of action in this manner.

Finally, as a practical matter, a finding of standing would not unleash a torrent of greenhouse gas nuisance suits. Prosecuting an interstate public nuisance action is a resource-intensive exercise. Therefore, such an action often stands as a last line of defense for a State to protect its citizens and resources when other efforts fail.

In 2006, North Carolina filed a public nuisance action against TVA under Alabama, Kentucky and Tennessee state law. *See North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291 (4th Cir. 2010), *cert. pending*, No. 10-997. The State alleged that TVA's coal-fired power plants were emitting unreasonable amounts of sulfur dioxide (SO_2) and oxides of nitrogen (NO_x) and thereby harming North Carolina and its citizens. Prior to filing its complaint against TVA, North Carolina sought reductions from TVA through negotiation and by pursuing statutory rights under the Clean Air Act. *See, e.g.*, § 126 Rule, *supra*; *North Carolina v. EPA*, 531 F.3d 896, 911-12, *modified*, 550 F.3d 1176 (D.C. Cir. 2008). Only when those efforts failed to produce timely results did the State resort to public nuisance law. *North Carolina ex rel. Cooper v. TVA*, 593 F. Supp. 2d 812, 816 (W.D.N.C. 2009), *rev'd on other grounds*, 615 F.3d 291 (4th Cir. 2010), *cert. pending*, No. 10-997. The case involved a series of expert witnesses, a twelve-day federal trial, and two

appeals, which garnered the participation of twenty-five States as parties, intervenors and *amici* on various sides of the issues. Given the cost and complexity of such litigation, such cases are unlikely to be filed except in the most compelling of circumstances.

Accordingly, the Petitioners have not shown that the Second Circuit erred in concluding that the Respondent States have standing.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

ROY COOPER
Attorney General of North Carolina

Christopher G. Browning, Jr.*
Solicitor General of North Carolina

James C. Gulick
Senior Deputy Attorney General

Marc D. Bernstein
Special Deputy Attorney General

March 2011

*Counsel of Record

AMICUS CURIAE BRIEF

No. 10-174

In The
Supreme Court of the United States

AMERICAN ELECTRIC
POWER COMPANY INC., et al.,

Petitioners,

v.

STATE OF CONNECTICUT, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICI CURIAE* NORTH COAST RIVERS ALLIANCE, DESERT PROTECTION SOCIETY, CALIFORNIA SPORTFISHING PROTECTION ALLIANCE, AND KLAMATH FOREST ALLIANCE IN SUPPORT OF RESPONDENTS

STEPHAN C. VOLKER*
JOSHUA A.H. HARRIS
M. BENJAMIN EICHENBERG
LAW OFFICES OF
STEPHAN C. VOLKER
436 14th Street, Suite 1300
Oakland, California 94612
(510) 496-0600
svolker@volkerlaw.com
**Counsel of Record*

Attorneys for Amici Curiae North Coast Rivers Alliance, Desert Protection Society, California Sportfishing Protection Alliance, and Klamath Forest Alliance

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

INTERESTS OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. GLOBAL WARMING THREATENS SIGNIFICANT HARM TO PUBLIC HEALTH AND WELFARE 4

A. Decreased Availability of Fresh Water 5

B. Extreme Temperatures 8

C. Extreme Weather Events 9

D. Disease 10

E. Recreation and Commercial Fishing 12

F. Agriculture 14

G. The Costs of Climate Change Impacts 16

II. THE JUDICIARY IS WELL EQUIPPED TO TACKLE CLIMATE CHANGE LITIGATION 17

III. THE WIDESPREAD DAMAGE ALREADY CAUSED BY GLOBAL WARMING, AS WELL AS THE POTENTIALLY HORRENDOUS IMPACTS FUTURE GENERATIONS WILL EXPERIENCE, MUST BE ACCOUNTED FOR UNDER THE LAW 20

A. Prudential Standing 24

1. Petitioners Have Prudential Standing 26

TABLE OF CONTENTS – Continued

Page

2. The Courts Have a Unique Responsibility 29

B. There Is No Displacement of the Federal Common Law of Nuisance 30

1. EPA Action Under the Clean Air Act, Both Before and After *Massachusetts v. EPA*, Failed to Constitute a Comprehensive Regulatory Program Addressing Damage from GHG Pollution 34

2. EPA Action Since the Second Circuit's Ruling Does Not Displace the Courts; Final Action by Administrative Agencies or by Congress Is Extremely Uncertain 36

CONCLUSION 38

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Allen v. Wright, 468 U.S. 737 (1984) 24

Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970) 26

Baker v. Carr, 369 U.S. 186 (1962) 22

Board of Commissioners v. United States, 308 U.S. 343 (1939) 32

Brown v. Board of Education, 347 U.S. 483 (1954) 18

City of Evansville, Indiana v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008 (7th Cir. 1979) 28

City of Milwaukee v. Illinois, 451 U.S. 304 (1981) 31, 32

Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) 32

Committee for Consideration of Jones Falls Sewage System v. Train, 539 F.2d 1006 (4th Cir. 1976) 32

Connecticut v. American Electric Power Company, Inc., 582 F.3d 309 (2d Cir. 2009) ..... *passim*

County of Oneida v. Oneida Indian Nation, 70 U.S. 226 (1985) 33

Cox v. City of Dallas, 26 F.3d 281 (5th Cir. 2001) 22

Diamond v. Chakrabarty, 447 U.S. 303 (1980) 31

TABLE OF AUTHORITIES – Continued

Page

D'Oench, Duhme & Co. v. Federal Deposit Insurance Corporation, 315 U.S. 447 (1942).....32

Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004).....24, 25

Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907).....28, 29, 30

Illinois v. Milwaukee, 406 U.S. 91 (1972).....28

Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44 (2d Cir. 1991).....23

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).....21

Massachusetts v. Environmental Protection Agency, 549 U.S. 497 (2007).....21, 22, 31, 34

McMahon v. Presidential Airways, Inc., 502 F.3d 1331 (11th Cir. 2007).....23

Maine People's Alliance & Natural Resource Defense Council v. Mallinckrodt, Inc., 471 F.3d 277 (1st Cir. 2006).....23

Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981).....35

Miree v. DeKalb County, 433 U.S. 25 (1977).....32

Missouri v. Illinois, 180 U.S. 208 (1901).....28

Mugler v. Kansas, 123 U.S. 623 (1887).....27

National Sea Clammers Association v. City of New York, 616 F.2d 1222 (3d Cir. 1980).....28

TABLE OF AUTHORITIES – Continued

Page

Natural Resources Defense Council, Inc. v. Watkins, 954 F.2d 974 (4th Cir. 1992) 22

New Jersey v. New York, 283 U.S. 336 (1931) 31

Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64 (3d Cir. 1990) 22

Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949) 22

Snapp v. Puerto Rico ex rel. Barez, 458 U.S. 592 (1982) 21

Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978) 28, 31

Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) 28

Tozzi v. U.S. Department of Health & Human Services, 271 F.3d 301 (D.C. Cir. 2001) 22

U.S. v. Gilman, 347 U.S. 507 (1954) 31

U.S. v. Little Lake Misere Land Co., 412 U.S. 580 (1973) 32

Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982) 26

Warth v. Seldin, 422 U.S. 490 (1975) 25, 26, 27

INTERESTS OF THE *AMICI CURIAE*[1]

Amici are environmental organizations with significant experience in studying, managing and protecting natural and cultivated resources in the states of California and Oregon, including mountains, deserts, forests, rivers, lakes, estuaries and their ecosystems. They are the North Coast Rivers Alliance, Desert Protection Society, California Sportfishing Protection Alliance, and Klamath Forest Alliance. *Amici* are not affiliated with any party to this action, and write solely to offer an environmental perspective on the significant issues of public welfare at stake in this dispute.

Amicus North Coast Rivers Alliance ("NCRA") is an unincorporated association of conservation leaders from throughout the north coast of California engaged in the submission of comments and expert testimony on land and water resource management issues. NCRA seeks compliance by local, state and federal agencies and private industry with state and federal environmental laws. NCRA's members use California's north coast rivers for fishing, boating, swimming and scientific study, and are concerned about the adverse effects of greenhouse gas emissions

---

[1] All petitioners and respondents have consented to the filing of *amicus* briefs, in support of either party or of neither party. This brief was not written in whole or in part by counsel for a party. No person or entity other than *amici* made any monetary contribution to the preparation or submission of this brief.

on river flows and the well being of fish and wildlife dependent on them in northern California.

Amicus Desert Protection Society ("DPS") is a non-profit California corporation formed in 1993 for the purpose of protecting and preserving the scenic, scientific, historic and recreational resources of the California desert. DPS' members use the California desert for scientific study, recreation, aesthetic enjoyment and agriculture, and are concerned about the adverse effects of greenhouse gases on climate change in the California desert, including the increasing summer temperatures over the past three decades, and their adverse effects on desert wildlife such as the endangered Peninsular Bighorn Sheep and the Desert Tortoise. DPS has engaged in public education to promote awareness of the unique and fragile resources of the California desert, and has participated in state and federal litigation to protect and restore California's unique desert resources.

Amicus California Sportfishing Protection Alliance ("CSPA") is a non-profit public benefit corporation organized under the laws of California to preserve California's public-trust fishery resources and enforce the state and federal laws that protect them. CSPA's members use northern California rivers for sport and commercial fishing, aesthetic enjoyment, nature study, boating and swimming, and are concerned about the adverse effects of greenhouse gas emissions on the shrinking Sierra Nevada snowpack and declining summer and fall flows of its rivers and those of the California Coast Range.

Amicus Klamath Forest Alliance ("KFA") is a non-profit public benefit corporation organized under the laws of California to promote sustainable forest ecosystems and economies in northern California and southwest Oregon through public education, advocacy and litigation. KFA's members use the mountains, forests, lakes and rivers of the region for nature study, fishing, boating, hiking, photography, and aesthetic enjoyment. They are concerned about the adverse effects of greenhouse gas emissions on climate change in the Cascade ranges of northern California and southwest Oregon, including rising summer temperatures and declining river flows, and the resulting adverse impacts on fish and wildlife.

SUMMARY OF ARGUMENT

Global warming poses significant, widespread and well documented threats to public health and welfare. Global warming is causing sea levels to rise, glaciers and mountain snowpacks to shrink, summer and fall river flows to decline, wildfires to increase, hurricanes to intensify, and summer heat waves and droughts to become more severe and prolonged. These changes have widespread adverse impacts to agricultural productivity, recreational and commercial fishing, forestry, and human health and safety, particularly among the elderly and infirm.

Although global warming's adverse impacts are widespread, they cause specific harm to respondents,

thus conferring standing to bring this lawsuit. Respondents have suffered particular, concrete, actual, imminent and redressable harms due to the petitioners' failure to limit greenhouse gas emissions that lead to global warming. These harms are well within the public nuisance cause of action traditionally ascribed to federal common law.

ARGUMENT

I. GLOBAL WARMING THREATENS SIGNIFICANT HARM TO PUBLIC HEALTH AND WELFARE

> Warming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice and rising global average sea level.[2]

As a result of global warming and associated weather pattern changes, regions of the United States have suffered a wide spectrum of devastating effects, including unprecedentedly destructive hurricanes, brutal winters, extensive flooding, extreme heat waves, and widespread and prolonged drought.

---

[2] Intergovernmental Panel on Climate Change ("IPCC"), CLIMATE CHANGE 2007 SYNTHESIS REPORT: CONTRIBUTION OF WORKING GROUPS I, II AND III TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 30 (Intergovernmental Panel on Climate Change 2008), located at http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf.

Global sea levels have already risen, and future increases in sea levels threaten the very existence of many coastal communities. Glaciers and mountain snowpacks continue to shrink, causing summer and fall river flows to decline in quantity and quality. The acreage of total arable land and irrigated farmland continues to diminish. Summer temperatures are rising, crops are failing, the Sierra Nevada snowpack is dwindling, winter flooding is increasing and summer river flows are declining. The elderly and the infirm are dying in aberrant heat waves and unusually harsh winters.

Despite these dire consequences and the uncontroverted evidence that anthropogenic greenhouse gas ("GHG") emissions are directly contributing to climate change (*id.* at 36-38), petitioners here ask that they be allowed to continue to degrade the planet's atmosphere for pecuniary gain without consequence or compensation to those affected by their actions. This request should be denied.

A. Decreased Availability of Fresh Water

Most Western states, including California and Oregon, depend on mountain glaciers and seasonal mountain snowpack to assure a year-round fresh water supply for domestic and agricultural uses.[3] In fact, snowmelt provides approximately 70 percent of

---

[3] Bruce E. Johansen, GLOBAL WARMING IN THE 21ST CENTURY 195-196, 224-227 (PRAEGER PUBLISHERS, 2006).

water flow in the western United States. California, in particular, is extremely dependent on snowpack storage of water. According to Jeffery Mount, professor of ecogeomorphology at the University of California, Davis, "[California] clings to the Sierra Nevada. The health of the Sierra Nevada, the hydrology of the Sierra Nevada, is everything to California." *Id.*

California's water supply is now at substantial risk. Each year, the mountain snow in the Sierra Nevada accumulates later and melts earlier, concurrent with a steady rise in average annual temperature.[4] This shortened season results in less overall snowpack accumulation, and less freshwater storage for human consumers. The mountain elevation level at which freezing occurs rises with temperature, meaning that much of the precipitation that once fell as snow will now fall as rain, leading to more frequent and severe flooding and a critical decrease in snowpack storage.[5]

Since springtime snowmelt is the primary source of water for the state, changes in the volume and timing of that freshwater infusion have significant

---

[4] *Id.*; I.T. Stewart, et al., "Changes Toward Earlier Streamflow Timing Across Western North America," *Journal of Climate* 18:1136-1155 (April 15, 2005).

[5] Johansen, *supra*, at 225-226; D.F. Boesch et al., *The Potential Consequences of Climate Variability and Change on Coastal Areas and Marine Resources: Report of the Coastal Areas and Marine Resources Sector Team*. Silver Spring, USGCRP:163 (2000).

impacts on state water management programs. *Id.* Rising temperatures prevent storage of precipitation as snow, increase flooding, erosion and landslides,[6] and exacerbate fluctuations in river flows, harming agricultural, municipal, and recreational consumers of that water. Furthermore, higher summer temperatures and lower forest moisture create dry conditions conducive to bark beetle infestations of forests and the ignition and spread of wildfires.[7]

Regional rainfall has dropped by 20 percent in many parts of California since 1900.[8] Some models predict even greater declines in precipitation as average temperatures increase.[9] In combination with decreased snowpack and more variable runoff flows, this drop in rainfall will worsen the existing water crisis in California. As water budgets in the West grow ever tighter, global warming will only aggravate the intensity and frequency of future disputes and sacrifices due to limited supplies.[10]

---

[6] United Nations Environmental Programme (UNEP), *Glacial Lake Outburst Flood Monitoring and Early Warning System* (2000), available at http://www.rrcap.unep.org/issues/glof.

[7] Johansen, *supra*, at 222-223.

[8] T.R. Karl et al., "Indices of Climate Change for the United States," *Bulletin of the American Meteorological Society*, 77:279-291 (1996).

[9] J.M. Lenihan et al., "Climate Change Effects on Vegetation Distribution, Carbon, and Fire in California," *Ecological Applications* 13(6):1667-1681 (2003).

[10] Johansen, *supra*, at 226-227.

B. Extreme Temperatures

The EPA estimates that a warming of three degrees Fahrenheit would almost double the annual heat-related deaths in Los Angeles, from 70 (in 1997) to 125.[11] The National Academy of Sciences projects that by the end of the 21st century, rising temperatures would cause a seven-fold increase in heat-related deaths in Los Angeles based on a 15-degree rise in summertime high temperatures, or a climate similar to that of Death Valley at present.[12] Even a small rise in global temperature can increase substantially the number of extremely hot days, increasing the likelihood of "killer" heat waves.[13] Such heat waves exacerbate preexisting cardiovascular and respiratory disorders, disproportionately affecting the elderly, very young, poor, and ill.[14] High temperatures

---

[11] J. Patz et al., *Climate Change and Health in California: A Pier Research Roadmap*, prepared for California Energy Commission (CEC-500-2005-093) (May 2005) (available at http://www.energy.ca.gov/pier/final_project_reports/CEC-500-2005-093.html)

[12] Johansen, *supra*, at 226-227.

[13] IPCC, *supra*, at 46, 51-52; Johansen, *supra*, at 190-191; T.R. Karl and R.W. Knight, "The 1995 Chicago heat wave: How likely is a recurrence?" *Bulletin of the American Meteorological Society* 78:1107-1119 (1997).

[14] IPCC, *supra*, at 46, 51-52; A.J. McMichael, *Human population health*. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE THIRD ASSESSMENT REPORT: CLIMATE CHANGE 2001 (Cambridge University Press, Cambridge, UK).

in urban areas also increase ground-level ozone, a pollutant that causes lung damage.[15]

In 2006 California experienced one of the most deadly heat waves on record, resulting in well over one hundred deaths and temperatures over 120 degrees in many towns across the state.[16] Many of the deaths were due to the fact that, unlike prior heat waves, the 2006 heat wave saw extremely high nighttime temperatures as well as daytime highs, so those affected were unable to recover at night.[17] And this, according to the IPCC, is only a sign of things to come: "[North American] [c]ities that currently experience heat waves are expected to be further challenged by an increased number, intensity and duration of heat waves during the course of the century."[18]

C. Extreme Weather Events

The World Meteorological Organization has documented a link between global warming and increasing extreme weather events, as have independent researchers, who write that "the increasing . . . number of category 4 and 5 hurricanes . . . is directly

---

[15] *Id.*; *see also*, Johansen, *supra*, at 614-616.

[16] J. Steinhauer, "In California, Heat is Blamed for 100 Deaths," NEW YORK TIMES, July 28, 2006.

[17] H. Becerra, "High Nighttime Temperatures Set Records Too," LOS ANGELES TIMES, July 25, 2006.

[18] IPCC, *supra*, at 51-52.

linked to" increasing temperatures.[19] Hurricane modeling has produced similar results. Simulated hurricanes modeled under warmer, high-GHG conditions are more intense, and a greater number of them evolve into powerful Category 5 storms.[20] Many people have already died as a result of increased hurricane activity in the Gulf region, and it is expected that deadly hurricane activity will only increase on average. Although the West Coast does not suffer hurricanes, climate change-induced increases in precipitation have caused flooding and landslides, particularly in California.[21]

D. Disease

Global warming will exacerbate many public health problems. According to the IPCC:

> The health status of millions of people is projected to be affected through, for example, increases in malnutrition; increased deaths, diseases and injury due to extreme weather

---

[19] C. Hoyos et al., "Deconvolution of the Factors Contributing to the Increase in Global Hurricane Intensity," *Science* (16 March 2006) 11235601 (DOI: 10.1126).

[20] T.R. Knutson, "Impact of CO2-Induced Warming on Simulated Hurricane Intensity and Precipitation: Sensitivity to the Choice of Climate Model and Convective Parameterization," *Journal of Climate* 17(18):3477-3495 (Sep. 15, 2004).

[21] D.F. Boesch et al., *The Potential Consequences of Climate Variability and Change on Coastal Areas and Marine Resources: Report of the Coastal Areas and Marine Resources Sector Team.* Silver Spring, USGCRP:163 (2000).

> events; increased burden of diarrhoeal diseases; increased frequency of cardio-respiratory diseases due to higher concentrations of ground-level ozone in urban areas related to climate change; and the altered spatial distribution of some infectious diseases.[22]

As mentioned, climate change will increase the spread of infectious diseases. For example, in 1970, Dengue fever, a prolonged, flu-like infection that can cause internal bleeding, fever, and death, had nearly disappeared from the Americas.[23] Because of rising temperatures, the range of the mosquito that carries Dengue fever has increased dramatically. *Id.* Consequently, Dengue fever is now common in much of South and Central America, and has spread as far north as areas of Texas "for the first time since records have been kept." *Id.* at 602. Similarly, geographic ranges for many diseases such as malaria, West Nile virus, western equine encephalitis, St. Louis encephalitis, Lyme disease, hantavirus, and *Vibrio parahaemolyticus* gastroenteritis will all expand as temperatures continue to rise, increasing the number of cases of severe illness and death directly attributable to global warming.[24]

---

[22] IPCC, *supra*, at 48.

[23] Johansen, *supra*, at 601-02.

[24] *Id.*; P.R. Epstein, "Climate Change and Human Health," *New England Journal of Medicine* 353(14):1433-1436 (October 6, 2005); P.R. Epstein, "West Nile Virus and the Climate," *Journal of Urban Health* 78(2):367-371 (June 2001).

E. Recreational and Commercial Fishing

Oceans absorb most of the excess carbon dioxide produced by humans, either as dissolved gas, or in the calcium carbonate skeletons of marine animals. It is estimated that the oceans have absorbed around half of all carbon dioxide generated by human activities since 1800.[25] In seawater, dissolved carbon dioxide becomes a weak carbonic acid, lowering the water's pH. *Id.* As the carbon dioxide content of the atmosphere has increased, the acidification of the oceans has harmed many forms of marine life, including several species of commercial fish.[26] Other warming-induced changes have serious ramifications for fisheries and ocean life. For instance, temperature anomalies in the North Atlantic have already degraded the entire ocean food chain, starting from the bottom: "[f]ree-floating microscopic plants called phytoplankton, the base of the oceanic food web, have been declining rapidly in areas where they once nourished rich fisheries, most notably in the temperate areas of the world's oceans in the Northern and Southern hemispheres."[27] Additionally, migration

---

[25] C.L. Sabine et al., "The Oceanic Sink for Anthropogenic CO2," *Science* (July 16, 2004) 305 (5682):367-371.

[26] *Id.*; IPCC, *supra*, at 48, 52.

[27] Johansen, *supra*, at 463; *see also* D.H. Cushing, *Population Production and Regulation in the Sea: A Fisheries Perspective* (Cambridge Univ. Press, Cambridge, 1995); J.M. Fromentin & B. Planque, "*Calanus* and environment in the eastern North Atlantic." 2. Influence of the North Atlantic Oscillation on *C.*

(Continued on following page)

patterns and spatial distributions of large fish, such as bluefin tuna, have been altered through climate-induced changes in prey abundance and temperature changes.[28] Overall, global fish production is expected to fall substantially as a result of rising ocean temperatures and acidity.[29] Changes like this have already affected fisheries in the northeast Pacific ecosystem.[30] In addition, global warming impacts on river water temperatures and flows and wetland habitats are severely degrading the health of fish populations including trout and salmon, harming commercial and sport fishing industries.[31] An analysis of global warming impacts on trout habitat predicts that up to 42 percent of existing fish habitat in the

---

finmarchius and *C. helgolandicus*. *Marine Ecology Prog. Service* 134:111-118 (1996).

[28] *Id.*; J.J. Polovina, "Decadal variation in the trans-Pacific migration of northern bluefin tuna (*Thunnus thynnus*) coherent with climate-induced change in prey abundance." *Fish Oceanography* 5:114-119 (1996).

[29] G.R. Walther et al., "Ecological Responses to Recent Climate Change," *Nature* 416:389-395 (March 28, 2002).

[30] J. A. McGowan, D. R. Cayan & L. M. Dorman, "Climate-ocean variability and ecosystem response in the Northeast Pacific," *Science* 281:210-217 (1998).

[31] D. Caissie, "The Thermal Regime of Rivers: A Review," *Freshwater Biology*, 51(8):1389-1406 (August 2006); D.W. Welch, Y. Ishida, and K. Nagasawa, "Thermal Limits and Ocean Migrations of Sockeye Salmon (*Oncorhynchus nerka*): Long-term Consequences of Global Warming," *Canadian Journal of Fisheries and Aquatic Science* 55: 937-948 (1998).

West could be lost by 2090.[32] A 50 percent loss in wetland area and productivity will lead to a 15 to 20 percent loss in estuarine-dependent fish harvests by the end of this century. *Id.*

F. Agriculture

Farming across the United States will be adversely affected by changes in rainfall distribution patterns, higher temperatures, and drought. Contrary to premature predictions by some that increased atmospheric carbon dioxide will increase agricultural production,[33] the negative impacts of higher temperatures and a destabilized water supply will outweigh any positive fertilization effect. The cereal grasses (wheat, rice, and corn) producing most of the nation's calories benefit *least* from increases in carbon dioxide.[34] The slight increases in crop yields due to greater concentrations of carbon dioxide in the air are more than offset by higher temperatures

---

[32] K. O'Neal, EFFECTS OF GLOBAL WARMING ON TROUT AND SALMON IN U.S. STREAMS (Defenders of Wildlife, 2002).

[33] R.M. Adams et al., "A Reassessment of the Economic Effects of Global Climate Change on U.S. Agriculture," *Climatic Change* 30(2):147-167 (1995).

[34] E.A. Ainsworth and S.P. Long, "What Have We Learned from Fifteen Years of Free-Air CO2 Enrichment (FACE)? A Meta-Analytic Review of the Responses of Photosynthesis, Canopy Properties and Plant Production to Rising CO2," *New Phytologist* 165:351-72 (2005).

and decreases in soil moisture.[35] For example, rice yield declines by ten percent for each 1-degree rise in growing-season minimum temperatures.[36] Where increased carbon dioxide accelerates crop growth, it simultaneously *diminishes* the nutritional quality of that crop.[37] Levels of protein decreased by an average of 14 percent across the cereal grains studied when they were exposed to increased levels of carbon dioxide.[38] Concentrations of iron and zinc also dropped under the same conditions.[39] Alterations in rainfall distribution patterns, as well as more rapid spring snowmelt, are causing increased erosion of

---

[35] H. Fountain, "Observatory: Threat to Rice Crops," NEW YORK TIMES, December 12, 2000, F-5; *see, also*, Intergovernmental Panel on Climate Change, *CLIMATE CHANGE 2001: IMPACTS, ADAPTATION AND VULNERABILITY*, section 5.3 (Cambridge University Press, Cambridge 2001).

[36] S. Peng et al., "Rice Yields Decline with Higher Night Temperature From Global Warming," *Proceedings of the National Academy of Sciences* 101(27):9971-9975 (July 6, 2004).

[37] L.M. Jablonski, X. Wang, and P.S. Curtis, "Plant Reproduction under Elevated CO2 Conditions: A Meta-Analysis of Reports on 79 Crop and Wild Species," *New Phytologist* 156 (2002) 9-26.

[38] "More Carbon Dioxide Could Reduce Crop Value," *Environment News Service*, October 3, 2002.

[39] S.P. Seneweera and J.P. Conroy, "Growth, Grain Yield and Quality of Rice (*Oryza sativa L.*) in Response to Elevated CO2 and Phosphorus Nutrition," *Soil Science and Plant Nutrition* 43:1131-1136 (1997).

farmland, and rising sea levels are causing coastal erosion.[40]

G. The Costs of Climate Change Impacts

According to the IPCC: "Multiple industries, such as timber, fisheries, travel, tourism, and agriculture are threatened by disturbances caused by climate change. Impacts on these sectors will influence financial markets, insurance companies and large multinational investors."[41] For example, a prominent study authored by British economist Nicholas Stern predicts that it would require a commitment of 1 percent worldwide gross domestic product ("GDP") to stabilize the carbon emissions and thereby avoid the worst effects of climate change.[42] Stern predicted that failure to cut emissions in the very near future would result in a 20 percent decrease in global GDP in the second half of this century. *Id.* In 2008 Stern doubled his estimate for the cost of carbon stabilization to 2

---

[40] K. Zhang, B.C. Douglas and S.P. Leatherman, "Global Warming and Coastal Erosion," *Climatic Change* 64(1-2):41-58 (May 2004).

[41] IPCC, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY. CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE: ECOSYSTEMS, THEIR PROPERTIES, GOODS, AND SERVICES 246 (Cambridge University Press, Cambridge, M.L. Parry, O.F. Canziani, J.P. Palutikof, P.J. van der Linden and C.E. Hanson, Eds., 2007).

[42] N. Stern, *Stern Review on The Economics of Climate Change* (HM Treasury, 2006).

percent of the world's GDP in light of the unexpected rapidity of the changes to the global environment.[43] Using a different metric, another recent report, focused on the United States only, states,

> if present trends continue, the total cost of global warming will be as high as 3.6 percent of gross domestic product (GDP). Four global warming impacts alone – hurricane damage, real estate losses, energy costs, and water costs – will come with a price tag of 1.8 percent of U.S. GDP, or almost $1.9 trillion annually (in [2008] dollars) by 2100.[44]

Despite the difficulty in projecting accurate future costs, it is apparent that failure to act now will multiply the costs in the future – including the costs of adapting to new climate challenges, replacing ecosystem services, and attempting to reverse – if possible – the degradation of the planet's atmosphere.

II. THE JUDICIARY IS WELL EQUIPPED TO TACKLE CLIMATE CHANGE LITIGATION

Contrary to the claims of certain *amici*, affirming the Second Circuit's decision will not (1) cause "hundreds" of similar lawsuits to be filed that will

---

[43] J. Jowit and P. Wintour, *Cost of tackling global climate change has doubled, warns Stern*, The Guardian, June 26, 2008.

[44] F. Ackerman, E. A. Stanton, THE COST OF CLIMATE CHANGE; WHAT WE WILL PAY IF GLOBAL WARMING CONTINUES UNCHECKED iv (Natural Resources Defense Council, 2008)

overwhelm the courts, (2) "destabilize our economy," or (3) "undermine our political process." U.S. Chamber of Commerce *Amicus Curiae* Brief, p. 5. First, as admitted by petitioners, there are very few similar cases currently pending in the nation's courts. Pet. Br. 2, n. 1. Petitioners in fact could cite only one. *Id.* Further, this case only concerns injunctive relief to limit future emissions. Future cases may target other large polluters seeking similar relief, but as courts rule on these cases the range of defendants will shrink quickly. Consequently, motivation to file lawsuits seeking injunctive relief against an ever-smaller array of polluters with fewer and fewer emissions will diminish. As to the claims that injunctions setting future limits on GHG emission will destabilize our economy, one need only refer to the extraordinary profits of large energy producing corporations to recognize the fallacy of such a statement. Under even the most basic of common law principles, no actor is permitted to profit from the destruction of other entities' property and the health and safety of citizens.

As to the claim that the Second Circuit's holding threatens to undermine the political process of the United States, nothing could be further from the truth. Courts have a long-standing history of tackling difficult and large-scale problems when other branches of the government were unable to act, *e.g.*:

- *Brown v. Board of Education*, 347 U.S. 483 (1954) – This Court ordered the desegregation of the nation's entire public school system.

- Asbestos Litigation – According to one database, asbestos litigation has involved at least 200,000 lawsuits, 700,000 plaintiffs, and several thousands defendants,[45] and the rate at which people are diagnosed with asbestos-related diseases will likely increase through the next decade.

- *Arizona vs. California* – The Courts, through the use of a special master, determined the states' and tribes' rights to the waters of Colorado River.

- Oil Spill Litigation – Courts resolved the extensive litigation pertaining to the Exxon Valdez oil spill and the current multifaceted litigation resulting from the more recent Gulf Oil Spill.

These cases, among many others, demonstrate that the courts are fully capable of addressing large-scale environmental problems. The fact that a problem is significant and affects many different interests should not weigh against its resolution by the courts; rather, such circumstances counsel for the judiciary's action to resolve such a problem.

---

[45] Navigant Consulting, Asbestos Litigation Database, located at: http://navigant.designreactor.com/downloads/AsbestosLitigationDatabase_Global_IC.pdf.

III. THE WIDESPREAD DAMAGE ALREADY CAUSED BY GLOBAL WARMING, AS WELL AS THE POTENTIALLY HORRENDOUS IMPACTS FUTURE GENERATIONS WILL EXPERIENCE, MUST BE ACCOUNTED FOR UNDER THE LAW

As shown above, the physical threats posed by global warming and the ability of the judiciary to address those threats are well documented and establish the strong scientific, practical, and philosophical foundation for judicial action. The legal foundation for such action, however, is equally clear, as demonstrated by the excellent analysis of the Second Circuit Court of Appeals. Accordingly, Western Conservation Organizations restrict their legal argument to several specific issues most pertinent to this Court's review.

The generalized effects of global warming have specific adverse impacts on petitioners, conferring standing to bring this action. Petitioners have suffered particular, concrete, actual, imminent, and redressable harms due to petitioners' GHG emissions that lead to global warming. Western Conservation Organizations agree with the Tennessee Valley Authority ("TVA") that respondents have satisfied the requirements of Article III standing and that the Political Question Doctrine is not an appropriate lense through which to examine respondents' claims. As TVA observed, "plaintiffs' allegations are sufficient to survive a motion to dismiss" on Article III grounds, and this "Court also need not, and should not, decide

whether plaintiffs' suits are barred by the political question doctrine." Brief for the Tennessee Valley Authority as Respondent Supporting Petitioners ("TVA Brief") at 11, 12.

The requirements of Article III standing are satisfied first because general allegations are usually sufficient at the pleadings stage, lowering the burden such that plaintiffs need only show a credible risk to their interests. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Second, as this Court explained in *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) ("*Massachusetts v. EPA*"), States enjoy relaxed standing criteria that avoid normal standards for redressability and immediacy. Furthermore, as recognized in *Snapp v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982), there is no reason why rights accorded to the states for more than a century to bring common law nuisance claims should be denied here.

The specific elements of Article III standing are (1) a sufficiently concrete, particular, and immediate injury in fact; (2) causation such that the conduct complained of is fairly traceable to the conduct complained of; and (3) the likelihood of the injury being redressed by a favorable ruling. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Each element exists here. First, both current and future injuries have been exhaustively demonstrated by the thoroughly documented climate change related harms described above. Second, because the harm alleged can be the result of many contributing factors so long

as petitioners can reasonably be found to have added to that harm, causation is satisfied. *See Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 72 (3d Cir. 1990) (holding that every possible cause of an injury need not be sued to establish standing); *Natural Res. Def. Council, Inc. v. Watkins*, 954 F.2d 974, 980 n. 7 (4th Cir. 1992) (distinguishing tort requirements for causation from those of Article III standing); *Cox v. City of Dallas*, 256 F.3d 281, 292 n. 19 (5th Cir. 2001) (common law nuisance encompasses actions which contribute to the creation of the nuisance). Third and finally, this Court's determination in *Massachusetts v. EPA*, 549 U.S. at 525, that lowering motor vehicle emissions "would slow or reduce harms suffered as a result of global warming buttresses the Second Circuit's determination that reducing GHG emissions from powerplants would satisfy the redressability requirements of Article III standing. *Connecticut v. American Electric Power Company, Inc.*, 582 F.3d 309, 347-349 (2d Cir. 2009) ("American Electric"); *Tozzi v. U.S. Dep't of Health & Human Servs.*, 271 F.3d 301, 310 (D.C. Cir. 2001); *cf. Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) (equal protection does not impose an all or nothing requirement).

TVA's arguments concerning the inappropriateness of applying the Political Question Doctrine to the particular circumstance of this case likewise bear emphasis. TVA Brief 39. As per the factors established by *Baker v. Carr*, 369 U.S. 186, 217 (1962): (1) separation of powers is not implicated because the

political branches have remained silent on global warming and there is no textual commitment of the regulation of nuisance in general or of GHGs in particular in the Constitution to either the Executive or Legislative branches (see *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991); *Maine People's Alliance & Natural Res. Def. Council v. Mallinckrodt, Inc.*, 471 F.3d 277, 286 (1st Cir. 2006) (both cases stating that nuisance is the provenance of the judiciary); (2) this case is governed by recognizable common law nuisance standards;[46] (3) ordinary tort suits like this one are inherently susceptible to judicial discretion *(McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1365 (11th Cir. 2007); and (4)-(6) this case demonstrates no lack of respect or embarrassment for the political branches or for the nation as a whole, nor does it contravene a need for unquestioning adherence to already made political decisions, in large part because there is no established U.S. policy on GHGs. Consequently, and contrary to the majority of briefs filed so far, the discussion of legal issues raised by the present case ought to begin with Prudential Standing.

---

[46] This factor bears such a striking resemblance to prudential issues covered in depth below that petitioners (Pet. 47-49), as well as many of the *amici* writing in support of petitioners, have become confused. As pointed out by the Second Circuit, the standards undoubtedly exist and can be applied. *American Electric*, 582 F.3d at 328-330. Whether or not they should be applied is beyond the scope of the Political Question Doctrine and belongs rather in a discussion of Prudential Standing.

A. Prudential Standing

This case represents the functioning of the American system of government at its finest, where the three coequal and coordinate branches operate through a system of checks and balances to ensure that the weakness of each particular branch is counter-balanced by the strength of one of its coordinate branches. Here, we see the inherent weakness of a political system besieged by special interests and frozen by the magnitude of the challenge to the American system of government posed by global warming. The legislative and executive branches have been emasculated by disproportionately powerful special interests and the self-interested scientific demagoguery of some of the most powerful economic interests ever known. There is no more appropriate time and place for a judiciary to stand for equity and justice than here and now, counter-balancing the failures of the other branches rather than deferring to those failures.

Prudential Standing involves limits self-imposed by the federal judiciary. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004). Under *Allen v. Wright*, 468 U.S. 737, 751 (1984), Prudential Standing is defined as

> several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a

> plaintiff's complaint fall within the zone of interests protected by the law invoked.

Petitioners and TVA place particular emphasis on a description of Prudential Standing as a doctrine which requires courts to absent themselves from disputes that involve an "abstract question of wide public significance." *Warth v. Seldin*, 422 U.S. 490, 500 (1975); TVA Brief 14; Pet. 19-20. Prudential Standing is a more appropriate doctrine under which to analyze the primary legal questions raised by petitioners and TVA because the undefined character of the doctrine lends itself to complex discussions of judicial philosophy and theories of government. According to this Court, "we have not exhaustively defined the prudential dimensions of the standing doctrine." *Elk Grove Unified Sch. Dist.*, 542 U.S. at 12.

Nevertheless, the arguments advanced by petitioners and TVA make the same basic mistake of earlier arguments made before the Second Circuit which conflate the ability of the court to handle climate litigation with the will of the court to do so. It is beyond a doubt that this Court *can* act, as demonstrated by the Second Circuit's thorough treatment of the foundational legal issues of federal nuisance jurisprudence. The question therefore becomes one of the will to act, and especially the will to act in fairness and equity when the other great institutions of American government find themselves cowed by exactly the arguments raised by petitioners and TVA to cow this Court.

1. Petitioners Have Prudential Standing

Petitioners place the foundation for Prudential Standing principles in *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474-475 (1982) ("*Valley Forge*"). This foundation, as explained by this Court in *Valley Forge*, consists of a "set of prudential principles" that require: (1) the plaintiff to "assert his own legal rights and interests" rather than those of third parties (citing *Warth v. Seldin*, 422 U.S. at 499); (2) courts to refrain from ruling on "'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches" (quoting *Warth v. Seldin*, 422 U.S. at 499-500); and (3) the particular complaint at issue to "fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question'" (quoting *Association of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 153 (1970). It is undisputed by petitioners and TVA that respondents are asserting their own legal rights and that respondents' claims fall within the zone of interests typically protected by the common law of nuisance. Therefore petitioners and TVA must focus on the second *Valley Forge* principle and the claim that respondents' claims constitute a generalized grievance.

Despite TVA's attempt to break this second *Valley Forge* principle down into constituent parts (TVA Brief 14-15), the principle itself remains essentially a holistic description of an uncompelled judicial

philosophy of self-governance rather than a sharply delineated methodology by which to evaluate standing. Essentially, TVA would have this Court declare that, due to the scope of the problem, this Court is helpless. In fact, the present case presents a well-defined example of judicial power which can be applied without setting public policy. As this Court explained in *Warth v. Seldin*, 422 U.S. at 500, "the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." Arguing that because there is no statutory or constitutional provision this Court should deny respondents' standing is tantamount to denying standing to all common law claims. Because this is clearly an absurd result, it must be assumed that there is an additional term in the description from *Warth v. Seldin*, namely "whether the constitutional or statutory provision [or common law claim] on which the claim rests properly can be understood as granting persons" standing. *Id.* Once spelled out in these terms, the argument becomes simply whether or not a federal common law nuisance cause of action exists for respondents, a question Western Conservation Organizations believe the Second Circuit conclusively answered in the affirmative.[47] Thus, the right to

---

[47] Western Conservation Organizations believe that the question of a cause of action has been established by the Second Circuit's exhaustive description, including the tracing of nuisance claims through both case law (beginning with *Mugler v.*

(Continued on following page)

judicial relief itself argues strongly against a denial of Prudential Standing in the present case.

Kansas, 123 U.S. 623 (1887), proceeding through *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907); *Missouri v. Illinois*, 180 U.S. 208 (1901), and *Illinois v. Milwaukee*, 406 U.S. 91 (1972), and finishing with the influence that the Restatement (Second) of Torts has had over federal cases including *Nat'l Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222 (3d Cir. 1980); *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), and *City of Evansville v. Ky. Liquid Recycling, Inc.*, 604 F.2d 1008 (7th Cir. 1979)). The Second Circuit concludes this analysis by finding that the injuries claimed constitute (1) an unreasonable interference with (2) a right common to the general public. Further, the Appeals Court found that the distinction between a statutory cause of action and a common law cause of action is irrelevant to the current case. In other words, federal courts have not been stripped of their authority to determine where a federal common law cause of action exists. *American Electric*, 582 F.3d at 349-371 (2d Cir. 2009). The Second Circuit's analysis dispatches petitioners' arguments by showing that there had never been "a requirement upon all federal common law of nuisance cases that the challenged pollution must be 'directly traced' or that plaintiffs must sue all sources of the pollution complained of in order to state an actionable claim" (*Id.* at 356); explaining "that a state raising a claim based on quasi-sovereign interests is 'somewhat more certainly entitled to specific relief than a private party might be'" (*id.* at 354-355 (quoting *Tennessee Copper Co.*, 206 U.S. at 237)); and demonstrating that private parties are not precluded from participating (*Id.* at 362). Nowhere in the common law of nuisance is there a "geographic nexus" requirement, as TVA tries to invent. TVA Brief 43 n. 20. As TVA itself explains to the contrary, this Court "did not suggest that the novel nature of the claim, the difficulty of the scientific question, or the physical attenuation between the release of sewage in Chicago and the alleged spread of disease in St. Louis had placed that claim beyond the common law's reach." *Id.*

TVA has lost sight of the limited relief sought by respondents in its attempt to cast the context of the present case as too large to comprehend. TVA Brief 15. Respondents are actually foreclosing a multiplicity of suits and aiding judicial efficiency by seeking an order forcing "Defendants to cap and then reduce their carbon dioxide emissions." *American Electric*, 582 U.S. at 314. Once such an order is in place there will no longer be any cause to pursue claims, and the already sparse landscape of global warming nuisance claims will dry up altogether. This Court is not being asked to determine the claim of TVA's bugbear, "unimaginably broad categories of both potential plaintiffs and potential defendants." TVA Brief 16. Nor is this Court being asked to determine a system of damages for global warming claims. Rather, this Court is simply being asked to allow respondents to exercise their right to seek judicial redress to limit the continuing damage and thus enable respondents to plan for the future costs of adapting to all of the myriad effects of climate change.

2. The Courts Have a Unique Responsibility

In petitioners' attempt to frighten the Court, they have cast the present case as a judicial takeover of the entire realm of air pollution regulation. This is analogous to an argument that *Georgia v. Tennessee Copper Co.* was also a judicial takeover of the regulation of air pollution, when in reality that case only

involved the limitation of harmful emissions from a discrete set of emitters so as to ameliorate future damages. 206 U.S. 230. Only the courts have the authority to address and apply the federal common law of nuisance and protect the fundamental concept of equity that it embodies. No other branch of government is better equipped to do so than the judiciary. It is fundamental to this analysis that any broad balancing of "the burdens reasonably and fairly to be borne by the many entities, groups, and sectors of the economy" (TVA Brief 18) would necessarily displace the court's narrow adjudication of individual common law claims. Justice, like Nature herself, abhors a vacuum and must stand when no one else will – else there is no justice. How to address the current and future damages likely to occur as a result of global warming in the absence of a comprehensive federal strategy for addressing GHGs is a question for the courts.

B. There Is No Displacement of the Federal Common Law of Nuisance

In order for the common law of nuisance to be displaced, there must exist a comprehensive regulatory framework that substantially covers the specific damages complained of by the particular plaintiffs in the present case. There is no comprehensive regulatory program in place to govern GHG emissions in the U.S. Consequently, new EPA findings bring the agency no closer to a comprehensive regulatory framework for addressing the GHG emissions complained of by

plaintiffs. This Court in *Massachusetts v. EPA* established only that the Clean Air Act could support a comprehensive regulatory program to address GHG emissions; the whole point of the Court's decision was that EPA had not yet begun that comprehensive program. Merely showing that carbon dioxide falls within the regulatory authority of the EPA is insufficient to prove displacement, as are the claimed but merely preliminary "significant steps toward addressing" GHG emissions cited by petitioners. TVA Brief 20; Pet. 40-46.

This Court has generally defined the area occupied by federal common law in the negative, as "[w]hen Congress has not spoken to a particular issue." *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981). This Court's description of federal common law in *City of Milwaukee v. Illinois* is well worth reprising as it is especially relevant in the present case:

> [n]othing in this process suggests that courts are better suited to develop national policy in areas governed by federal common law than they are in other areas, or that the usual and important concerns of an appropriate division of functions between the Congress and the federal judiciary are inapplicable. See *TVA v. Hill*, 437 U.S. 153, 194 (1978); *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980); *United States v. Gilman*, 347 U.S. 507, 511-513 (1954). We have always recognized that federal common law is "subject to the paramount authority of Congress." *New*

> *Jersey v. New York*, 283 U.S. 336, 348 (1931). It is resorted to "[i]n absence of an applicable Act of Congress," [*Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943)] and because the Court is compelled to consider federal questions "which cannot be answered from federal statutes alone," *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 469 (1942) (Jackson, J., concurring). See also *Board of Commissioners v. United States*, 308 U.S. 343, 349 (1939); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 594 (1973); *Miree v. DeKalb County*, 433 U.S. 25, 35 (1977) (Burger, C. J., concurring in judgment). Federal common law is a "necessary expedient," *Committee for Consideration of Jones Falls Sewage System v. Train*, 539 F.2d 1006, 1008 (4th Cir. 1976) (en banc), and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears.

Id. at 313-314 (some citations omitted). In order to find displacement, this Court must find that the scheme established by Congress to regulate GHG emissions would "address the problem formerly governed by federal common law." *Id.* at 315. Since nuisance law is applicable to GHGs, as the Second Circuit has so convincingly demonstrated, the burden shifts to the Legislative and Executive branches if they wish to positively enter the field by designing legislation or regulations that substantively address

the problem. A statute or regulation must speak *directly* to the issue at hand in order to displace federal common law. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 236-237 (1985). An implied statement of negative intent along the lines that Congress has chosen not to act (TVA Brief 23) is patently insufficient to show displacement. *Id.*

TVA repeatedly makes the point that it would prefer to have EPA regulate rather than allow the courts to address GHG pollution. TVA Brief 20. However, what TVA would prefer,[48] or what might be considered the very best method for dealing with the problems of global warming, is most certainly not at issue in the present case. The fantasy of a balkanization of GHG regulation (*id.*) is nothing more than a weak appeal to slippery slope reasoning.

---

[48] It is far from clear, actually, that TVA or petitioners in general would prefer that EPA regulated GHG emissions. For the sake of the present case they take that stance, but the subtext to their argument is that they would far prefer that there be no regulation whatsoever. Their arguments boil down to this: the law forbids the courts from redressing respondents' legitimate grievances even where, as here, Congress and the Executive are silent.

1. EPA Action Under the Clean Air Act, Both Before and After *Massachusetts v. EPA*, Failed to Constitute a Comprehensive Regulatory Program Addressing Damage from GHG Pollution

The Clean Air Act was not designed specifically to govern GHG emissions, although it is sufficiently broad to allow EPA – should it elect to do so – to address the multifarious impacts of global warming. As this Court found in *Massachusetts v. EPA*, 549 U.S. at 127, the Clean Air Act certainly authorizes the regulation of GHGs because it was so broadly written, but that conclusion is a far cry from concluding that the Clean Air Act actively addresses the problem of GHG emissions. As the Second Circuit explains, "we must look specifically at the regulation of stationary sources" in order to determine whether displacement has occurred in the present case. *American Electric*, 582 F.3d at 376. Indeed, no decision by this Court has held that federal common law is displaced by the Clean Air Act in the area of air pollution. *Id.* at 378.

Under the Clean Air Act, the EPA is charged at present only with *monitoring*, not regulating, CO2 emissions. *Id.* at n. 46 (citing Pub. L. No. 101-549, § 821(a)). Before it can even begin the process of designing regulations, the EPA must first issue an endangerment finding. As the Second Circuit elaborates, "EPA must still complete the remaining steps in the rulemaking process before it could actually regulate greenhouse gas emissions, including setting

NAAQS and delaying any action to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance." *Id.* at 380 (quotations omitted). Thus, the problem respondents complained of was not specifically and effectively addressed under the Clean Air Act[49] at the time the Second Circuit issued its ruling. *Id.* at 381.

TVA acknowledges this to be true, conceding that the Clean Air Act imposes "few restrictions on the emissions of air pollutants in the absence of regulations promulgated by EPA." TVA Brief 45. Mere enactment of the Clean Air Act was thus insufficient to displace the federal common law of nuisance. See *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981). Therefore petitioners' claim that, "[j]ust as the Clean Water Act displaced the federal common law water pollution claims asserted in *Milwaukee II*, the Clean Air Act displaces the common law air emission claims asserted here" (Pet. 41.) is mistaken because the analogy between the Clean Air Act and the Clean Water Act is faulty – the Clean Air Act imposes few restrictions without specific regulation by EPA, whereas the Clean Water Act by contrast specifically

---

[49] Petitioners have notably abandoned all claims that federal common law has been displaced in this area by any federal legislation or administrative action outside of the Clean Air Act.

proscribes discharges of pollutants into the waters of the U.S. TVA Brief 45.

2. EPA Action Since the Second Circuit's Ruling Does Not Displace the Courts; Final Action by Administrative Agencies or by Congress is Extremely Uncertain

EPA has clearly not directly addressed the problem raised by respondents. Petitioners and TVA would have this Court rule that EPA's procrastination and tentative proposals directly address the problem, claiming that by "actively exercising its judgment and statutory discretion to determine when and how . . . ," the EPA has taken decisive action. TVA Brief 45. But the EPA's regulatory process is a long and convoluted process, and the end result is very much in doubt up to, and in some cases even beyond, the moment regulations are actually on the books. It could take 20 years for EPA to make rules that directly address respondents' grievances, during which time petitioners would have this Court sit idly by while respondents' equitable claims languish unheard.

There is ample proposed legislation currently in Congress limiting the ability of the EPA to regulate. For instance, the proposed Energy Tax Prevention Act of 2011, sponsored by Senators James Inhofe and

John Barrasso, and Representatives Fred Upton[50] and Ed Whitfield, would block EPA regulation of GHGs under the Clean Air Act. S. 228, 112th Cong. (2011). Another bill sponsored by Senator Jay Rockefeller of West Virginia would force EPA to take a two year hiatus from any regulatory effort directed at addressing the damage caused by global warming. S. 231, 112th Cong. (2011). With these efforts in mind, as well as the keen understanding possessed by the Court of the labyrinthine regulatory process of the EPA, it is clear that EPA is a long way from displacing the federal common law nuisance cause of action addressing stationary source GHG emissions. Add to this the potential for litigation to derail EPA's efforts, and the uncertainty surrounding EPA regulations is pervasive.

Endangerment and mobile source emissions findings by the EPA do not mean that major stationary sources are now regulated by the EPA. TVA advances several conclusions based on new miles-per-gallon standards, among them that polluters must now obtain permits (TVA Brief 48), but these conclusions are nothing more than TVA's non-binding interpretation of what the future holds and hardly a sound basis on which to make a displacement finding. TVA stretches displacement jurisprudence and credulity with its claim that "[b]y issuing the endangerment

---

[50] Yet these same legislators appearing as *amicus curiae* urge this Court to find that EPA regulation has displaced respondents' common law claims.

finding and light-duty-vehicle rule, and thereby rendering greenhouse gases 'subject to regulation' under the existing statutory scheme of the CAA, EPA displaced any federal common-law." *Id.* at 48-49. TVA's argument is riddled with speculation: "*if* the settlement is formally adopted;" (*id.* at 51) "[EPA] *may* soon be specifically committed to completing a rule-making;" (*id.*) EPA is "'in the *process* of responding to a remand;'" (*id.* at 50, quotation omitted). TVA's argument for federal displacement is far too murky to oust the courts from their historic authority and duty to apply the common law. Displacement of the common law requires more.

CONCLUSION

Prudential concerns strongly favor respondents' standing before this Court. There has been no significant action taken by the political branches that would displace federal common law. Accordingly, this Court should affirm the Second Circuit's ruling and allow respondents' prosecution of their nuisance causes of action to proceed, lest the grave harm caused by

petitioners' greenhouse gas emissions continue unabated and unredressed.

Respectfully submitted,

STEPHAN C. VOLKER*
JOSHUA A.H. HARRIS
M. BENJAMIN EICHENBERG
LAW OFFICES OF STEPHAN C. VOLKER
436 14th Street, Suite 1300
Oakland, California 94612
(510) 496-0600
svolker@volkerlaw.com
**Counsel of Record*

Attorneys for Amici Curiae
North Coast Rivers Alliance, et al.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
FEB 7 - 2011
OFFICE OF THE CLERK

No. 10-174

In the
Supreme Court of the United States

AMERICAN ELECTRIC
POWER COMPANY INC., et al.,

Petitioners,

v.

STATE OF CONNECTICUT, et al.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

R. S. RADFORD
*DAMIEN M. SCHIFF
*Counsel of Record
LUKE WAKE, *Of Counsel*
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: rsr@pacificlegal org
E-mail: dms@pacificlegal.org
E-mail: lw@pacificlegal org
Counsel for Amicus Curiae
Pacific Legal Foundation

41703 L
43

QUESTIONS PRESENTED

The court of appeals held that States and private plaintiffs may maintain actions under federal common law alleging that defendants—in this case, five electric utilities—have created a "public nuisance" by contributing to global warming, and may seek injunctive relief capping defendants' carbon dioxide emissions at judicially determined levels. The questions presented are:

1. Whether States and private parties have standing to seek judicially fashioned emissions caps on five utilities for their alleged contribution to harms claimed to arise from global climate change caused by more than a century of emissions by billions of independent sources.

2. Whether a cause of action to cap carbon dioxide emissions can be implied under federal common law where no statute creates such a cause of action, and the Clean Air Act speaks directly to the same subject matter and assigns federal responsibility for regulating such emissions to the Environmental Protection Agency.

3. Whether claims seeking to cap defendants' carbon dioxide emissions at "reasonable" levels, based on a court's weighing of the potential risks of climate change against the socioeconomic utility of defendants' conduct, would be governed by "judicially discoverable and manageable standards" or could be resolved without "initial policy determination[s] of a kind clearly for nonjudicial discretion." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

I. THE STATES LACK STANDING TO PURSUE THEIR GLOBAL WARMING PUBLIC NUISANCE TORT ACTIONS IN FEDERAL COURT 3

A. The Energy Companies' Emissions Are Not a But-for Cause of the States' Injuries, and Therefore Are Not Fairly Traceable to Those Injuries 3

1. The States Cannot Establish That the Energy Companies' Emissions Are a But-for Cause of Their Injuries or Any Increment Thereof . . . 4

2. This Court Should Not Adopt the "Cause or Contribute" Rationale Used by Some Circuit Courts To Justify Standing in Pollution Abatement Cases 7

3. Fair Traceability Cannot Be Sustained on an "Alternate Causation" Theory 10

B. The States Cannot Establish Likelihood of Redress 14

TABLE OF CONTENTS—Continued

Page

II. THE STATES' CLAIMS DO NOT RAISE JUSTICIABLE QUESTIONS 20

A. Litigants Raise a Nonjusticiable Political Question If There Are No Discoverable and Manageable Standards for Resolution 20

B. There Are No Judicially Manageable Standards for Determining the Reasonableness of the Energy Companies' Emissions, or for Proving Relief in an Equitable Manner 23

C. Judicial Resolution of the States' Claims Would Establish National Policy over Politically Charged Subject Matter on Which Congress Has Deliberated, But Has Declined To Regulate 27

CONCLUSION 33

TABLE OF AUTHORITIES

Page

Cases

Armstrong v. United States,
364 U.S. 40 (1960) 26

Baker v. Carr,
369 U.S. 186 (1962) 20-21, 23, 28

California v. GMC, No. C06-05755 MJJ,
2007 U.S. Dist. LEXIS 68547
(N.D. Cal. Sept. 17, 2007) 24-25

Comer v. Murphy Oil USA,
607 F.3d 1049 (5th Cir. 2010) 2

Connecticut v. Am. Elec. Power,
582 F.3d 309 (2d Cir. 2009) 26-27

Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978) 6-7

Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979) 11

Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149 (4th Cir. 2000) . . . 8

Georgia v. Tennessee Copper Co.,
237 U.S. 474 (1915) 24

In re Gap Stores Sec. Litig.,
79 F.R.D. 283 (N.D. Cal. 1978) 13-14

Linda R. S. v. Richard D.,
410 U.S. 614 (1973) 3-4

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 3, 6, 14, 17

TABLE OF AUTHORITIES—Continued

Page

Luther v. Borden, 48 U.S. (7 How.) 1 (1849) 22

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 20-21

Massachusetts v. Environmental Protection Agency, 549 U.S. 497 (2007) ... 1, 12-14, 16, 29-30

Massachusetts v. Mellon, 262 U.S. 447 (1923) 6

Monsanto Co. v. Geertson Seed Farms,
130 S. Ct. 2743 (2010) 2

Native Vill. of Kivalina v. ExxonMobil Corp.,
663 F. Supp. 2d 863 (N.D. Cal. 2009) 10

Native Vill. of Kivalina v. ExxonMobile Corp.,
No. 09-17490 (9th Cir.) 2

Natural Res. Def. Council v. Watkins,
954 F.2d 974 (4th Cir. 1992) 8

Pabst Brewing Co. v. Corrao,
161 F.3d 434 (7th Cir. 1998) 14

Pub. Interest Research Group v. Powell Duffryn Terminals, 913 F.2d 64 (3d Cir. 1990) 8

Reynolds v. Sims, 377 U.S. 533 (1964) 27

Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546 (5th Cir. 1996) 8

Summers v. Tice, 199 P.2d 1 (Cal. 1948) 11

Vieth v. Jubelirer, 541 U.S. 267 (2004) ... 20, 22-23

Winter v. Natural Res. Def. Council,
129 S. Ct. 365 (2008) 17

TABLE OF AUTHORITIES—Continued

Page

Constitution

U.S. Const. art. I, § 8 27

art. II, § 2 27

Statutes

Cal. Health & Safety Code
§ 38500, *et seq.* 30

Rules

Sup. Ct. R. 37 1

R. 37.6 1

Miscellaneous

Biskupic, Joan, *Tensions Rise Between Supreme Court, Politicians*, USA Today, Jan. 24, 2011, *available at* http://www.usatoday.com/news/washington/judicial/2011-01-15-RWcourtpolitics23_ST_N.htm (last visited Feb. 3, 2011) 32

Buck, Stuart, *Common Law Environmental Protection: The Common Law and the Environment in the Courts*, 58 Case W. Res. 621 (2008) 25-26

Davis, Kenneth C. & Pierce, Richard J., Jr., Administrative Law Treatise (3d ed. 1994) 18

Duffy, Michael, *Climate Change Causation: Harmonizing Tort Law and Scientific Probability*, 28 Temp. J. Sci. Tech. & Envtl. L. 185 (2009) 10, 15

TABLE OF AUTHORITIES—Continued

Page

Gatchel, Brian J., *Informational and Procedural Standing after* Lujan v. Defenders of Wildlife, 11 J. Land Use & Envtl. L. 75 (1995) 17-18

Gold, Steve C., *The More We Know, the Less Intelligent We Are?—How Genomic Information Should, and Should Not, Change Toxic Tort Causation Doctrine*, 34 Harv. Envtl. L. Rev. 369 (2010) 4

H.R. Rep. No. 102-474(I), Purpose and Summary (1992) 29

Hall, Mathew, *A Catastrophic Conundrum, But Not a Nuisance: Why the Judicial Branch is Ill-Suited to Set Emissions Restrictions on Domestic Energy Producers Through the Common Law Nuisance Doctrine*, 13 Chap. L. Rev. 265 (2010) 25-26, 28-32

Hodas, David R., *Standing and Climate Change: Can Anyone Complain About the Weather?*, 15 J. Land Use & Envtl. L. 451 (2000) 15

Johnson, Toni, *Economic Challenges for Climate Change Policy*, Council on Foreign Relations (July 7, 2009), *available at* http://www.cfr.org/publication/16009/economic_challenges_for_climate_change_policy.html (last visited Feb. 3, 2011) 30-31

Keeton, W. Page, *et al.*, Prosser & Keeton on The Law of Torts (5th ed. 1984) ... 4, 7, 11, 24

TABLE OF AUTHORITIES—Continued

Page

Lizza, Ryan, *As the World Burns*, The New Yorker, Oct. 11, 2010, at 70, *available at* http://www.newyorker.com/reporting/2010/10/11/101011fa_fact_lizza?currentPage=1 (last visited Feb. 3, 2011) 31

Mank, Bradford C., *Standing and Future Generations: Does* Massachusetts v. EPA *Open Standing for Generations to Come?*, 34 Colum. J. Envtl. L. 1 (2009) 17

Merrill, Thomas W., *Global Warming as a Public Nuisance*, 30 Colum. J. Envtl. L. 293 (2005) 5, 12, 14-15

Miller, Matthew Edwin, Note, *The Right Issue, the Wrong Branch: Arguments Against Adjudicating Climate Change Nuisance Claims*, 109 Mich. L. Rev. 257 (2010) . . 12, 18-19

Muller, Susan, *Unprecedented Harm: Will the Roberts Court Recognize the Distinction Between Global Warming and Its Effects?*, 44 New Eng. L. Rev. 317 (2010) 9

Newark, F.H., *The Boundaries of Nuisance*, 65 L. Q. Rev. 480 (1949) 24

Pub. L. No. 105-276, 112 Stat. 2461 (1998) 29

Pub. L. No. 106-377, 114 Stat. 1441 (2000) 29

Pub. L. No. 106-74, 113 Stat. 1047 (1999) 29

Restatement (Second) of Torts 7, 11, 24

Restatement (Third) of Torts: Liab. for Physical & Emotional Harm (2010) 4

TABLE OF AUTHORITIES—Continued

Page

S. Res. 98, 105th Cong. (1997) 29

Schwartz, Victor E., *et al.*, *Why Trial Courts Have Been Quick to Cool "Global Warming" Suits*, 77 Tenn. L. Rev. 803 (2010) 5, 14, 30

Tribe, Laurence H., *et al.*, Wash. Legal Found., *Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* (2010), *available at* http://www.wlf.org/publishing/publication_detail .asp?id=2132 (last visited Feb. 3, 2011) 23-24, 26

INTEREST OF AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) submits this brief amicus curiae in support of Petitioners American Electric Power Co., *et al.*

PLF is the largest and most experienced nonprofit, public-interest law foundation of its kind in the United States. For more than 35 years, PLF has litigated in support of the rights of individuals to make reasonable use of their private property free of unnecessarily intrusive government interference, and has advocated in favor of maintaining a reasonable balance between regulatory efforts to protect the environment and the other necessary and proper functions of government and a free society.

To further this interest, PLF established a Global Warming Project. The Project's purpose is to ensure that the crisis of global warming—regardless of the crisis' actual, imminent, or long-term effects to the physical environment and human populations—not be used as a pretext to violate individuals' property rights and other constitutionally protected liberties. As an example of the Project's work, PLF submitted an amicus brief in *Massachusetts v. Environmental Protection Agency (EPA)*, 549 U.S. 497 (2007), arguing that the threat of global warming does not justify a departure from the normal rules of standing in the federal courts. PLF also has participated as amicus in

---

[1] Counsel of record have consented to the filing of this brief. Letters evidencing this consent have been filed with the Clerk of the Court. In accordance with Rule 37.6, PLF states that no counsel for a party authored any portion of this brief and no counsel or party made a monetary contribution intended to fund the brief's preparation or submission.

global warming public nuisance cases in the Fifth and Ninth Circuit Courts of Appeals, as well as in this case in support of the Petition for Certiorari. *See Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010); *Native Vill. of Kivalina v. ExxonMobile Corp.*, No. 09-17490 (9th Cir.). PLF believes that this case raises important public interest questions about the country's response to global climate change, and the extent to which that response can be controlled or dictated by enterprising litigants through the judicial system.

SUMMARY OF ARGUMENT

Respondents State of Connecticut, *et al.* (States), have brought public nuisance tort claims against Petitioners American Electric Power Co., *et al.* (Energy Companies), for harms allegedly caused by the Energy Companies' greenhouse gas emissions. These claims should be rejected for the following reasons.

First, the States lack standing to pursue their claims in federal court. Their global warming related injuries are not fairly traceable to the Energy Companies' emissions, as they must be. *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2752 (2010) ("Standing under Article III of the Constitution requires that an injury be . . . fairly traceable to the challenged action . . . ."). Moreover, the States' requested relief cannot redress their injuries because even completely eliminating the Energy Companies' emissions would not affect or change any phenomenon of global warming. *Cf. id.* Nothing in *Massachusetts* dictates a different conclusion.

Second, the States have raised a nonjusticiable political question. Courts cannot apply traditional common law tort theories equitably to redress injuries

related to climate change. There are no judicially manageable standards for extending those theories to hold a handful of greenhouse gas emitters liable for their *de minimis* contribution to the collective emissions of all humanity. To hold the Energy Companies—or similarly situated defendants—liable, courts would have to establish a policy in contravention of the existing congressional policy of nonregulation.

I

THE STATES LACK STANDING TO PURSUE THEIR GLOBAL WARMING PUBLIC NUISANCE TORT ACTIONS IN FEDERAL COURT

A. The Energy Companies' Emissions Are Not a But-for Cause of the States' Injuries, and Therefore Are Not Fairly Traceable to Those Injuries

To establish standing to sue in federal court, a plaintiff must show that his injury is fairly traceable to the allegedly wrongful action of the defendant. *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("[T]here must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant . . . .") (internal quotation marks omitted). The fair traceability requirement naturally implies a but-for causation test, *i.e.*, a plaintiff's injury is fairly traceable to the defendant's allegedly wrongful act if the injury would not have occurred but for the wrongful act. *See, e.g.*, *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 (1973) ("[F]ederal plaintiffs must allege some threatened or actual injury *resulting from* the

putatively illegal action before a federal court may assume jurisdiction.") (emphasis added). *Cf.* Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 26 (2010) ("Conduct is a factual cause of harm when the harm would not have occurred absent the conduct."), *quoted in* Steve C. Gold, *The More We Know, the Less Intelligent We Are?—How Genomic Information Should, and Should Not, Change Toxic Tort Causation Doctrine*, 34 Harv. Envtl. L. Rev. 369, 422 n.327 (2010).

To establish but-for causation, a plaintiff need not show that his harm was foreseeable, or that the causal links from the defendant's actions to the proffered injury are knowable with metaphysical certitude; but what the plaintiff must show is that the causal path between action and injury exists at all. *See* W. Page Keeton, *et al.*, Prosser & Keeton on The Law of Torts 266 (5th ed. 1984) ("The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct . . . .").

1. The States Cannot Establish That the Energy Companies' Emissions Are a But-for Cause of Their Injuries or Any Increment Thereof

The States cannot meet fair traceability's but-for standard of causation. For, even assuming that global warming is happening and will cause injury to the States' territories, it is impossible to trace the injuries resulting from such climatological changes to the Energy Companies' emissions. In other words, it is impossible for the States to establish that the Energy Companies' emissions, taken individually or in the aggregate, are a but-for cause of the States' injuries or any identifiable increment of those injuries. *See*

Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 Colum. J. Envtl. L. 293, 297 (2005) ("[T]he entire operations of all six defendants are responsible at most for 2.5% of the world's greenhouse gases. This makes it difficult to say that they are in any sense the cause of the problem."). It is not known, for example, what quantity of greenhouse gases is necessary to cause (or accelerate) the various climatologically related injuries that the States advance.

Even if such a quantity can be known, the States cannot show that this quantity of greenhouse gas emissions, absent the Energy Companies' contributions, is unreachable. *See id.* at 298 ("Even if [the Energy Companies'] CO2 discharges were declared illegal and completely enjoined, it is most doubtful that this would end the injuries threatened to flow from global warming. Granting the injunction [the States and the other Petitioners] seek—which would phase out [the Energy Companies'] emissions over time—would not even put a dent in the inexorable rise in world temperatures caused by the long-term accumulation of greenhouse gases."); Victor E. Schwartz, *et al.*, *Why Trial Courts Have Been Quick to Cool "Global Warming" Suits*, 77 Tenn. L. Rev. 803, 835-36 (2010) ("[L]awsuits alleging global climate change harms . . . . seek . . . to change the way the world makes and consumes energy. Given the millions, or potentially billions, of sources for the gases at issue in these lawsuits, no defendant, or even handful of defendants, can be deemed the factual cause of the alleged harms.") (footnote omitted). In short, the States cannot demonstrate that the Energy Companies' emissions are a but-for cause of their injuries or any increment of those injuries.

Further, there are several good reasons for the Court not to abandon the fair traceability standard just to accommodate public nuisance suits based on global warming.

First, standing must impose *some* causal burden, however minimal, else the Court would be unfaithful to its tradition, based on the mandate of Article III, that the judiciary does not exist to settle abstract controversies or to allow litigants to vindicate a generalized citizenship or monetary interest. *See, e.g.*, *Lujan*, 504 U.S. at 573-74 ("We have consistently held that a plaintiff raising only a generally available grievance about government . . . does not state an Article III case or controversy."); *Massachusetts v. Mellon*, 262 U.S. 447, 484 (1923) ("It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief. This court can have no right to pronounce an abstract opinion upon the constitutionality of a state law.") (quotation marks omitted); *id.* at 488 ("We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.").

Second, relaxing the fair traceability standard would invite lawsuits orchestrated by litigants who have little real interest in the underlying legal issues. *See Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 72 (1978) ("The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have alleged such a

personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.") (quotation marks omitted).

Third, maintaining the fair traceability standard of but-for causation is a reasonable compromise between the extremes of no causation and some form of proximate causation. *Cf.* Keeton, *supra*, at 273 ("The term 'proximate cause' is applied by the courts to those more or less undefined considerations which limit liability even where the fact of causation is clearly established."). *Cf.* Restatement (Second) of Torts § 430 (discussing "legal cause").

The States cannot prove that the Energy Companies' emissions are a but-for cause of their injuries. That failure means, under this Court's standing jurisprudence, that the States' injuries are not fairly traceable to the Energy Companies' alleged wrongdoing.

2. This Court Should Not Adopt the "Cause or Contribute" Rationale Used by Some Circuit Courts To Justify Standing in Pollution Abatement Cases

To support their standing, the States, as well as litigants in similar global warming public nuisance actions, have relied on case law holding that a single polluter can be held liable for public nuisance so long as the polluter "contributed to," although did not solely cause, the nuisance. Whatever the merits of the "cause or contribute" rationale, the theory has no application here, for two reasons.

First, all of these "contribution" cases concerned instances where the alleged polluter was worsening, to some degree, a discrete geographical area, *i.e.*, not the entire Earth. *See, e.g., Pub. Interest Research Group v. Powell Duffryn Terminals*, 913 F.2d 64, 68 (3d Cir. 1990) (Clean Water Act challenge to pollution in Kill Van Kull, a regulable waterbody); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 152 (4th Cir. 2000) (en banc) (same as to a manmade lake and the Edisto River), *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 550 (5th Cir. 1996) (same as to Galveston Bay); *Natural Res. Def. Council v. Watkins*, 954 F.2d 974, 976 (4th Cir. 1992) (same as to the Savannah River)). Because the defendants were allegedly polluting a geographic region of limited scope, these courts of appeals could entertain the benign presumption that such alleged pollution would worsen the plaintiffs' injuries (which were a direct function of the geographical area's polluted status). The "contribution" cases do not, however, stand for the proposition that causation is irrelevant for fair traceability. Instead, they hold that causation may be reasonably presumed where the plaintiff is injured by the polluted status of a discrete geographical area, and the defendant's actions worsen that polluted status.

These "contribution" cases do not offer a useful means of analysis in this case because the twin bases for the presumption of causation—a discrete geographical area and a discrete set of potential polluters—are absent. Rather, here the geographical area is the entire Earth's atmosphere, and the set of potential polluters includes every emitter of greenhouse gases. Under such circumstances, it would be unreasonable to maintain the presumption of

causation, and nothing in these "contribution" cases would support fair traceability for the States.

Second, in the "contribution" cases there was a direct causal link and correlation between the defendants' polluting activities and the plaintiffs' injuries—the more pollution added, the greater the harm. But here there is no similar correlation. The addition of greenhouse gases to the atmosphere does not necessarily harm the States. Rather, their alleged injuries are a function of the change in climate, which itself is alleged to be a function, at least in part, of greenhouse gas emissions. The causal chain advanced by the States "includes four basic links: emissions of GHG --> increased GHG in atmosphere--> global warming --> effects of global warming." Susan Muller, *Unprecedented Harm: Will the Roberts Court Recognize the Distinction Between Global Warming and Its Effects?*, 44 New Eng. L. Rev. 317, 335-36 (2010). Of these, the "first and second links . . . have become familiar to courts through traditional environmental cases," such as the "contribution" cases. *Id.* at 336. In the "traditional" case, "emissions or discharges of a pollutant into a common resource, such as air or water, lead to elevated levels of that pollutant in the common resource." *Id.* Thus, "the first two links are followed by a third and final link that directly connects the elevated levels of the pollutant in the common resource to a harm allegedly suffered by the plaintiff." *Id.* The causal chain in a global warming case is different, however, because of "the presence of a third link that is *not* the site of any alleged harm." *Id.* That third link is global warming, "an intermediary effect, which in turn is a cause of other effects, and it is among these *effects* of global warming that the harms alleged in litigation are to be found." *Id.*

A bald assertion that the Energy Companies have added greenhouse gases to the atmosphere cannot establish fair traceability under the "contribution" cases' logic because, as explained above, the States' injuries are not a direct function of the quantity of greenhouse gases in the atmosphere. They are instead a function of the effects of unknown quantities of such gases on climate-related phenomena. *See* Michael Duffy, *Climate Change Causation: Harmonizing Tort Law and Scientific Probability*, 28 Temp. J. Sci. Tech. & Envtl. L. 185, 189 (2009) ("[C]limate change is not simply a process of cause and effect, but rather is a result of causal chains. For example, emissions from certain human activities alter the balance of energy entering and exiting the atmosphere; this imbalance—combined with other human and natural factors—produces changes in global average temperature, which can cause a variety of local and regional climate effects.") (footnote omitted). Were the causal requirement to be relaxed, then the States could establish fair traceability as against any human being, whose daily expiration of carbon dioxiode "contributes" to the total amount of greenhouse gases in the atmosphere—an untenable outcome. *Cf. Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 880 (N.D. Cal. 2009) ("[I]t is entirely irrelevant whether any defendant 'contributed' to the harm because a discharge, standing alone, is insufficient to establish injury.").

3. Fair Traceability Cannot Be Sustained on an "Alternate Causation" Theory

Some global warming public nuisance litigants in other cases have argued that their standing can be

based on an "alternate causation" theory, a doctrine derived from tort law ensuring that a wrongdoer cannot escape liability on the grounds that there are other actors who, standing alone, could have caused the same injury.[2] *See* Keeton, *supra*, at 268 ("If the defendant's conduct was a substantial factor in causing the plaintiff's injury, it follows that he will not be absolved from liability merely because other causes have contributed to the result . . . .").

An example of the doctrine at work is a hunting party, where two hunters negligently shoot a third member of their group, having mistaken him for a deer.[3] The shots from either of the two hunters would

---

[2] The doctrine is a close cousin of the "indivisible injury" rule. *See Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 260 (1979) (observing that "the common law . . . allows an injured party to sue a tortfeasor for the full amount of damages for an indivisible injury that the tortfeasor's negligence was a substantial factor in causing, even if the concurrent negligence of others contributed to the incident").

[3] The example is based on the facts of *Summers v. Tice*, 199 P.2d 1 (Cal. 1948). One important difference between the facts here and those in *Tice* is that in *Tice* both hunters were found to be negligent but the plaintiff could not prove which hunter actually caused his injury. *See id.* at 4. The court nevertheless held that the burden was appropriately placed on the negligent hunters to prove that one of them was *not* a cause of the plaintiff's injuries. *See id. See generally* Restatement (Second) of Torts § 433B(3) (codifying *Tice*). This variation of alternate causation is even less helpful to the States than that set forth in the text because it would require them first to establish the Energy Companies' negligence, *i.e.*, unreasonableness, before proving causation. That cannot be done in the context of global warming litigation because the mere emission of greenhouse gases harms no one and hence cannot be unreasonable. Such emission can only be unreasonable if it is tied to an actual injury, which requires some proof of

(continued...)

have been sufficient to kill the third hunter; but that does not mean that the two hunters can thereby escape liability for the third hunter's death. Key to the doctrine's applicability is the requirement that each of the alleged wrongdoers be a potential but-for cause of the injury. In other words –A and B are alternate causes of harm X if, but only if, A or B could cause X where the other putative causes ceased to exist. Put in terms of the hunting party example, hunter A can be an alternate cause of fellow hunter X's death if, but only if, death would still ensue notwithstanding the absence of hunter B.

The doctrine of alternate causation does not apply here. Assuming that there exist one or more greenhouse gas emitters who could have caused, or contributed to, the States' injuries, the States still cannot prove that the Energy Companies are among that class of emitters. Rather, the Energy Companies would have to be among that class of emitters that has a meaningful impact on climate change, *not* just a measurable impact on the national or world contribution of greenhouse gases. *See* Merrill, *supra*, at 298. After all, although "an injunction halting John Doe from driving his car to work 'would slow the pace of global emissions increases,'" "no one could argue that suing Mr. Doe would 'redress' a climate-related harm." Matthew Edwin Miller, Note, *The Right Issue, the Wrong Branch: Arguments Against Adjudicating Climate Change Nuisance Claims*, 109 Mich. L. Rev. 257, 284 (2010) (quoting *Massachusetts*, 549 U.S. at

---

[3] (. .continued)
causation. Thus, the States could not use the *Tice* version of alternate causation to establish their standing to sue without begging the question.

526). *Cf. Massachusetts*, 549 U.S. at 525 ("Judged by any standard, U.S. motor-vehicle emissions make a *meaningful* contribution to greenhouse gas concentrations and hence, according to petitioners, to global warming.") (emphasis added).

Nevertheless, one might argue that, because the class of all automobile emitters like Mr. Doe *does* make a meaningful contribution of greenhouse gases (according to *Massachusetts*), it follows that a global warming plaintiff might have standing under an alternate causation theory to sue such a class directly. The suggestion is problematic, however, for at least three reasons.

First, creating such a defendant class would not solve the problem of causation; that John Doe has been sued along with his many fellow automobile drivers does not change the fact that none of the drivers is a but-for cause of any global warming related injury. The plaintiffs in *Massachusetts* had standing to sue EPA in part because EPA had legal authority over a meaningful class of emitters, including legal authority *to regulate the emissions* of that class. Neither John Doe, nor any of his fellow drivers, standing alone, causes any harm to plaintiffs. His being joined with other *de minimis* emitters does not give him authority, or responsibility, over the aggregate emissions of his fellow defendants, which he must have if he is to be deemed the cause of a global warming plaintiff's injuries.

Second, the requirements of due process would likely render the certification of such a large and broadly dispersed class a logistic impossibility. *Cf. In re Gap Stores Sec. Litig.*, 79 F.R.D. 283, 291-92 (N.D. Cal. 1978) ("[I]n the context of defendant class actions

due process requires notice to each class member and the exercise of jurisdiction only in circumstances fundamentally fair to absent non-litigating class members."); *Pabst Brewing Co. v. Corrao*, 161 F.3d 434, 439 (7th Cir. 1998) ("[T]he due process rights of unnamed class members of a defendant class are entitled to special solicitude . . . .").

Third, such a class is *not* present here. *Compare* Merrill, *supra*, at 297 (observing that the energy companies' emissions amount at most to 2.5% of world totals) to *Massachusetts*, 549 U.S. at 524 (observing that the U.S. transportation sector emits about 6% of world totals).

Thus, to determine whether the Energy Companies fall within the class of meaningful contributors would require the implausible showing that, absent other greenhouse gas emitters but with the Energy Companies, the States' injuries would have occurred (or would have been worsened). *Cf.* Schwartz, *supra*, at 836 ("No one source, or even a handful of sources, could directly impact the earth's weather or its climate."). The doctrine of alternate causation allows a plaintiff to get around the problem of an injury caused by different persons or entities; it does not transform an independently irrelevant action into a but-for cause of the plaintiff's injury.

B. The States Cannot Establish Likelihood of Redress

In addition to fair traceability, standing doctrine requires that "it must be likely, as opposed to merely speculative, that the [plaintiff's] injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal quotation marks omitted). For their

remedy, the States seek a court order capping and reducing the Energy Companies' emissions. This remedy cannot meet the requirements of likelihood of redress.

As explained in the previous section, there is no direct correlation between greenhouse gas emissions and global warming related injuries. The mere emission of greenhouse gases does not injure the States. *See* David R. Hodas, *Standing and Climate Change: Can Anyone Complain About the Weather?*, 15 J. Land Use & Envtl. L. 451, 457 (2000) ("Unlike local or regional air pollution, where the emissions impose noxious consequences on downwind victims, . . . greenhouse gases are either inert, useful or harmless when emitted. It is only their slow accumulation in the atmosphere which changes the climate broadly.") (footnote omitted). Rather, the correlation between emissions and the States' injuries depends upon how greenhouse gases, in various quantities, affect weather and other climatological patterns that in turn negatively affect the States' territories. *See* Duffy, *supra*, at 189. Although it is not speculative whether a cap and reduction order would reduce the Energy Companies' emissions, it *is* entirely speculative whether such a cap and reduction would measurably change the quality or quantity of the States' alleged global warming related injuries. *See* Merrill, *supra*, at 298.

Massachusetts v. EPA does not help the States, because that decision's standing discussion does not apply to common law claims brought against actors who do not have regulatory control over large classes of emitters.

First, the redressability issue in *Massachusetts* concerned whether forcing EPA to make a decision on the Commonwealth's request that the agency regulate greenhouse gases under the Clean Air Act would remedy, to any extent, the Commonwealth's global warming related harms. *See* 549 U.S. at 525. The Court answered yes: although such a remedy would not reverse global warming, the Court nevertheless possessed "jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it." *Id.* The Court addressed the standing inquiry in the context of the legal action before it—a challenge to the failure to respond fully to a rulemaking request. In circumstances such as those, it was a simple task to affirm the existence of that which is absent from this case: the one-to-one correlation of emissions reduction to injury amelioration. The Commonwealth was procedurally injured by EPA's failure to regulate to reduce emissions; an order from the Court that could lead to such regulation would remedy the procedural injury. That conclusion was easy for the Court to adopt because the requirements of redressability are relaxed in a procedural standing case. *See id.* at 517-18 ("[A] litigant to whom Congress has accorded a procedural right to protect his concrete interests—here, the right to challenge agency action unlawfully withheld, § 7607(b)(1)—can assert that right without meeting all the normal standards for redressability and immediacy.") (internal quotation marks and citation omitted). The States, however, have no such benefit because they advance no procedural right but rather a substantive right based on their legal or sovereign interests in their territories.

This procedural/substantive right distinction for standing is crucial to understanding why

Massachusetts does not support the standing of litigants who bring common law public nuisance claims to remedy global warming related injuries. The Court relaxes the demands of standing for procedural injuries because, otherwise, many violations of procedural rules might go unreviewed and unremedied. Indeed, in *Lujan*, where the Court first gave explicit approval to the doctrine of procedural standing,[4] the Court explained that a homeowner living adjacent to a proposed dam site "has standing to challenge the licensing agency's failure to prepare an environmental impact statement [under the National Environmental Policy Act (NEPA)], even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered." *Lujan*, 504 U.S. at 573 n.7. Because NEPA imposes only procedural obligations, *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 376 (2008), a NEPA plaintiff could rarely if ever meet the but-for standard of fair traceability because he could never show that, but for the NEPA violation, the agency's decision would have been different. *See* Bradford C. Mank, *Standing and Future Generations: Does* Massachusetts v. EPA *Open Standing for Generations to Come?*, 34 Colum. J. Envtl. L. 1, 37 (2009) ("Without the relaxed [standing] standards . . . , NEPA plaintiffs generally could not establish standing because the government could cancel a proposed project for any number of reasons."). Such a result, which would routinely deny judicial review, would largely render NEPA and other procedural statutes (including the rulemaking petition process at issue in *Massachusetts*) dead letters.

---

[4] *See* Brian J. Gatchel, *Informational and Procedural Standing after* Lujan v. Defenders of Wildlife, 11 J. Land Use & Envtl. L. 75, 91 (1995).

But the Court has no reason to fear underenforcement of, for example, federal nuisance law, because where a nuisance exists, its cessation will necessarily have "real world" effects (unlike compliance with a wholly procedural obligation) that will satisfy traditional standing requirements. That expectation is consistent with the Court's general standing concerns of discouraging lawless agency behavior and mitigating against factional bias. *See* Gatchel, *supra*, at 87-88 & n.83 (citing Kenneth C. Davis & Richard J. Pierce, Jr., Administrative Law Treatise § 16.11 (3d ed. 1994)). The "real world" value of a procedural or informational right may not be significant enough to expect private party enforcement, and thus relaxed standing that allows the functional equivalent of private attorney general enforcement makes sense. *See* Gatchel, *supra*, at 87-88. Similarly, few agencies' mandates are focused on procedure or information dissemination, and thus relaxed standing "to those concerned with evaluating the values that Congress desires to protect" in procedural statutes reduces the risk of agency capture by "narrow parochial interests." *Id.* at 88. Neither of these concerns, however, is implicated by a public nuisance suit seeking to remedy alleged injuries to real property. Although the absence of real world effects in procedural rights cases may justify the relaxation of certain standing requirements, that justification is not present here.

Second, the States cannot establish, as they must under *Massachusetts*, that their requested relief would provide them *meaningful* redress. "[T]he small degree of redress in *Massachusetts* satisfied the majority in part because federal agencies tackle regulatory hurdles incrementally." Miller, *supra*, at 284. In other words, "the EPA could acceptably 'whittle away' at global

warming, refining its approach as it adopts more stringent regulation." But here, "the logic of agency experimentation and refining is inapposite." *Id.* A capping and reduction of the Energy Companies' emissions either "redresses the alleged injuries . . . or does not; it would not spur a domino effect of additional redress." *Id.* Granting relief to the States would not lead to the "initiat[ion of] procedures that could require nationally systemic [greenhouse gas] reductions and transform the federal regulatory paradigm, as in *Massachusetts*." *Id.*

Third, the States' requested relief would not solve what one commentator has called the "leakage" problem. *See id.* at 286. That is, the States have sued a discrete and small subset of the nation's greenhouse gas emitters. Even assuming that this subset is responsible for a nontrivial quantity of the world's anthropogenic greenhouse gas emissions, there is absolutely nothing in the States' requested remedy that can stop other Energy Companies from "picking up the slack," as it were, and emitting more greenhouse gases precisely because the Energy Companies sued here cannot. *See id.* at 287 ("Unless the defendants' consumers were somehow precluded from acquiring energy from non-party competitors or other power sources—whether those consumers relocate or remain in place—climate nuisance plaintiffs cannot show beyond a speculative level that capping several defendants' emissions would translate into any slowing or reduction of climate change, given the possibility of energy source substitution or supplementation."). In contrast, in *Massachusetts* leakage was not a problem because EPA had in theory regulatory control over all emitters in the country.

The States cannot demonstrate that their injuries are fairly traceable to the Energy Companies' greenhouse gas emissions, nor can they show that a capping and reduction of those emissions would remedy their injuries. For these reasons, the States lack standing to pursue their public nuisance tort claims in federal court.

II

THE STATES' CLAIMS DO NOT RAISE JUSTICIABLE QUESTIONS

A. Litigants Raise a Nonjusticiable Political Question If There Are No Discoverable and Manageable Standards for Resolution

The States have raised a novel question as to whether the public nuisance doctrine may be used to hold private entities liable for their *de minimis* and undifferentiated contribution to the Earth's greenhouse gas load. The States contend that these contributions are causing climate change, which has injured their territories and properties. The States argue that this question is justiciable, but they fail to explain how a court can address their claims without making prohibited political judgments.

The political question doctrine provides that some issues are beyond the purview of the federal courts. *Baker v. Carr*, 369 U.S. 186, 210 (1962) ("The nonjusticiability of a political question is primarily a function of the separation of powers."). The doctrine bars federal courts from considering novel questions which do not lend themselves to principled resolution. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004). As Chief Justice Marshall explained: "It is emphatically the

province and duty of the judicial department to say what the law is," but it is beyond the province of the courts to consider "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 170 (1803).

Some questions are nonjusticiable by their very nature. *Marbury*, 5 U.S. at 165 ("If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction."). Thus, in determining whether a question is justiciable, a court must look to the nature of the question presented. *Baker*, 369 U.S. at 211-12. This Court's decision in *Baker v. Carr* provides that there are six considerations relevant in the determination of whether a particular question is barred by the political question doctrine. *Baker*, 369 U.S. at 217.

Under *Baker*, courts consider whether: (1) there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department;" (2) there is "a lack of judicially discoverable and manageable standards for resolving" the question; (3) resolution will require an initial policy decision; (4) a judicial resolution would express a lack of respect for a coordinate branch of government; (5) there is "an unusual need for unquestioning adherence to a political decision already made," and (6) there is potential for "embarrassment from multifarious pronouncements by various departments on one question." *Baker*, 369 U.S. at 217.

Though all six of the considerations set forth in *Baker* may be relevant in determining whether a

matter is a nonjusticiable political question, this Court has since indicated that the second consideration is particularly important: if a reviewing court finds a lack of judicially manageable standards, it will hold the question to be nonjusticiable. *Vieth*, 541 U.S. at 277-78. Such a question is quintessentially a political question in nature because its resolution demands the exercise of political judgment; it would be impossible for a court to resolve the question without being arbitrary in its proclamation of the law, or making an initial policy decision. Either way the court would be making positive law, rather than interpreting existing law. For this reason, the political question doctrine provides that such matters are reserved for the Legislative and Executive Branches. *See, e.g., Luther v. Borden*, 48 U.S. (7 How.) 1, 47 (1849) (holding that the question of whether Rhode Island had established a new government was inherently political and unsuited for judicial resolution).

A court cannot presume that an issue is justiciable simply because it is raised within the context of a traditional tort claim, and has not been expressly committed to another branch of government. The Second Circuit held below that the nuisance doctrine provides such standards, but the opinion fails to explain how those standards can be applied in a judicially manageable way to resolve the novel questions presented in this case without making impermissible political judgments. As set forth below, courts cannot extend the nuisance doctrine to address the problem of climate change without exercising

political judgment and making impermissible policy decisions.

B. There Are No Judicially Manageable Standards for Determining the Reasonableness of the Energy Companies' Emissions, or for Proving Relief in an Equitable Manner

The political question doctrine bars a court from considering issues where there are no judicially manageable standards for resolution, regardless of whether the issues are raised in the context of a familiar cause of action. *See Baker*, 369 U.S. at 211-12. In this case, the States seek to extend the common law public nuisance doctrine in a new and unprecedented manner, but the doctrine does not afford courts the tools necessary coherently to manage the problem of climate change.[5] Laurence H. Tribe, *et al.*, Wash. Legal Found., *Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* 13-20 (2010).[6]

---

[5] This is not to say that courts are categorically barred from entertaining novel claims, but courts cannot resolve issues without judicially manageable standards. *See Vieth*, 541 U.S. at 277-78. The common law grows through reasoned application of existing standards to new situations, which may require logical extensions, but never mere promulgation, of rules. *Id.* ("[L]aw pronounced by the courts must be principled, rational, and based upon reasoned distinctions," for judicial action must be "governed by *standard*, by *rule*.").

[6] *Available* at http://www.wlf.org/publishing/publication_detail.asp?id=2132 (last visited Feb. 3, 2011).

The public nuisance doctrine is based upon an already vague standard that completely breaks down when one seeks to extend it to international climate issues. *See* Keeton, *supra*, at 616 (concept of nuisance "has meant all things to all people."); *see also* F.H. Newark, *The Boundaries of Nuisance*, 65 L. Q. Rev. 480, 480 (1949) (the public nuisance tort is "intractable to definition" because "[t]he boundaries of the tort of nuisance are blurred"). In traditional public nuisance cases, courts determine the reasonableness of an interference with a right common to the public by weighing the social utility of the challenged action against the gravity of the injury suffered. *See* Restatement (Second) of Torts § 827. This is a manageable task because there is always a direct connection between the challenged action and the injury alleged, allowing a reasoned and nonattenuated assessment of the propriety of the challenged action. *See* Tribe, *supra*, at 15; *see, e.g.*, *Georgia v. Tennessee Copper Co.*, 237 U.S. 474, 477-78 (1915) (public nuisance doctrine applied to hold a smelter liable for noxious emissions causing direct injury to surrounding properties).

Yet that standard of review cannot be extended to address the international issue of climate change, because, unlike traditional nuisance actions, the assignment of liability in a suit over global warming would not be based on a reasoned consideration of the defendant's direct impact on the plaintiff, but upon a weighing of political judgment as to the "best" or "preferable" means of addressing the international problem of climate change, and who should bear the burden of curbing global emissions. *California v. GMC*, No. C06-05755 MJJ, 2007 U.S. Dist. LEXIS 68547, at *46 (N.D. Cal. Sept. 17, 2007) ("The Court is

left without guidance in determining what is an unreasonable contribution to the sum of carbon dioxide in the Earth's atmosphere, or in determining who should bear the costs associated with the global climate change . . . ."). Because almost every human action may be said to contribute to the world's emissions, there must be some threshold at which liability attaches under the States' theory. Stuart Buck, *Common Law Environmental Protection: The Common Law and the Environment in the Courts*, 58 Case W. Res. 621, 642 (2008) ("[W]e all emit carbon in some form, even if only exhaling. . . . So if there is to be a lawsuit over global warming, the most basic question is: who should sue whom?"). But the establishment of such a threshold would represent both an impermissible policy choice as to what level of emissions is acceptable, and a political decision as to who should bear the burden of curbing emissions. *GMC*, 2007 U.S. Dist. LEXIS 68547, at *19-*20 (global warming cases require an initial policy decision entailing a balancing of competing social costs, which our system commits to the elected branches).

Moreover, there are no manageable standards for resolution of the issues presented in this case because the courts are incapable of redressing the States' injuries in a fair and equitable manner. Incremental relief is inappropriate in the global warming context because it is inherently unfair and inequitable to allow plaintiffs to single out defendants to bear the burden of liability for the collective actions of all humanity. Mathew Hall, *A Catastrophic Conundrum, But Not a Nuisance: Why the Judicial Branch is Ill-Suited to Set Emissions Restrictions on Domestic Energy Producers Through the Common Law Nuisance Doctrine*, 13 Chap. L. Rev. 265, 275 (2010) ("While an individual

emitter of carbon dioxide is undoubtedly contributing to the problem on some level, any individual contribution is likely so minimal as to have no measurable effect in terms of the injury causing consequences such as warming and sea level rise."); *see also Armstrong v. United States*, 364 U.S. 40, 49 (1960) (individuals should not be forced to bear public burdens, "which, in all fairness and justice, should be borne by the public as a whole"). Such collective problems require collective resolution in the form of generally applicable rules and regulations, but no court is qualified to promulgate the law in this fashion. Tribe, *supra*, at 14.

Where, as in this case, a plaintiff alleges an injury caused by the collective actions of all humanity, the court is simply incapable of fashioning relief in an equitable manner because it has no power to bind humanity at large. Climate change is a global phenomenon, supposedly caused by the collective actions of millions of emitters throughout the world. Many of these emitters reside beyond the reach of any American court's jurisdiction. Even assuming jurisdiction over all contributors, it would be impractical to join all such defendants in one suit. *See* Buck, *supra*, at 642. Therefore, the issue is judicially unmanageable, for it is both impossible and impractical for any court to provide an equitable remedy to address the asserted cause of the States' injuries.

The only way to resolve the problem of climate change is to coordinate human behavior so as to ensure the reduction of global emissions, but this cannot be done by any court order. Pet. App. 26a (*Connecticut v. Am. Elec. Power*, 582 F.3d 309, 325 (2d Cir. 2009))

("Nor could a court set across-the-board domestic emissions standards or require any unilateral, mandatory emissions reductions over entities not party to the suit."). Human behavior can only be collectively coordinated through the enactment of generally applicable positive laws. While courts lack the power to order human behavior in this manner, our constitutional system of government vests the coordinate branches of government with that power. Congress is vested with enumerated powers to enact such laws in response to important national issues. U.S. Const. art. I, § 8. Likewise, the President has the power to enter into treaties, with the advice and consent of the Senate, in order to address issues affecting the international community. *Id.* art. II, § 2. While the courts are naturally incapable of addressing such collective issues, it remains the prerogative of the democratically elected coordinate branches to address them, as those branches represent the collective body of the sovereign American people. *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) ("Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will.").

C. Judicial Resolution of the States' Claims Would Establish National Policy over Politically Charged Subject Matter on Which Congress Has Deliberated, But Has Declined To Regulate

The last four factors in the *Baker* test distill to the proposition that a case presents a nonjusticiable political question if the political branches have already established a policy that may be undermined if a court

were to decide that question. 369 U.S. at 217 (resolution of a political question, by establishment of a policy, would demonstrate a lack of respect for the political branches, would potentially lead to "embarrassment from multifarious pronouncements by various departments," and would be particularly inappropriate where there is "an unusual need for unquestioning adherence to a political decision already made"); *see also* Hall, *supra*, at 280. Where a policy already exists it is impossible for a court to resolve a question implicating that policy without undermining the policy, and thereby demonstrating a lack of respect for those coordinate branches. The resulting conflict between the branches would also be of potential embarrassment to the courts and the coordinate branches. This is all the more likely where the policy question is as politically charged, and of such great national importance, as the global warming issue is.

In this case, the States ask the courts to set policies to control climate change even as the political branches consider the propriety of various regulatory policies. To date, the political branches have established a policy largely of "no regulation" out of concern for the adverse impacts that greenhouse gas regulations would have on the American economy. Congress has evinced this "no regulation" policy by rejecting various legislative proposals to regulate greenhouse gas emissions. It has also demonstrated commitment to this policy through bills and resolutions that prevent the implementation of regulations.

Congress recognizes the importance of the global warming issue, but in weighing the costs of regulation Congress has "found that domestic emissions reduction action should only be taken 'in the context of concerted

international action.'" Hall, *supra*, at 280-81 (quoting H.R. Rep. No. 102-474(I), Purpose and Summary (1992)). Pursuant to that policy, the Executive Branch has worked with the international community to achieve a global solution to the problem of climate change, although the United States has yet to enter into a binding treaty forcing domestic emission reductions. In 1997 President Clinton signed the Kyoto Protocol, which called for mandatory emission reductions. Hall, *supra*, at 281. The treaty was never presented to the Senate for ratification because it was obvious that the Senate would not have ratified the treaty in light of a unanimous Senate resolution, S. Res. 98, 105th Cong. (1997) (Passed 95-0), urging the President "not to sign any [treaty] that did not include emissions restrictions on developing nations, as the Kyoto Protocol failed to contain." Hall, *supra*, at 281. Congress subsequently passed several bills barring the Environmental Protection Agency from enforcing the Kyoto Protocol. *See* Pub. L. No. 105-276, 112 Stat. 2461, 2496 (1998); Pub. L. No. 106-74, 113 Stat. 1047, 1080 (1999); Pub. L. No. 106-377, 114 Stat. 1441, 1441A-41 (2000). This legislative activity demonstrates an affirmative policy against any emission reduction regulatory scheme outside of a truly global agreement, binding upon developed and developing nations alike.[7] Hall, *supra*, at 282.

---

[7] As discussed above, *supra*, Part I.B., *Massachusetts* dealt with an interpretive question over the mandates of a federal statute, not the common law. The Court held that EPA was obligated to consider whether greenhouse gases endanger health and human welfare under the Clean Air Act. The Court observed that Congress had not established a policy barring EPA from regulating greenhouse gases under the Clean Air Act. *Massachusetts*, 549 U.S. at 528-29 ("On its face, the definition (continued...)

If Congress were sufficiently motivated to enact regulations on greenhouse gases it would do so, as has been demonstrated by other legislative bodies. For example, the California Legislature enacted the Global Warming Solutions Act of 2006 in an effort to begin curbing greenhouse gas emissions. Cal. Health & Safety Code, § 38500, *et seq.* But, Congress has repeatedly considered and rejected similar regulatory proposals.

To date, all such proposals have failed for the same reason that Congress rejected the Kyoto Treaty's emission reductions. Hall, *supra*, at 280-82. Of central concern in this ongoing political debate is the propriety of imposing regulations that will raise energy costs for Americans, placing a particular hardship on the poor, and likely slowing economic growth. *See* Schwartz, *supra*, at 829 (greenhouse gas regulations will raise energy costs, and will have a disproportionate impact on the poor, because the poor must allocate a larger share of their budget for energy expenditures); Toni Johnson, *Economic Challenges for Climate Change Policy*, Council on Foreign Relations (July 7, 2009) ("Finding an approach that manages to cut greenhouse gases without doing serious harm to the U.S. economy, particularly given the global economic downturn,

---

[7] (...continued)
embraces all airborne compounds of whatever stripe . . . ."). This observation merely establishes that the Clean Air Act does not foreclose EPA's regulation of greenhouse gases, *not* that Congress also supports the use of federal common law to achieve the same ends. Rather, *Massachusetts* means only that Congress has no objection to EPA regulation of greenhouse gases, in at least some circumstances, under the Clean Air Act.

remains a top concern.").[8] Those concerns were raised with even greater fervor, in light of our now faltering economy, by Republicans in opposition to a renewed—but unsuccessful—push for a national cap and trade scheme in 2010. *See* Ryan Lizza, *As the World Burns*, The New Yorker, Oct. 11, 2010, at 70 (attributing Congress' failure to pass the cap and trade bill to heightened concerns over the possibility that such regulation may lead to another economic downturn).[9] Thus, Congress has weighed, and will re-weigh, the panoply of social and economic considerations entailed in its political judgment as to the best national policy on greenhouse gas emissions. But at this time Congress has determined that the costs of regulation outweigh the benefit of forced domestic reductions, at least in the absence of a global accord binding upon our nation's chief economic competitors, including underdeveloped nations like China and India. Hall, *supra*, at 282.

Should a court then decide to weigh these social and economic considerations differently, so as to hold defendants liable for their otherwise legal emissions, a court would not only be exercising political judgment to establish policy, but would also be contravening Congress' political judgment and its policy choices. This course would open the courts up to public criticism, which would not only question the wisdom of the judiciary's political judgment, but would also charge courts with disrespecting Congress' policy

---

[8] *Available at* http://www.cfr.org/publication/16009/economic_challenges_for_climate_change_policy.html (last visited Feb. 3, 2011).

[9] *Available at* http://www.newyorker.com/reporting/2010/10/11/101011fa_fact_lizza?currentPage=1 (last visited Feb. 3, 2011).

of no regulation. Such a judicial decision would not set the issue to rest, but would rather spark a firestorm of political controversy, reinvigorating the global warming debate. This might lead Congress to respond with legislation and, moreover, might potentially undermine American bargaining power as the political branches continue to work with the international community to develop a truly global response to climate change. Hall, *supra*, at 281.

For all of these reasons, there is an unusual need for the Court to respect the political judgment of the coordinate branches. Failure to do so would injure the judiciary because it would likely compromise the judiciary's image, and thereby lead to embarrassment. *See* Joan Biskupic, *Tensions Rise Between Supreme Court, Politicians*, USA Today, Jan. 24, 2011 ("[T]he risk to the court would be a lessening of people's regard for the institution and faith that it is a neutral decision-maker.").[10] Accordingly, all of the last four factors in the *Baker* test weigh against judicial intervention in the global warming debate, and for this reason the States have raised a nonjusticiable political question.

---

[10] *Available at* http://www.usatoday.com/news/washington/judicial/2011-01-15-RWcourtpolitics23_ST_N.htm (last visited Feb. 3, 2011).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

DATED: February, 2011.

Respectfully submitted,

R. S. RADFORD
*DAMIEN M. SCHIFF
*Counsel of Record
LUKE WAKE, *Of Counsel*
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: rsr@pacificlegal.org
E-mail: dms@pacificlegal.org
E-mail: lw@pacificlegal.org
Counsel for Amicus Curiae
Pacific Legal Foundation

AMICUS CURIAE BRIEF

No. 10-174

In The Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY, INC., *et al.*,

Petitioners,

v.

STATE OF CONNECTICUT, *et al.*,

Respondents.

On *Writ Of Certiorari* To The United States Court Of Appeals For The Second Circuit

BRIEF OF SOUTHEASTERN LEGAL FOUNDATION, INC., ROSS McKITRICK, Ph.D., LAURENCE I. GOULD, Ph.D., AND PATRICK J. MICHAELS, Ph.D., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

SHANNON LEE GOESSLING
Counsel of Record
SOUTHEASTERN LEGAL FOUNDATION, INC.
2255 Sewell Mill Road
Suite 320
Marietta, GA 30062
(770) 977-2131
shannon@southeasternlegal.org

EDWARD A. KAZMAREK
KAZMAREK GEIGER & LASETER LLP
3490 Piedmont Road N.E.
Suite 350
Atlanta, GA 30305
(404) 812-0840

HARRY W. MACDOUGALD
CALDWELL & WATSON LLP
5825 Glenridge Drive, N.E.
Building Two, Suite 200
Atlanta, GA 30328
(404) 843-1956

Attorneys for Amici Curiae

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether there is any *de minimis* threshold below which a defendant's contributions to a plaintiff's alleged harms are too remote and inconsequential to plausibly satisfy the requirements of traceability and redressability.

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Authorities iii

Interest of the *Amici Curiae* 1

Summary of Argument 4

Introduction 5

Argument 9

I. The Harms Alleged by Plaintiffs Are Not "Traceable" to the Acts or Omissions of the Named Defendants 10

II. Plaintiffs' Alleged Harms Cannot Be Redressed By Any Conceivable Judicial Remedy 13

III. The Extent to Which Anthropogenic Greenhouse Gases Cause Global Warming Is Substantially Uncertain 20

IV. Plaintiffs' Claims Present Political Not Scientific Questions 37

Conclusion 39

Appendix ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Ashcroft v. Iqbal, 556 U.S. ___, 129 S.Ct. 1937 (2009) 6

Bell Atlantic v. Twombly, 550 U.S. 544 (2007) 6, 7

Bennett v. Spear, 520 U.S. 154 (1997) 13

Center for Biological Diversity v. NHTSA, 538 F.3d 1172 (9th Cir. 2008) 22

Central Valley Chrysler-Jeep, Inc. v. Goldstene, 529 F.Supp.2d 1151 (E.D. Cal. 2007) 23

CGM v. Bellsouth Telecommunications, Inc., 2010 U.S. Dist. LEXIS 63450 (W.D.N.C. Mar. 16, 2010) 7

Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149 (4th Cir. 2000) 13

Liberty University, Inc. v. Merrill, 2010 U.S. Dist. LEXIS 125922 (W.D. Va. Nov. 30, 2010) 6, 7

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 4, 6, 7, 13

Massachusetts v. EPA, 549 U.S. 497 (2007) ..... *passim*

McCain v. Hermann Law Office, 2010 U.S. Dist. LEXIS 94512 (D.Vt. Jul. 7, 2010) 7

NASA v. Nelson, 2011 WL 148254 (S.Ct. Jan. 19, 2011) 23

Rocky Mtn. Farmers Union v. Goldstene, 719 F.Supp.2d 1170 (E.D. Cal. 2010) 22

TABLE OF AUTHORITIES – Continued

Page

STATUTES

42 U.S.C. § 7475(a) 12

42 U.S.C. § 7479(1) 12

42 U.S.C. § 7602(j) 12

42 U.S.C. § 7661a(a) 12

OTHER AUTHORITIES

CCSP 2006 Synthesis and Assessment Report p. 116, in figure 5.7E 33

CCSP 2006 Synthesis and Assessment Report Product, p. 25, figure 1.3 33

Climatic Research Unit, Data, Temperature, http://www.cru.uea.ac.uk/cru/data/temperature/ 16

East Anglia emails, http://www.eastangliaemails.com/emails.php?eid=1052&filename=1255523796.txt 34

Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed.Reg. 66,496 22

Energy Information Administration, Emissions from Energy Consumption at Conventional Power Plants and Combined-Heat-and-Power Plants, http://www.eia.doe.gov/cneaf/electricity/epa/epat3p9.html 18

TABLE OF AUTHORITIES – Continued

Page

Energy Information Administration, Table 11.19 World Carbon Dioxide Emissions From Energy Consumption, 1998-2007, http://www.eia.doe.gov/aer/txt/ptb1119.html 17

IPCC AR4 WG1 § 10.5.1 31

IPCC AR4 WG1 § 2.2 14

IPCC AR4 WG1 § 2.3.1 14

IPCC AR4 WG1 § 2.3.4 21

IPCC AR4 Table 2.6 30

IPCC AR4 WG1 § 2.9.1, Table 2.11 ..... 25, 26

IPCC AR4 WG1 § 8.4.7 27

IPCC AR4 WG1 § 9.2.2 32

IPCC AR4 WG1 § 10.3.2.1 33

IPCC AR4 FAQ 1.1 ..... 25, 26

IPCC AR4 WG1 § 1.6 24

IPCC AR4 WG1 § 8.6.3.2 30

IPCC AR4 WG1 § 11.10.1 35

IPCC AR4 WG1 § 8.6.2.3 ..... 28, 29

IPCC AR4 Summary for Policymakers, p. 12 ..... 15, 30

IPCC AR4 WG1 Chap. 8, FAQ 8.1 35

IPCC AR4 WG1 Chap. 9, Executive Summary 24

IPCC AR4 WG1 Glossary 28

TABLE OF AUTHORITIES – Continued

Page

IPCC Official: "Climate Policy Is Redistributing The World's Wealth" The Global Warming Policy Foundation, http://thegwpf.org/the-climate-record/1877-ipcc-official-climate-policy-is-redistributing-the-worlds-wealth.html 37

IPCC TAR § 6.5.3, Table 6.2 15

IPCC TAR § 12.22 27

IPCC TAR WG1 The Scientific Basis § 14.2.2.2 28

Key Judge Downplays Prospects for Successful Climate Damages Suits, Inside EPA, March 5, 2010 at 18 38

Knight, J., *et al.* (2009), "Do global temperature trends over the last decade falsify climate predictions?" In: Peterson, T. C., & Baringer, M.O. (eds.), "State of the Climate in 2008" Special Supplement to the Bull. Am. Meteorol. Soc., 90-91 32

Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed.Reg. 25324 18

McKitrick, Ross R., *et al.* (2010), *Panel and Multivariate Methods for Tests of Trend Equivalence in Climate Data Sets*. 11 Atmospheric Science Letters 270, 276 doi: 10.1002/asl.290 32

NOAA, Trends in Atmospheric Carbon Dioxide, available at http://www.esrl.noaa.gov/gmd/ccgg/trends/global.html 11

TABLE OF AUTHORITIES – Continued

Page

Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed.Reg. 31514 12

"Q&A: Professor Phil Jones," BBC News, Feb. 13, 2010, http://news.bbc.co.uk/2/hi/8511670.stm 34

Spencer, Roy W., *et al.*, *On the diagnosis of radiative feedback in the presence of unknown radiative forcing* 110 GEOPHYSICAL RESEARCH LETTERS D16109, doi:10.1029/2009JD013371 (2010) 29

Stainforth, David, *et al.*, *Confidence, uncertainty and decision-support relevance in climate predictions*, Phil. Trans. R. Soc. A 2007 365, 2145-2161, 2154 31

U.S. Energy Information Administration, International Energy Statistics, http://tonto.eia.doe.gov/cfapps/ipdbproject/IEDIndex3.cfm?tid=90&pid=44&aid=8 14

INTEREST OF THE *AMICI CURIAE**

Southeastern Legal Foundation, Inc. (SLF) is a national constitutional public interest law firm and policy center that promotes the public interest in the proper construction and enforcement of the laws and the Constitution of the United States. Founded in 1976, SLF was established for the purpose of participating in the public policy process and engaging in litigation in the public interest. In addition to legislative initiatives and promulgation of programs designed to inform and educate the public, the organization's attorneys represent plaintiffs in courts throughout the country to enforce laws advancing its interests through litigation.

In particular, SLF advocates these core principles in the area of environmental regulation, where it is increasingly common to find impairments of economic freedom, excessive government, and restrictions on the free enterprise system.

SLF is a petitioner before the D.C. Circuit Court of Appeals in five cases challenging the Environmental Protection Agency's suite of rules for regulation of human emissions of greenhouse gas regulations. Case

---

* This brief is authored in its entirety by the attorneys for SLF identified on the cover, and no person or entity other than SLF, its members or its counsel has made any monetary contribution to the preparation or submission of this brief. SLF has obtained permission to file this brief from all parties hereto. Their letters of consent have been filed with the Clerk pursuant to Rule 36.

Nos. 10-1035 and 10-1239 (consolidated with 09-1322), 10-1083 and 10-1131 and (consolidated with 10-1073) and 10-1094 (consolidated with 10-1092).

Ross McKitrick, Ph.D., is a tenured, full professor of economics at the University of Guelph in Canada. He is a Senior Fellow of the Fraser Institute, and a member of the Academic Advisory Boards of the John Deutsche Institute for Economic Policy at Queen's University and the Global Warming Policy Foundation in London, UK. His research areas include applications of statistical methods in climate measurement, the relationship between economic growth and pollution, and regulatory mechanism design. His research has appeared in such journals as The Journal of Environmental Economics and Management, Economic Modeling, The Energy Journal, Journal of Geophysical Research, Geophysical Research Letters, and Proceedings of the National Academy of Sciences. He is the author of the advanced textbook Economic Analysis of Environmental Policy, published by the University of Toronto Press, and coauthor of Taken By Storm: The Troubled Science, Policy and Politics of Global Warming which was a recipient of the 2002 Donner Prize for Best Book on Canadian Public Policy. Professor McKitrick is widely-cited around the world as an expert on global warming and environmental issues. His views have been published or broadcast many times in national and international media and presented at academic conferences in Canada, the United States and Europe. He has testified before the U.S. Congress and the Canadian

Parliamentary Finance and Environment Committees. In 2006 he was one of 12 experts from around the world asked to brief a panel of the U.S. National Academy of Sciences on paleoclimate reconstruction methodology. Dr. McKitrick has been involved in the analysis of climate change, including both policy and physical science issues, for nearly twenty years, and feels it is important that decision-makers have access to clear and reliable information in light of the complexities and the high stakes involved.

Laurence I. Gould, Ph.D., Professor of Physics at the University of Hartford, has been studying global warming and climate change since 2003 and has given many presentations on the topic. He is a past Chair (2004) of the New England Section of the American Physical Society, and has been a Visiting Fellow at Yale University (History of Science, Philosophy of Science). Dr. Gould is concerned that the corruption of climate science is having a severe negative impact on the economy and the entire educational system and if left unchecked will also corrupt science in general with further impairment of human life.

Patrick J. Michaels, Ph.D., is Senior Fellow in Environmental Studies at the Cato Institute and is a Distinguished Senior Fellow in the School of Public Policy at George Mason University. He is an *amicus* in this brief in his individual capacity only as the Cato Institute is filing its own *amicus* brief in this case. He is a past president of the American Association of State Climatologists and was program chair for the Committee on Applied Climatology of the

American Meteorological Society. Dr. Michaels was also a research professor of Environmental Sciences at University of Virginia for thirty years. Dr. Michaels was a contributing author and is a reviewer of the United Nations Intergovernmental Panel on Climate Change. He has researched climate change science and policy for nearly four decades and is concerned, as a private citizen, about efficient regulation of environmental problems.

SUMMARY OF ARGUMENT

Plaintiffs cannot satisfy any of the requirements of Article III standing. The defendants' emissions of carbon dioxide (CO_2) make such a *de minimis* contribution to the global CO_2 concentration and to global average surface temperature that plaintiffs cannot plausibly allege either traceability or redressability as required by *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

Though it is assumed by many that there is no meaningful scientific controversy surrounding human-caused global warming, the United Nations Intergovernmental Panel on Climate Change (IPCC) reports on which plaintiffs rely plainly disclose substantial scientific uncertainty about multiple fundamental climate processes. These uncertainties afflict the extent to which global warming can be attributed to human emissions of greenhouse gases. In recognition of these uncertainties, the Court should proceed with due

caution on the question of the relationship between climate change and anthropogenic emissions of greenhouse gases, leaving the issue open for full adversarial development in other proceedings, if any.

Finally, the question of global warming and climate policy is inherently political, as even its proponents have candidly admitted. The political question doctrine is perfectly suited to this case, and would protect the judiciary from controversies it cannot handle, and preserve the balance of power with the other branches and the sovereignty of electorate on a momentous public issue.

INTRODUCTION

The District Court dismissed plaintiffs' suit based on the political question doctrine, and therefore did not reach the question of standing. 406 F.Supp.2d 265, 267, 271 n.6 (S.D.N.Y. 2005).

The Second Circuit reversed the District Court on the political question issue, and therefore reached standing and concluded that plaintiffs met every test of standing. 582 F.3d 309, at 315 (2nd Cir. 2009).

The Second Circuit held plaintiffs met the standing requirements of traceability and redressability because the magnitude of plaintiffs' injuries would supposedly be less if defendants' emissions were reduced than if they were not reduced, 582 F.3d at 349. This "every little bit helps" rule has no limits

and no place to stop. How little is too little to make a federal case?

Accordingly, this case presents the question of whether there is any *de minimis* threshold below which a defendant's contributions to a plaintiff's alleged harms are too inconsequential to plausibly satisfy the requirements of traceability and redressability.

The question of whether there is a lower limit to the "every little bit helps" rule is merely begged, not answered by the boilerplate rules of pleading standing, such as the chestnut that "general factual allegations of injury resulting from the defendants' conduct may suffice." *Lujan*, 504 U.S. at 561. While it is fairly said that at the pleading stage plaintiffs are not required to present scientific evidence to prove the elements of standing, they must nevertheless present a *plausible* statement of a justiciable claim. *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937 (2009). Thus, in *Liberty University, Inc. v. Geithner*, 2010 U.S. Dist. LEXIS 125922 (W.D. Va. Nov. 30, 2010), the court dismissed the plaintiff's challenge of the Patient Protection and Affordable Care Act because of lack of standing, stating as follows:

> "The party invoking federal jurisdiction bears the burden of establishing" the elements of standing.... The plaintiff must support each element of the standing requirement with "the manner and degree of evidence" required at the motion to dismiss stage....

> In the past, this meant that the plaintiffs allegations were accepted as true.... The decisions of the Supreme Court of the United States in *Iqbal* and *Twombly*, however, clarify that, to survive a motion to dismiss, the plaintiff's allegations must present sufficient facts to be plausible.

Id., at 12-13. *See also, McCain v. Hermann Law Office*, 2010 U.S. Dist. LEXIS 94512 (D.Vt. Jul. 7, 2010) (applying *Iqbal/Twombly* "plausibility" requirements in dismissing plaintiff's claims for lack of standing); and *CGM v. Bellsouth Telecommunications, Inc.*, 2010 U.S. Dist. LEXIS 63450 (W.D.N.C. Mar. 16, 2010) (court recommended that plaintiff's claim be dismissed for lack of standing because plaintiffs claims did not meet the *Iqbal/Twombly* plausibility requirement.)

The Second Circuit failed to require the plaintiffs to meet even minimal standards of plausibility with respect to their standing.

This was erroneous. Although the review of standing is not as demanding at the pleading stage as it would be at the summary judgment stage, *Lujan*, 504 U.S. at 561, "standing" is nevertheless a jurisdictional requirement under Article III. A patently improbable collection of unsupportable allegations does not magically confer jurisdiction where it would not otherwise exist. There are minimal thresholds of plausibility, traceability and redressability that must be satisfied. Standing is "an essential and unchanging part of the case-or-controversy requirement of Article III," *Lujan*, 504 U.S. at 560, and requires

meaningful consideration where the plaintiffs' standing is doubtful. In other words, while the Court should take plaintiffs' *factual* allegations for what they are at the pleading stage, whether those facts state a plausible and *legally sufficient* grounds for standing must be determined by the court.

The Second Circuit accepted plaintiffs' assertion that "defendants' continued emissions of carbon dioxide *contribute* to global warming." 582 F.3d at 345 (emphasis added). This contribution to harm was held to be actionable under the law of public nuisance. The triviality of the injuries was no bar to suit because "the size of injury is not germane to standing analysis." *Id.* at 347, citing *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 72 n.8 (3d Cir. 1990), citing *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973). For traceability purposes, then, "every little bit hurts."

On redressability, the Court held "the magnitude of plaintiffs' injuries will be less if defendants' emissions are reduced than they would be without a remedy." 582 F.3d at 349. According to the Second Circuit, any reduction, by any person, in any amount, in any location, is sufficient for Article III standing. For redressability purposes, therefore, "every little bit helps."

Neither the Complaints nor the Second Circuit's opinion quantify how little defendants' emissions actually contribute to global warming, or how little

global warming would be avoided by granting the relief sought. As set forth below, those figures can be calculated and if they could speak they would say "*de minimis non curat lex*." Assuming the science on which plaintiffs rely is correct, 10 years of defendants' total emissions contributes 0.0047°C in warming, which is 10 times smaller than the level of precision in measurement of global average surface temperature. The "relief" plaintiffs seek would accomplish a temperature reduction of 0.00071°C, or 7.1 ten-thousandths of a degree, 71 times smaller than the smallest change that can be detected.

ARGUMENT

As is more fully shown below, based on any plausible view of the factual nature of plaintiffs' claims, and any reasonable reading of applicable law, plaintiffs cannot show that their alleged injuries are in any meaningful way "traceable" to the acts or omissions of the named defendants, or that any feasible set of judicially fashioned remedies would redress plaintiffs' alleged harms. For these reasons, whether or not this Court also reverses the Second Circuit on other grounds (such as political question), the Second Circuit's rationale in finding that plaintiffs had standing should be expressly reversed so that it does not stand available for use in future cases.

I. THE HARMS ALLEGED BY PLAINTIFFS ARE NOT "TRACEABLE" TO THE ACTS OR OMISSIONS OF THE NAMED DEFENDANTS.

Carbon dioxide is a ubiquitous and necessary element of the carbon cycle, which is fundamental and essential to life on earth. Carbon dioxide is both the naturally occurring product of the oxidation of any carbon-containing material and an essential nutrient for all photosynthetic processes. All animals and insects emit CO_2 every time they exhale. Bacteria and fungi release CO_2 to the atmosphere as they decompose organic detritus. CO_2 is emitted from the combustion of fossil fuels and the production of cement. In essence, natural emissions of CO_2 are a necessary and essential aspect of all life on earth.

Plaintiffs allege defendants emit 650 million metric tons of CO_2 per year, 406 F.Supp.2d 265, 268 (S.D.N.Y. 2005), which is alleged to constitute 25% of U.S. electric power industry's emissions, which themselves are said to be 10% of global CO_2 emissions. *Id.* According to the complaint, therefore, defendants are responsible for approximately 2.5% of all human emissions.

As a constituent of the atmosphere, CO_2 is a trace gas. Atmospheric CO_2 levels from all sources are

currently approximately 390 parts per million on a volumetric basis ("ppmv").[1]

Plaintiffs claim their damages are fairly traceable to defendants' 2.5% contribution to total human CO_2 emissions, while ignoring the sources of the other 97.5%. This contention could only be true if there is no lower threshold to traceability for standing purposes. It is a fact that every vehicle, every apartment building, every restaurant, every home, every office building, every school, and essentially every other human enterprise is a "source" of carbon dioxide. All therefore "contribute" to atmospheric CO_2 levels to some extent and hence to global warming and hence to plaintiffs' alleged damages. Absent a threshold of insignificance, all are subject to suit under the Second Circuit's theory. For example, a typical office building in the Northeast emits approximately 20 pounds of CO_2 per year per square foot of office space.[2] This means that the offices of the EPA Headquarters emit something in the range of 8000 tons per year of CO_2.[3] The offices of the Second Circuit, and even the offices of this esteemed Court, would likewise be "sources" of

---

[1] NOAA, Trends in Atmospheric carbon dioxide, available at http://www.esrl.noaa.gov/gmd/ccgg/trends/global.html (last visited Feb. 2, 2011). In other words, each cubic foot of air contains approximately 390-millionths of a cubic foot of CO_2.

[2] *See* http://www.energystar.gov/index.cfm?c=evaluate_performance.bus_portfoliomanager_carbon (last visited Feb. 3, 2011).

[3] Assuming EPA Headquarters has 4000 employees and is a typical office environment with 200 square feet of office space per employee.

CO_2. Even with a threshold of "major" sources as defined under the Clean Air Act, namely 100 tons per year,[4] EPA estimates that the number of major sources would exceed 6 million in the United States alone.[5] This is why even EPA concluded that defining CO_2 as a "pollutant" under the Clean Air Act and then applying the literal wording of the Act to CO_2 emissions would necessarily lead to "absurd" results.[6] The Second Circuit's nuisance theory, having no floor at all, leads to even more absurd results.

To satisfy the causation requirement, the alleged injury must be "fairly traceable to the actions of the

---

[4] These thresholds are built into the definitions of "major emitting facility" and "major source" set forth at CAA §§ 169(1) and 302(j), 42 U.S.C. §§ 7479(1) and 7602(j), which establish the applicability of the PSD preconstruction permit program and Title V operating permit program, respectively. *See* CAA § 165(a), 42 U.S.C. § 7475(a) (requiring PSD permits for "major emitting facilities") & CAA § 502(a), 42 U.S.C. § 7661a(a) (requiring Title V operating permits for all "major sources").

[5] Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule (Tailoring Rule), 75 Fed.Reg. 31514 at 31536.

[6] In *Massachusetts v. EPA*, this Court concluded that CO_2 fit within the definition of an "air pollutant" under the Clean Air Act. 549 U.S. 497, 532 (2007). Thereafter, however, EPA concluded that regulating CO_2 under the Act would be absurd and impossible. Tailoring Rule, 75 Fed.Reg. at 31,525 and 31,536. As a result, EPA's current regulations address this contradiction by changing the statutory emissions threshold at which CO_2 is regulated in order to make the regulations administratively feasible. *Id.* at 31,570. SLF takes no position *in this case* on whether CO_2 is properly subject to regulation under the Act.

defendant." *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (citation and internal quotation marks omitted). This requirement "ensures that there is a genuine nexus between a plaintiff's injury and a defendant's alleged . . . conduct," *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000), and "is in large part designed to ensure that the injury complained of is 'not the result of the independent action of some third party not before the court,'" *id.* at 162 (quoting *Lujan*, 504 U.S. at 560).

The *reductio ad absurdum* of the Second Circuit's "every little bit hurts" rule of traceability is that adverse effects are "fairly traceable" to all sources of CO_2, no matter how small, and that all of them are therefore subject to suit.

II. PLAINTIFFS' ALLEGED HARMS CANNOT BE REDRESSED BY ANY CONCEIVABLE JUDICIAL REMEDY.

In similar fashion, plaintiffs cannot plausibly allege that their damages could be redressed by any conceivable judicial remedy.

Assuming plaintiffs' causal theories are correct, and borrowing from the science as reported by the IPCC on which plaintiffs rely,[7] one can calculate defendants' alleged contribution to global warming.

---

[7] Plaintiffs cite the IPCC multiple times in their complaint, paras. 80, 81, 88, 92, 93 and 107.

According to the IPCC, it takes approximately 15.5 billion metric tons of CO_2 emissions to increase atmospheric CO_2 levels by 1 ppm.[8] According to plaintiffs, defendants are currently emitting 650 million metric tons of CO_2 per year. Assuming that rate continues over the course of 10 years, defendants will emit 6.5 billion metric tons, or enough to raise average atmospheric CO_2 levels by 0.42 ppm.

According to IPCC, the change in "radiative forcing"[9] in watts per meter squared caused by increasing CO_2 levels is given by the formula 5.35 times

---

[8] *See* IPCC AR4 WG1 § 2.3.1, available at http://www.ipcc.ch/publications_and_data/ar4/wg1/en/ch2s2-3.html (last visited Feb. 2, 2011). Annual global CO_2 emissions figures (available from the U.S. Energy Information Administration, International Energy Statistics, http://tonto.eia.doe.gov/cfapps/ipdbproject/IEDIndex3.cfm?tid=90&pid=44&aid=8 (last visited Feb. 2, 2011), divided by the average atmospheric CO_2 concentration changes (available from the U.S. Department of Commerce, http://www.esrl.noaa) (last visited Feb. 2, 2011) over the same years shows that atmospheric concentration goes up by 1 ppm for every 15.5 billion metric tons of human CO_2 emissions.

[9] Radiative forcing is defined by the IPCC as "'the change in net (down minus up) irradiance (solar plus longwave; in W m-2) at the tropopause after allowing for stratospheric temperatures to readjust to radiative equilibrium, but with surface and tropospheric temperatures and state held fixed at the unperturbed values'. Radiative forcing is used to assess and compare the anthropogenic and natural drivers of climate change." *See* IPCC AR4 WG1 § 2.2, available at http://www.ipcc.ch/publications_and_data/ar4/wg1/en/ch2s2-2.html (last visited Feb. 2, 2011).

the natural logarithm of the proportionate change in concentration:[10]

$$\text{Radiative forcing } (W/m^2) = 5.35 * \ln(\frac{C}{C_0})$$

Assuming ten years of defendants' emissions from today would increase atmospheric CO_2 levels by 0.42 ppm, C_0 and C would be 390.0 ppm and 390.42 ppm, respectively. Doing the math, therefore, the total of *all* of defendants' CO_2 emissions over a ten-year period would lead to an increased radiative forcing of 0.0058 W/m^2.

The IPCC Fourth Assessment Report (AR4) also lists the "climate sensitivity" (that is, how much the temperature changes for a doubling of CO_2) as likely being between 2°C and 4.5°C with a best estimate of 3.0°C.[11] Applying the IPCC best estimate for climate sensitivity (a temperature change of 3.0°C from a forcing change of 3.71W/m^2) one can calculate that each change in radiative forcing of 1 W/m^2 produces 0.81°C of temperature change (i.e. 3.0°C/3.71W/m^2).

Applying this factor, and relying solely on the IPCC analysis that is essential to plaintiffs' own

---

[10] *See* IPCC Third Assessment Report (TAR) § 6.5.3, Table 6.2, available at http://www.grida.no/publications/other/ipcc%5Ftar/?src=/CLIMATE/IPCC_TAR/wg1/222.htm (last visited Feb. 2, 2011).

[11] IPCC AR4 Summary for Policymakers, p. 12, available at http://www.ipcc.ch/publications_and_data/ar4/wg1/en/spmsspm-understanding-and.html (last visited Feb. 2, 2011).

statement of their claims, one can determine that all of defendants' CO_2 emissions over a ten-year period would result in a change in radiative forcing of 0.0058 W/m^2, which in turn would result in a projected temperature change of 0.0047°C (or 0.0085°F).[12]

The level of precision in measurement of global average surface temperature is 0.05°C.[13] Thus, a complete elimination of defendants' emissions for 10 years would produce a calculated effect on global temperature that is 10 times smaller than the smallest change in global average temperature than can be detected. Since the effect would have to be 10 times bigger to even be detected, it would be impossible to confirm that it had ever actually occurred.

If the remedy were less than a complete elimination of defendants' emissions, the effect would be even smaller. In their complaint, plaintiffs allege at paragraph 148 that "by reducing emissions by approximately three percent annually over the next decade, the defendants would achieve their share of the carbon dioxide emission reductions necessary to *significantly slow the rate and magnitude of warming.*" (Emphasis added). Reducing defendants'

---

[12] IPCC's climate sensitivity = 3.0°C/3.71W/m^2, or 0.809°C per W/m^2. So, if Defendants contribute 0.0058 W/m^2, the projected change in temperature is 0.0058 W/m^2 * 0.809°C per W/m^2, or 0.0047°C.

[13] *See* Climatic Research Unit, Data, Temperature, http://www.cru.uea.ac.uk/cru/data/temperature/ (last visited Feb. 2, 2010).

emissions by 3% each year for 10 years from an initial level of 650 million metric tons (mmt) would achieve a cumulative reduction in emissions over ten years of 981.5 mmt as compared to unchanged emissions for 10 years. A reduction in CO_2 emissions of 981.5 mmt equates to a change in atmospheric concentration of 0.0633 ppm, a change in radiative forcing of 0.000873 W/m^2, and a change in temperature of 0.00071°C. This change, 7.1 ten-thousandths of a degree, is 71 times smaller than the threshold of detection. Being undetectable by two orders of magnitude, the relief plaintiffs seek in this lawsuit would do nothing that anyone could ever measure or detect to slow the rate and magnitude of warming, much less do so "significantly."

Between 2001 and 2007 China added new CO_2 emissions from energy consumption at an average rate of 543 million metric tons per year.[14] At that rate, the annual emissions reductions prayed for by plaintiffs in the first year would be replaced by growth in China alone in 13 days.[15]

---

[14] *See* Energy Information Administration, Table 11.19 World Carbon Dioxide Emissions From Energy Consumption, 1998-2007, http://www.eia.doe.gov/aer/txt/ptb1119.html (last visited Feb. 2, 2011).

[15] China's growth in CO_2 emissions from energy consumption has averaged 540 million metric tons per year from 2001 through 2007, *See* n.14, *supra*. This averages to 1.479 million metric tons per day. A 3% reduction in defendants' annual emissions of 650 million metric tons is 19.5 million metric

(Continued on following page)

The futility of the relief sought by plaintiffs is comparable to that of EPA's motor vehicle greenhouse gas regulations, which, after a century, would accomplish a temperature reduction of 0.01°C, also well below the level of detection.[16]

There has been a real-time experiment on plaintiffs' thesis since this lawsuit was filed in 2005. According to figures from the Energy Information Administration of the U.S. government, annual CO_2 emissions from electric power generation in the U.S. declined from 2005 to 2009 by 274,330,000 metric tons.[17] The cumulative reduction in emissions from 2005 to 2009 compared to five years of emissions at the 2005 rate is 385,882,000 metric tons, equal to 42% of defendants' annual emissions. Using the formulae shown above, this equates to a change in

---

tons, which would be replaced by China's growth in emissions in 13.1 days.

[16] In *Massachusetts*, this Court held that regulation of tailpipe emissions would "slow or reduce" climate change. 504 U.S. at 525. In fact, in the tailpipe emissions regulations that ensued from the *Massachusetts* ruling, EPA asserted the rule would avoid a temperature increase of one 0.01°C and one millimeter in sea level rise over the course of the next century. Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed.Reg. 25324 at 25495. This temperature change is also below the threshold of detection.

[17] *See* Energy Information Administration, Emissions from Energy Consumption at Conventional Power Plants and Combined-Heat-and-Power Plants, http://www.eia.doe.gov/cneaf/electricity/epa/epat3p9.html (last visited Feb 2, 2011).

concentration of 0.0249 ppm, a change in radiative forcing of 0.000343 W/m^2, and a change in temperature of 0.0002780°C, or 2 ten-thousandths of a degree, 180 times smaller than the threshold of detection. From 2005 to 2009, while these emissions reductions were occurring, global atmospheric CO_2 has gone from 379.76 in 2005 to 387.35 ppm in 2009.[18]

Plaintiffs' claim for relief is a monument to futility, the necessary result of failing to enforce the requirements of traceability and redressability. Without being tethered by meaningful requirements of traceability and redressability, global warming nuisance litigation would punish any targeted defendants and their rate payers and yet accomplish nothing for the plaintiffs or the planet. It should not be necessary to point out that attempting to manage climate through pointless exactions from hapless defendants comports neither with the rule of law nor with rationality itself, but that is where we find ourselves.

Perhaps (this is not certain), a worldwide program of massive reductions in global CO_2 emissions would be sufficient to produce a detectable change in global temperature. But that was not the issue before the Second Circuit, nor could it possibly be. The point here is that, assuming plaintiffs' estimates of defendants' CO_2 emissions are accurate, and assuming the truth of the models on which plaintiffs' base their

---

[18] *See* ftp://ftp.cmdl.noaa.gov/ccg/co2/trends/co2_annmean_mlo.txt (last visited Feb. 2, 2011).

claims of causality, plaintiffs' harms cannot possibly be redressed by any conceivable judicial remedy. Therefore, plaintiffs failed to state a plausible claim of standing and their case should have been dismissed.

III. THE EXTENT TO WHICH ANTHROPOGENIC GREENHOUSE GASES CAUSE GLOBAL WARMING IS SUBSTANTIALLY UNCERTAIN.

All of the foregoing has assumed that plaintiffs' causal premise is correct. Even granting that premise, the contribution of any particular set of defendants to global warming is so *de minimis* that public nuisance litigation to redress global warming is an exercise in futility.

Laying those arguments to one side, this case obviously does not come before the Court in a vacuum. Anthropogenic global warming is one of the most contentious political issues of our time.[19] EPA has issued a massive and far-reaching set of greenhouse gas regulations in the wake of *Massachusetts v. EPA*. These rules are currently before the D.C. Circuit Court of Appeals in one of the largest and most

---

[19] In the West Virginia senate campaign in 2010, the winning candidate, then-Governor Jim Manchin, ran a television ad in which he loads a bolt-action rifle, says "I sued EPA and I'll take dead aim at the cap and trade bill" as he fires a bullet through the cap and trade bill. *See* http://www.youtube.com/watch?v=xIJORBRpOPM&feature=player_embedded (last visited Feb. 1, 2011).

complex judicial reviews of environmental regulation in our nation's history. These cases may eventually arrive before this Court. Before rushing in where angels fear to tread, the Court should be aware of the nature of the scientific uncertainties surrounding anthropogenic global warming that are disclosed in the very IPCC reporting on which plaintiffs rely.

Quite independent of the standing arguments in the preceding sections, and in the traditional advisory role of *amici*, in this section we point out that the IPCC reports on which plaintiffs rely plainly identify substantial and pivotal uncertainties in climate science. The IPCC reports also recommend that decision makers – like the members of this Court – be fully aware of those uncertainties.[20]

While the posture of this case precludes a full treatment of unresolved issues in climate science, the importance of this case and of the issue make it appropriate to acquaint the Court with the nature and extent of a few of the critical uncertainties. In addition, it is important to clarify the meaning and effect of how *Massachusetts* treated the issue of causation, a subject about which there is some confusion.

The effect of the treatment of causation in *Massachusetts* is limited by the fact that the EPA did "not

---

[20] IPCC AR4 WG1 § 2.3.4 ("Communicating risk and uncertainty is a vital part of helping people respond to climate change.") Available at http://www.ipcc.ch/publications_and_data/ar4/wg2/en/ch2s2-3-4.html (last visited Feb. 2, 2011).

dispute the existence of a causal connection between man-made greenhouse gases and global warming." 549 U.S. at 523 (2007).

Neither EPA's concession in *Massachusetts* nor the *fait accompli* it presented the Court ordains the causal relationship as a law of nature on a par with the law of gravity. Whether and to what extent the assertion is actually true in the physical world is a separate matter, as the workings of nature are indifferent to judicial opinions.

Nevertheless, the Court's recitation of EPA's concession has been cited as binding authority for the causal premise. In its Endangerment Finding, EPA bootstrapped its concession by repeatedly citing this Court's "holding" in *Massachusetts* that man-made greenhouse gases cause global warming as support for its finding of endangerment. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed.Reg. 66,496, 66,499, 66,537-8, 66,543, and 66,545. ("The Administrator agrees that '[j]udged by any standard, U.S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations and hence, . . . to global warming.' *Massachusetts v. EPA*, 549 U.S. at 525.") Some courts have also seen the issue as settled by *Massachusetts*. *See, e.g.*, *Center for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1198 n.41, 1224 (9th Cir. 2008) (describing an "emergent consensus on global warming" and citing *Massachusetts* for the proposition that an increase in greenhouse gases could cause climate change); *Rocky*

Mtn. Farmers Union v. Goldstene, 719 F.Supp.2d 1170, 1177 n.3 (E.D. Cal. 2010) (observing that "[c]ounsel for all parties appear to accept as fact that global warming is without debate or dispute"); *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F.Supp.2d 1151, 1169 (E.D. Cal. 2007) (referring to "growing consensus" on the issue).

The Court has traditionally proceeded cautiously and modestly where it does not have the benefit of a full adversarial treatment of momentous and contentious issues. *See NASA v. Nelson*, 2011 WL 148254 (S.Ct. Jan. 19, 2011) (slip op., p. 8, n.10) ("It is undesirable for us to decide a matter of this importance in a case in which we do not have the benefit of briefing by the parties and in which potential amici had little notice that the matter might be decided.") The reverberations of EPA's concession on causation in *Massachusetts* illustrate the wisdom of such restraint on the question of causation in this case. The nature and depth of the uncertainties disclosed by the IPCC reports, discussed below, confirm it.

Read fairly, there is considerably less to IPCC's pronouncements that meets the eye. On the one hand, IPCC seems to argue that the causal relationship between CO_2 emissions and changes in global temperature is settled. For example, IPCC, on which plaintiffs' rely, concludes on the subject of causation that

> [i]t is extremely unlikely (<5 percent) that the global pattern of warming during the

> past half century can be explained without external forcing, and very unlikely that it is due to known natural external causes alone.... Greenhouse gas forcing has very likely caused most of the observed global warming over the last 50 years.

IPCC AR4 Working Group 1 (WG1) Chap. 9, Executive Summary.[21] In other words, it was caused by human emissions of greenhouse gases. EPA adopts this conclusion verbatim in its Endangerment Finding. 74 Fed.Reg. at 66,518.

On the other hand, further examination of the IPCC's documentation indicates that the IPCC itself admits there are multiple and profound uncertainties in the understanding of the climate system that necessarily bring the certitude of this conclusion into question.

First, the IPCC's AR4 explains that there are three principal influences on the climate system:

> There are three fundamental ways to change the radiation balance of the Earth: 1) by changing the incoming solar radiation (e.g., by changes in Earth's orbit or in the Sun itself); 2) by changing the fraction of solar

---

[21] Available at http://www.ipcc.ch/publications_and_data/ar4/wg1/en/ch9s9-es.html (last visited Feb. 2, 2011). Quantification of the levels of certainty meant by "extremely likely" (>95%), "very likely" (>90%), and "very unlikely" (<10%) is found at AR4 WG1 § 1.6, available at http://www.ipcc.ch/publications_and_data/ar4/wg1/en/ch1s1-6.html (last visited Feb. 2, 2011).

> radiation that is reflected (called 'albedo'; e.g., by changes in cloud cover, atmospheric particles or vegetation); and 3) by altering the longwave radiation from Earth back towards space (e.g., by changing greenhouse gas concentrations). Climate, in turn, responds directly to such changes, as well as indirectly, through a variety of feedback mechanisms.

IPCC AR4 FAQ 1.1.[22] The uncertainty problem lies in the level of scientific understanding of these effects. The sun is the most important of these three factors: It provides all of the Earth's atmospheric energy. *Id.* But according to IPCC, there is no scientific consensus on the influence of the sun. This led the IPCC to acknowledge a "low" level of scientific understanding about the sun's overall effect on climate. AR4 WG1 § 2.9.1, Table 2.11. While changes in solar irradiance, which are understood, may have a small effect compared to those from changes in clouds and greenhouse gases, the fact remains that the full scope of how the sun influences climate is not understood. Whatever the effects of changes in solar output may be, the uncertainties in the cloud and aerosol effects are enormous.

The second factor is the albedo effect, including from clouds, which controls how much solar energy is reflected back into space. IPCC acknowledges

---

[22] *See* http://www.ipcc.ch/publications_and_data/ar4/wg1/en/faq-1-1.html (last visited Feb. 2, 2011).

"significant uncertainty" about clouds as well. AR4 WG1 § 2.9.1, Table 2.11.

Third and last, are greenhouse gases (the most predominant of which is water vapor) that control how much heat is maintained in the atmosphere by absorbing long-wave radiation from the surface and reradiating some of it back to the surface. IPCC AR4 FAQ 1.1. It is through this mechanism that CO_2 has its greenhouse effect. According to IPCC, the overall level of scientific understanding of the climate effects of greenhouse gases is "high," with a scientific consensus about the physical mechanisms involved, namely the physics of radiative heat transfer. AR4 WG1 § 2.9.1, Table 2.11.

Of the three primary climate drivers, then, there is substantial *un*certainty about the influence of two. This necessarily calls into question the extraordinary level of certainty expressed by the IPCC's conclusion that it is "very likely" (90%) that recent warming in the 20th century (but not prior episodes of equally rapid warming in the historical record) is caused by anthropogenic greenhouse gases. Either the sun and clouds are understood, or they are not. If the IPCC does not understand their influence on climate, they cannot be ruled out to a 90% level of certainty as a cause of any particular climate phenomenon, whether it be rising or falling temperatures.

A vast array of natural cycles, currents, oscillations, variations and feedbacks ultimately determine the *net* climate result of any given change in the

environment, including an increase in CO_2. Most of these manifestations of natural variability can only be observed, not understood.[23] Detecting natural variability is necessary to then identify the human effects. But "there is still considerable uncertainty in the magnitude of internal climate variability."[24] Computing global temperature changes caused by changes in CO_2 concentration while not accounting for the other relevant forces that are not understood has all the analytical rigor of searching for your keys under the streetlight because that's where the light is.

The IPCC's Third Assessment Report candidly acknowledged that the limited understanding of climate processes necessarily makes climate modeling an uncertain exercise:

> In sum, a strategy must recognize what is possible. In climate research and modeling, we should recognize that we are dealing with a coupled nonlinear chaotic system, and therefore that *long-term prediction of future climate states is not possible.*

---

[23] *See, e.g.*, IPCC AR4 WG1 § 8.4.7 explaining that "serious systematic errors in both the simulated mean climate and the natural variability persist" in attempts to model the El Niño Southern Oscillation. Available at http://www.ipcc.ch/publications_and_data/ar4/wg1/en/ch8s8-4-7.html (last visited Feb. 2, 2011).

[24] *See* IPCC TAR § 12.2.2 "These findings emphasise that there is still considerable uncertainty in the magnitude of internal climate variability." Available at http://www.grida.no/publications/other/ipcc%5Ftar/?src=/CLIMATE/IPCC_TAR/wg1/222.htm (last visited Feb. 2, 2011).

IPCC TAR WG1 The Scientific Basis § 14.2.2.2 (emphasis added). In AR4, the IPCC put it this way:

> Since knowledge of the climate system's past and current states is generally imperfect, as are the models that utilize this knowledge to produce a climate prediction, and since the climate system is inherently nonlinear and chaotic, predictability of the climate system is inherently limited. Even with arbitrarily accurate models and observations, there may still be limits to the predictability of such a nonlinear system.

IPCC AR4 WG1 Glossary entry for "predictability."

In global climate models relied upon by the IPCC, a doubling of CO_2 by itself only causes a portion of the projected warming, 1.2°C of the total 3.7°C.[25] The rest is caused in the model results by what the models' programming assumes to be positive feedbacks, primarily from water vapor. *Id.* There are *huge* uncertainties in the operation and effects of these feedbacks.

---

[25] IPCC AR4 WG1 § 8.6.2.3 "In the idealised situation that the climate response to a doubling of atmospheric CO_2 consisted of a uniform temperature change only, with no feedbacks operating (but allowing for the enhanced radiative cooling resulting from the temperature increase), the global warming from GCMs would be around 1.2°C (Hansen *et al.*, 1984; Bony *et al.*, 2006)." Available at http://www.ipcc.ch/publications_and_data/ar4/wg1/en/ch8s8-6-2-3.html (last visited Feb. 2, 2011).

Global climate models use widely divergent values for the key variable of climate sensitivity to CO_2, varying from 2.1°C to 4.4°C, a spread of 109% from low to high.[26] If the sensitivity of climate to CO_2 – *the* central issue in the debate – were truly settled science, the value of the climate sensitivity parameter would not vary in models by more than 100%, or be the subject of vigorous ongoing scientific debate and inquiry.[27]

Even more significantly, the ignorance regarding clouds is so abysmal that there is no scientific consensus on whether cloud feedbacks are even positive or negative, much less on their magnitude.[28] The lack

---

[26] The spread among climate models in climate sensitivity and other key modeling parameters is described in IPCC AR4 WG1 § 8.6.2.3 http://www.ipcc.ch/publications_and_data/ar4/wg1/en/ch8s8-6-2-3.html (last visited Feb. 2, 2011).

[27] *See, e.g.*, Spencer, Roy W., *et al.*, *On the diagnosis of radiative feedback in the presence of unknown radiative forcing* 110 GEOPHYSICAL RESEARCH LETTERS D16109, doi:10.1029/2009JD013371 (2010). ("It is clear that the accurate diagnosis of short-term feedbacks (let alone long-term climate sensitivity) from observations of natural fluctuations in the climate system is far from a solved problem.")

[28] IPCC AR4 WG1 § 8.6.3.2 ("In doubled atmospheric CO_2 equilibrium experiments performed by mixed-layer ocean-atmosphere models as well as in transient climate change integrations performed by fully coupled ocean-atmosphere models, models exhibit a large range of global cloud feedbacks, *with roughly half of the climate models predicting a more negative CRF in response to global warming, and half predicting the opposite* (Soden and Held, 2006; Webb, *et al.*, 2006)." (emphasis added). Available at http://www.ipcc.ch/publications_and_data/ar4/wg1/en/ch8s8-6-3-2.html (last visited Feb. 2, 2011).

of understanding of cloud effects is the primary reason climate sensitivity is so poorly understood.[29]

The effects of anthropogenic aerosols "remain the dominant uncertainty in radiative forcing."[30] Aerosols have a cooling effect by reflecting sunlight. The astonishing spread in aerosol parameters in climate models is given in IPCC AR4 Table 2.6. The atmospheric quantity of anthropogenic sulfate used in the models, measured in $mg(SO_4)/m^2$, ranges from 2.70 to 6.70, and the radiative forcing effect for the top of a clear sky ranges from -0.29 to -0.94 W/m^2.[31]

These uncertainties and lack of understanding of how climate actually works necessarily hobble the enterprise of modeling global climate, just as the blind men had difficulty describing the elephant.

Averaging the results of models afflicted by such ignorance, known as ensemble modeling, does not solve the problem because the averages do not bring

---

[29] IPCC AR 4 WG1 § 8.6.3.2 ("Moreover, the spread of climate sensitivity estimates among current models arises primarily from inter-model differences in cloud feedbacks. (*cites omitted*) Therefore, cloud feedbacks remain the largest source of uncertainty in climate sensitivity estimates.") *Id.*

[30] IPCC AR4 Working Group 1 Summary for Policymakers, Human and Natural Drivers of Climate Change, available at http://www.ipcc.ch/publications_and_data/ar4/wg1/en/spmsspm-human-and.html (last visited Feb. 2, 2011).

[31] IPCC AR4 Table 2.6 is available at http://www.ipcc.ch/publications_and_data/ar4/wg1/en/ch2s2-4-4-1.html#table-2-4 (last visited Feb. 2, 2011).

understanding to the fundamental processes that are not understood.[22]

The poor understanding of the fundamental processes of the climate system is manifested not just by the scattershot spread in key determining variables or the inability to guess whether cloud feedbacks are negative or positive. The proof is also in the pudding – average temperature trends have

---

[22] IPCC AR4 WG1 § 10.5.1 ("The effects of uncertainty in the knowledge of Earth system processes can be partially quantified by constructing ensembles of models that sample different parameterizations of these processes. However, some processes may be missing from the set of available models, and alternative parameterizations of other processes may share common systematic biases. Such limitations imply that distributions of future climate responses from ensemble simulations are themselves subject to uncertainty (Smith, 2002), and would be wider were uncertainty due to structural model errors accounted for.") available at http://www.ipcc.ch/publications_and_data/ar4/wg1/en/ch10s10-5.html (last visited Feb. 2, 2011). *See also*, Stainforth, David, *et al.*, *Confidence, uncertainty and decision-support relevance in climate predictions*, Phil. Trans. R. Soc. A 2007 365, 2145-2161, 2154 ("The frequency distributions across the ensemble of models may be valuable information for model development, but there is no reason to expect these distributions to relate to the probability of real-world behaviour. One might (or might not) argue for such a relation if the models were empirically adequate, but given nonlinear models with large systematic errors under current conditions, no connection has been even remotely established for relating the distribution of model states under altered conditions to decision-relevant probability distributions.") Available at http://rsta.royalsocietypublishing.org/content/365/1857/2145.full.pdf+html (last visited Feb. 2, 2010).

been lower than the models predicted, both in the tropics,[33] and globally.[34]

Further, a distinctive fingerprint projected by the models, upper tropospheric warming in the tropics, is missing. The IPCC AR4 stated that enhanced warming in the tropical troposphere was predicted by all models.[35] AR4 Figure 9.1 showed that such warming ought to be observed already, as it is the predominant feature of model runs incorporating

---

[33] McKitrick, Ross R., *et al.* (2010), *Panel and Multivariate Methods for Tests of Trend Equivalence in Climate Data Sets*. 11 Atmospheric Science Letters 270, 276 doi: 10.1002/asl.290. (Referring to in the tropical lower and mid-troposphere, "[o]ver the interval of 1979 to 2009, model-projected temperature trends are two to four times larger than observed trends in both the lower and mid-troposphere and the differences are statistically significant to the 99% level.")

[34] Knight, J., *et al.* (2009), "Do global temperature trends over the last decade falsify climate predictions?" In: Peterson, T. C., & Baringer, M.O. (eds.), "State of the Climate in 2008" Special Supplement to the Bull. Am. Meteorol. Soc., 90-91. ("Observations indicate that global temperature rise has slowed in the last decade (Fig. 2.8a). The least squares trend for January 1999 to December 2008 calculated from the HadCRUT3 dataset (Brohan, *et al.* 2006) is +0.07±0.07°C decade^-1 – much less than the 0.18°C decade^-1 recorded between 1979 and 2005 and the 0.2°C decade^-1 expected in the next decade (IPCC; Solomon, *et al.* 2007).") The authors argue that the divergence between prediction and observation is not statistically significant.

[35] IPCC AR4 WG1 § 9.2.2, available at http://www.ipcc.ch/publications_and_data/ar4/wg1/en/ch9s9-2-2.html (last visited Feb. 2, 2011).

historical greenhouse gas emissions. *Id.* IPCC projections for the coming century (Figure 10.7) likewise show the tropical troposphere to be the central location of atmospheric warming in response to future greenhouse gas emissions.[36] The accompanying IPCC text states:

> Upper-tropospheric warming reaches a maximum in the tropics and is seen even in the early-century time period. The pattern is very similar over the three periods, consistent with the rapid adjustment of the atmosphere to the forcing. These changes are simulated with good consistency among the models.

IPCC AR4 WG1 § 10.3.2.1.

The U.S. Climate Change Science Program ("CCSP"), on which plaintiffs' also rely, predicted this fingerprint of anthropogenic global warming in their CCSP 2006 Synthesis and Assessment Report Product, p. 25, figure 1.3. The CCSP 2006 report also included the observations showing *no* fingerprint on p. 116, in figure 5.7E. These figures are reproduced in the appendix attached hereto. The CCSP referred to the mismatch as a "potentially serious inconsistency." CCSP 2006, p. 11.

---

[36] *See* IPCC AR4 WG1 § 10.3.2.1, available at http://www.ipcc.ch/publications_and_data/ar4/wg1/en/ch10s10-3-2.html (last visited Feb. 2, 2011).

The lack of any statistically significant global warming since 1998,[37] even as CO_2 concentration has gone from 366.50 in 1998 to 389.78 in 2010,[38] adds to the uncertainties in climate science. An actual, observed increase in CO_2 concentrations equal to 555 years' worth of defendants' emissions is not associated with a statistically significant effect on global temperatures.[39]

This lack of warming since 1998 was the subject of an email discussion that became public and famous in the Climategate scandal of November 2009. Prominent IPCC Working Group 1 Physical Science Basis lead author Kevin Trenberth was discussing the lack of warming with fellow scientists. In a message thread from October 14, 2009, Trenberth says "The fact is that we can't account for the lack of warming at the moment and it is a travesty that we can't."[40] A colleague, Tom Wigley, disagreed, drawing this reply from Trenberth:

---

[37] "Q&A: Professor Phil Jones," BBC News, Feb. 13, 2010, available at http://news.bbc.co.uk/2/hi/8511670.stm (last visited Feb. 2, 2011).

[38] *See* n.1, *supra*.

[39] At 15.5 billion metric tons of emissions per ppm, *see* note 8, *supra*, a change of 23.28 ppm would result from 360 billion metric tons of emissions, equal to 555 years of defendants' emissions at the rate of 650 million metric tons per year.

[40] East Anglia emails, http://www.eastangliaemails.com/emails.php?eid=1052&filename=1255523796.txt (last visited Feb. 4, 2011).

> How come you do not agree with a statement that says we are no where close to knowing where energy is going or whether clouds are changing to make the planet brighter. We are not close to balancing the energy budget. The fact that we can not account for what is happening in the climate system makes any consideration of geoengineering quite hopeless as we will never be able to tell if it is successful or not! It is a travesty!

Id. Michael Mann, another famous climate scientist, countered that the lack of warming could be "explained" by natural variability, but Trenberth demurred: "Saying it is natural variability is not an explanation. What are the physical processes? Where did the heat go?" *Id.* Nobody knows where the missing heat went, and the reason nobody knows is that the canonical IPCC understanding of the climate system is not sufficient to explain it, as Trenberth has so clearly admitted.

Compounding these difficulties for the plaintiffs, the IPCC's climate models are global, not regional. They are not capable of modeling climate on a regional basis. "Models continue to have significant limitations, such as in their representation of clouds, which lead to uncertainties in the magnitude and timing, as well as regional details, of predicted climate change." IPCC AR4 WG1 Chap. 8, FAQ 8.1. *See also* IPCC AR4 WG1 § 11.10.1 ("projections provide plausible future regional climate scenarios, although methods to establish the reliability of the regional AOGCM scales have yet to mature.")

The effects that plaintiffs attribute to defendants, and the relief they claim would ensue if their prayers were granted are necessarily regional in scope. For example, one of the plaintiffs is Rhode Island; no one, including IPCC, claims that it can forecast the effect of reductions in CO_2 emissions on Rhode Island, or any other region for that matter. The state of the art does not permit valid or reliable assessment at the scales at issue in this lawsuit.

Despite the breadth and depth of the lack of understanding so plainly disclosed in the IPCC reports, the IPCC and the EPA insist that they know with 90% certainty that more than half the warming since the mid 20th century is caused by man.

This abbreviated discussion, relying primarily on the IPCC and the CCSP, is sufficient to clearly show that attributing the cause and extent of global warming to anthropogenic greenhouse gas emissions, to the exclusion of other natural causes, is afflicted by deep and substantial uncertainties surrounding the fundamental processes that drive climate.

The scope of appellate rulings on the nature and extent of the causal relationship between human emissions of greenhouse gases and global warming is necessarily constrained in any given case by the state of the record and the standard of review of disputed factual contentions. The EPA's concession in *Massachusetts* has given rise to unfounded assertions that this Court has definitively decided the causation issue and that it is free from significant uncertainty.

That is a misreading of *Massachusetts* and of the IPCC reports. Given the momentous issues at stake, judicial recognition of the profound uncertainties in climate science and a due caution and restraint in addressing the subject is most appropriate.

IV. PLAINTIFFS' CLAIMS PRESENT POLITICAL NOT SCIENTIFIC QUESTIONS.

The district court found that the case presented a non-justiciable political question. The new co-chair of IPCC Working Group 3, Ottmar Edenhofer, would agree that global warming is a political question, though not in the same sense. He recently gave an interview in which he said:

> The climate summit in Cancun at the end of the month is not a climate conference, but one of the largest economic conferences since the Second World War. . . . But one must say clearly that we redistribute de facto the world's wealth by climate policy. Obviously, the owners of coal and oil will not be enthusiastic about this. One has to free oneself from the illusion that international climate policy is environmental policy. This has almost nothing to do with environmental policy anymore, with problems such as deforestation or the ozone hole.[41]

---

[41] *See* IPCC Official: "Climate Policy Is Redistributing The World's Wealth" The Global Warming Policy Foundation, http://thegwpf.org/the-climate-record/1877-ipcc-official-climate-policy-is-redistributing-the-worlds-wealth.html (last visited Feb. 2, 2011),

(Continued on following page)

The plaintiffs are presumably less cynical than Mr. Edenhofer, and might complain that he does not speak for them. But he does speak for the IPCC, on which plaintiffs rely. Edenhofer's statement was not a reckless charge made by an overzealous critic of the IPCC. It was made by the co-chair of Working Group 3 and depicts climate change policy as explicitly political and derides the contention that it is about the environment as an "illusion."

Judge Hall, author of the Second Circuit opinion, apparently also had explicitly political goals in mind. He was reported to "hope[ ] the ruling will pressure both the executive branch and Congress to implement climate policies," and to "hope[ ] the existence of this nuisance action may influence the Senate to provide 60 votes to pass a climate bill." *Key Judge Downplays Prospects for Successful Climate Damages Suits*, Inside EPA, March 5, 2010 at 18. Even if "pressuring" other co-equal branches of government explains the decision, it does not excuse it; it is most decidedly *not* a proper role for the federal judiciary and this Court should not tolerate such conduct.

The political question doctrine preserves the constitutional balance of power and protects the judiciary from the institutional harm that would ensue

---

translating from original German publication http://www.nzz.ch/nachrichten/politik/schweiz/klimapolitik_verteilt_das_weltvermoegen_neu_1.8373227.html (last visited Feb. 2, 2011).

from wading into such controversies. It should be applied to this case.

CONCLUSION

Issues of standing, justiciability causality, and political question tend to merge when the rule of standing is so meaningless that every person on earth could sue every other person on earth for contributing to global warming and yet accomplish nothing to solve the problem that could ever be detected. Such an absurd prospect should be avoided. The Court could legitimately conclude that no one has standing to sue over the problem of global warming or that it is a political question having no business in a federal court. The Second Circuit should be reversed.

Respectfully submitted,

SHANNON LEE GOESSLING
Counsel of Record
SOUTHEASTERN LEGAL FOUNDATION, INC.
2255 Sewell Mill Road
Suite 320
Marietta, GA 30062
(770) 977-2131
shannon@southeasternlegal.org

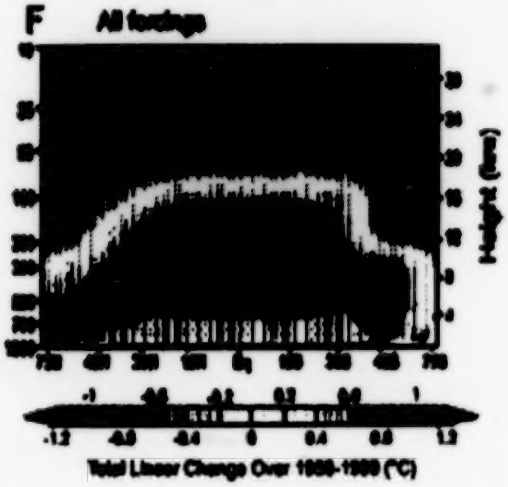
EDWARD A. KAZMAREK
KAZMAREK GEIGER & LASETER LLP
3490 Piedmont Road N.E.
Suite 350
Atlanta, GA 30305
(404) 812-0840

HARRY W. MACDOUGALD
CALDWELL & WATSON LLP
5825 Glenridge Drive, N.E.
Building Two, Suite 200
Atlanta, GA 30328
(404) 843-1956

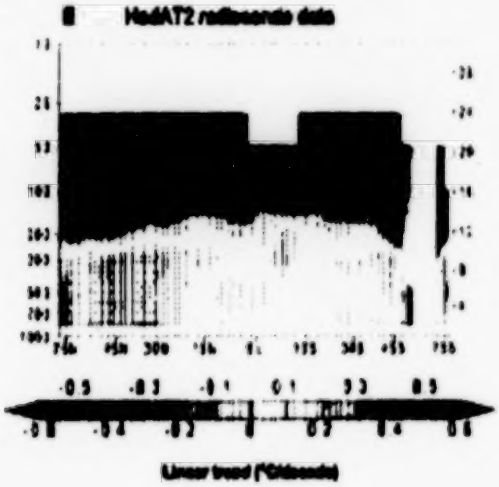
Attorneys for Amici Curiae

APPENDIX

CCSP 2006, p. 25, Figure 1.3, Predicted upper tropospheric tropical warming "fingerprint."



CCSP 2006, p. 116, Figure 5.7, Observations showing no "fingerprint."



AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
MAR 18 2011
OFFICE OF THE CLERK

No. 10-174

In the Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY INC., ET AL.,

Petitioners,

v.

STATE OF CONNECTICUT, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF TORT LAW SCHOLARS IN SUPPORT OF RESPONDENTS

DOUGLAS A. KYSAR
Counsel of Record and Amicus
Yale Law School
127 Wall Street
New Haven, CT 06511
(203) 436-8970
douglas.kysar@yale.edu

[Complete *Amici* List Appears on Inside Cover]

AMICI CURIAE

Jules L. Coleman is the Wesley Newcomb Hohfeld Professor of Jurisprudence and Professor of Philosophy at Yale Law School.

Jon Hanson is the Alfred Smart Professor of Law at Harvard Law School.

Scott Hershovitz is Assistant Professor of Law at University of Michigan Law School.

Heidi M. Hurd is the David C. Baum Professor of Law and Philosophy at the University of Illinois College of Law.

Gregory C. Keating is the William T. Dalessi Professor of Law and Philosophy at the University of Southern California Gould School of Law.

Douglas A. Kysar is the Joseph M. Field '55 Professor of Law at Yale Law School.

Thomas O. McGarity is the Joe R. and Teresa Lozano Long Endowed Chair in Administrative Law at the University of Texas at Austin School of Law.

Jane Stapleton is the Ernest E. Smith Professor at the University of Texas at Austin School of Law, Research Professor of Law at the Australian National University College of Law, and Emeritus Fellow of Balliol College and Statutory Visiting Professor of Law at Oxford University.

All law school affiliations for identification only

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
INTEREST OF *AMICI CURIAE* 1
SUMMARY OF ARGUMENT 2
ARGUMENT 4
I. THE PURSUIT OF COMMON LAW REMEDIES IS IMPORTANTLY DISTINCT FROM PUBLIC LAW LITIGATION 4
II. LAYERING THE "PRIVATE-LAW MODEL OF PUBLIC LAW" LITIGATION ONTO THE COMMON LAW ITSELF THROUGH STANDING AND POLITICAL QUESTION DOCTRINES IS CONFUSING AND UNNECESSARY 10
III. THE SUBSTANTIVE LAW OF TORT ADDRESSES PETITIONERS' CONCERNS AND GUARDS AGAINST THE HARMFUL OUTCOMES THAT THIS LITIGATION SUPPOSEDLY THREATENS 19
CONCLUSION 32

TABLE OF AUTHORITIES

Page(s)

Cases

Alden v. Maine, 527 U.S. 706 (1999) 9
Allen v. Wright, 468 U.S. 737 (1984) 14
Baker v. Carr, 369 U.S. 186 (1962).....15
Barasich v. Columbia Gulf Transmission Co., 467 F. Supp. 2d 676 (E.D. La. 2006) 16, 23, 24
Boim v. Holy Land Found. for Relief & Dev., 549 F.3d 685 (7th Cir. 2008).....29
City of Milwaukee v. Illinois & Michigan, 451 U.S. 304 (1981).....18
Connecticut v. American Elec. Power Co., 582 F.3d 309 (2d Cir. 2009) 28
Corrie v. Caterpillar, Inc., 503 F.3d 974 (9th Cir. 2007).....15
Cox v. City of Dallas, 256 F.3d 281 (5th Cir. 2001).....29
Elk Grove Unified Sch. Dist. v. *Newdow*, 542 U.S. 1 (2004).....14
Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002).....9
Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000) 12
Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907).....8, 22
Gilligan v. Morgan, 413 U.S. 1 (1973).....16
Goldwater v. Carter, 444 U.S. 996 (1979) 16

TABLE OF AUTHORITIES—Continued

Page(s)

Harley v. Merrill Brick Co., 48 N.W. 1000 (Iowa 1891) 30

Illinois ex rel. Scott v. City of Milwaukee, No. 72 C 1253, 1973 U.S. Dist. LEXIS 15607 (N.D. Ill. Nov. 1, 1973), *aff'd in relevant part and rev'd in part sub nom., Illinois v. City of Milwaukee*, 599 F.2d 151, 177 (7th Cir. 1979), *vacated on other grounds*, 451 U.S. 304 (1981) 29, 30

Illinois v. City of Milwaukee, 406 U.S. 91 (1972) 22

In re Katrina Canal Breaches Consol. Litig., 647 F. Supp. 2d 644 (E.D. La. 2009) 24

Kansas v. Colorado, 185 U.S. 125 (1902) 8

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) . 11

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 7

Massachusetts v. EPA, 549 U.S. 497 (2007) 13

Missouri v. Illinois, 180 U.S. 208 (1901) 8

New England Legal Found. v. Costle, 666 F.2d 30 (2d Cir. 1981) 26

New Jersey v. City of New York, 283 U.S. 473 (1931) 22

Nixon v. United States, 506 U.S. 224 (1993) 16

North Carolina ex. rel. Cooper v. TVA, 615 F.3d 291 (4th Cir. 2010) 26

Palsgraf v. Long Island Railroad Company, 162 N.E. 99 (N.Y. 1928) 20

Rhode Island v. Massachusetts, 37 U.S. 657 (1838) ... 8

Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26 (1976) 11

TABLE OF AUTHORITIES—Continued

Page(s)

Sinram v. Pa. R.R. Co., 61 F.2d 767 (2d Cir. 1932)..21
Strauss v. Belle Realty Co., 482 N.E.2d 34 (N.Y. 1985).....24
United States v. Richardson, 418 U.S. 166 (1974)....11
Warth v. Seldin, 422 U.S. 490 (1975).....14

Scholarly Authorities

Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 Yale L.J. 425 (1974).....19, 20
Jules Coleman, *Doing Away with Tort Law*, 41 Loy. L.A. L. Rev. 1149 (2008).....21
Jules L. Coleman, *Risks and Wrongs* (2002).....5
Jules L. Coleman, *The Structure of Tort Law*, 97 Yale L.J. 1233 (1988) (book review).....4
Richard A. Epstein, *Federal Preemption, and Federal Common Law, in Nuisance Cases*, 102 Nw. U. L. Rev. 551 (2008).....5, 9, 10
Richard A. Epstein, *A Theory of Strict Liability*, 2 J. Legal Stud. 151 (1973).....4
Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies – And Their Connections to Substantive Rights*, 92 Va. L. Rev. 633 (2006).....19
Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 Harv. L. Rev. 1274 (2006).....16
John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 Tex. L. Rev. 917 (2010).....4

TABLE OF AUTHORITIES—Continued

Page(s)

John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 Yale L.J. 524 (2005) ...7

Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 Stan. L. Rev. 67 (2010) 5

David Hunter & James Salzman, *Negligence in the Air: The Duty of Care in Climate Change Litigation*, 155 U. Pa. L. Rev. 1741 (2007) 22

Gregory C. Keating, *Is Tort a Remedial Institution?*, USC Law Legal Studies Paper No. 10-10 (July 1, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1633687 .....5, 22

Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 Iowa L. Rev. 449 (1992) 5

Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 Stan. L. Rev. 1921 (2003) 8, 9

Restatement (Second) of Torts (1979) .....*passim*

Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2009) 28, 30

Arthur Ripstein, *Equality, Responsibility, and the Law* (2001) 5

Jane Stapleton, *Factual Causation*, 38 Fed. L. Rev. 467 (2010) 12, 28

Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163 (1992) 11

TABLE OF AUTHORITIES—Continued

Page(s)

Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 Colum. L. Rev. 1432 (1988).....10

Laurence H. Tribe et al., *Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine*, Wash Legal Found. Critical Legal Issues Series No. 169 (Jan. 2010).....20, 21, 31

Ernest J. Weinrib, *The Idea of Private Law* (1995) 5

Ernest J. Weinrib, *Understanding Tort Law*, 23 Val. U. L. Rev. 485 (1989) 4

Charles A. Wright & Mary Kay Kane, *Law of Federal Courts* (6th ed. 2002) 11

Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 Vand. L. Rev. 1 (1998) .8, 21

Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause*, 44 Wake Forest L. Rev. 1247 (2009) 23, 24

INTEREST OF THE *AMICI CURIAE*[1]

Amici—Jules L. Coleman, Jon Hanson, Scott Hershovitz, Heidi M. Hurd, Gregory C. Keating, Douglas A. Kysar, Thomas O. McGarity, and Jane Stapleton—are law professors who have taught, written about, and practiced tort law. *Amici* have an interest in seeing that the Court is fully informed regarding the history, structure, and function of tort law, including the federal common law of nuisance. *Amici* file this brief solely as individuals and not on behalf of the institutions with which they are affiliated.

---

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their institutions, or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

At the heart of this dispute is a debate over whether tort law represents an implicit regulatory device or a traditional private law system for the pursuit of civil justice. Petitioners and their supporters adopt the regulatory view, arguing that courts using common law principles and judicial remedies are ill-equipped to combat the enormity of the climate change problem. Their argument begs an essential question, for whether or not courts appear inferior to other institutions in addressing the climate change problem depends first on how one constructs "the problem."

The most appropriate construction of the problem raised by the instant litigation is one that can be addressed *only* by courts: Have the actions of Petitioners violated the common law entitlement of Respondents to be free from unreasonable injury? The other branches of government can speak to the judiciary's institutional limitations by taking on the myriad regulatory tasks that are necessitated by climate change *as a public policy problem*, but it remains emphatically the role of the courts to interpret core common law principles in relation to the particular parties and disputes before them, even when those disputes arise against the backdrop of a complex phenomenon like climate change. In that respect, standing and political question doctrines must play a different and more narrow role in the instant case than they do in public law litigation. Most importantly, the "private law-model of public law" litigation—which utilizes analogues to common law recovery requirements in order to ensure that parties challenging legislative or

administrative action hold a sufficient interest to satisfy the case or controversy demands of Article III—should not be uncritically carried over into common law litigation itself.

Allowing tort claims to proceed to the merits—where they face a variety of substantive obstacles, many of which anticipate and, indeed, provide the model for justiciability limitations on public law litigation—maintains an appropriate division of labor between governmental institutions, ensuring that courts fulfill their obligation to hold open the common law as a site for the airing of grievances unless and until they are addressed through other lawful means. Concern over any potentially undesirable effects of such litigation is most responsibly addressed through judicial management of the substantive standards of tort law themselves. Layering the "private law-model of public law" litigation back onto the private law to achieve such an end is confusing and unnecessary.

ARGUMENT

I. THE PURSUIT OF COMMON LAW REMEDIES IS IMPORTANTLY DISTINCT FROM PUBLIC LAW LITIGATION

An influential view holds that tort law is best understood as a form of implicit regulation. From legal realist accounts of tort law as a tool of social engineering to contemporary economic accounts of tort law's incentive effects, this "public law" model has at times dominated judicial and scholarly understandings of the field. *See* John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 Tex. L. Rev. 917, 921-25 (2010). The problem with such accounts is that they fail to explain central features of tort law's history, practice, and structure. *See* Jules L. Coleman, *The Structure of Tort Law*, 97 Yale L.J. 1233 (1988) (book review); Ernest J. Weinrib, *Understanding Tort Law*, 23 Val. U. L. Rev. 485 (1989); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. Legal Stud. 151 (1973). Seen properly, tort law is a pillar of private law whereby parties are empowered to seek redress from their wrongdoers using the authority of the state:

> To study torts is to learn what sort of conduct our legal system defines as wrongfully injurious toward another such that, when committed, the victim is entitled to exact something from the wrongdoer. This is the domain of law that was born centuries ago with the recognition of the writ of *trespass vi et armis* and that today is defined by state and federal common law.

Goldberg & Zipursky, *supra* at 919.

Far from a general purpose regulatory device, tort law adjudicates claims of specific victims that they have been injured by the conduct of one or more specific wrongdoers. Such a mechanism helps: (1) to constitute an ongoing principled determination of the content of our primary duties of harm avoidance, Gregory C. Keating, *Is Tort a Remedial Institution?*, U.S.C. Law Legal Studies Paper No. 10-10 (July 1, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1633687; (2) to repair the harmful effects of wrongful conduct according to tenets of corrective justice, Jules L. Coleman, *Risks and Wrongs* (2002); Ernest J. Weinrib, *The Idea of Private Law* (1995); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 Iowa L. Rev. 449 (1992); (3) to reinforce ideals of social equality and individual responsibility, Arthur Ripstein, *Equality, Responsibility, and the Law* (2001); and (4) to afford a vital procedural mechanism whereby parties express their mutual answerability to one another, Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 Stan. L. Rev. 67 (2010).

Importantly, even in a federal common law nuisance suit involving states as parties, these classical aspects of tort law remain and must be respected. *See* Richard A. Epstein, *Federal Preemption, and Federal Common Law, in Nuisance Cases*, 102 Nw. U. L. Rev. 551 (2008). Rather than an attempt to obtain in the courtroom what has not been won through legislation or regulation, a tort action seeks instead to hold actors accountable for alleged violations of common law duties. Notwithstanding the dramatic factual backdrop of climate change, the present suit remains unequivocally a tort action inasmuch as Respondents

seek only to demonstrate that Petitioners have wrongfully harmed them according to longstanding principles of federal common law. Adjudication of Respondents' claim would serve all of the purposes described above: (1) it would clarify through reasoned analysis whether the duty to avoid creating or contributing to a nuisance extends to the emission of greenhouse gases; (2) it would confirm the responsibility of the courts to provide a remedy in the event that a tortious wrong has occurred between the specific parties at bar; (3) it would acknowledge that the principles of liberty and security sometimes conflict and therefore demand forthright, respectful arbitration in order to reinforce our ideals of equality and responsibility; and (4) it would enable those who are suffering harm and those who have contributed to that harm to face one another in a process that is dignifying to both rather than being denigrating to either.

In contrast to this traditional understanding, the "public law" view of tort is evidenced in the briefs of Petitioners and their supporters through numerous descriptions of this suit as seeking to "regulate" greenhouse gas emissions. Referring to climate change nuisance actions, Petitioners maintain that "[e]ach case gives rise to a new opportunity for federal judges to make regulatory judgments." Petition for a Writ of Certiorari at 4. On behalf of the Tennessee Valley Authority, the Acting Solicitor General proclaims that "[t]his case concerns the methods by which the United States will regulate carbon-dioxide emissions." Brief for the Tennessee Valley Authority in Support of Petitioners at 2 ("TVA Brief"). The Chamber of Commerce of the United States worries that upholding the decision below of

the Second Circuit "will invite a potentially endless barrage of common law suits and produce a patchwork of judge-made regulation." Brief Amicus Curiae of the Chamber of Commerce of the United States in Support of Petitioners at 25 ("Chamber Brief").

Such contentions ignore tort's long history as a forum for the self-presentation of grievances by parties within a classical liberal framework of government. A bedrock feature of the Anglo-American legal tradition has been the entitlement of injured parties to seek to persuade impartial courts that they hold a right of action against their wrongdoers. *See* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 Yale L.J. 524, 558-60 (2005). Though its import may seem hard to glean today, Chief Justice Marshall clearly embraced such a view in *Marbury v. Madison*, when he stated that "[t]he very essence of civil liberty . . . consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). For centuries, the essential manner in which government has fulfilled this duty to provide a venue for the airing of grievances has been through the common law. As such, the implications of the present case extend far beyond the rights of climate change litigants, to all parties who seek recognition and rectification of their injuries in an impartial judicial venue.

It is significant to note that this private law understanding of tort applies also to states and their ability to invoke federal common law. Just as citizens are afforded civil recourse in recognition that "[t]he rule of law forbids private retribution when [] invasions of rights occur," Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 Vand. L. Rev. 1, 85 (1998), states too are afforded access to the federal courts in recognition that they are otherwise "[b]ound hand and foot by the prohibitions of the Constitution" in their attempts to address adversaries. *Kansas v. Colorado*, 185 U.S. 125, 144 (1902) (quoting *Rhode Island v. Massachusetts*, 37 U.S. 657 (1838)). As Justice Holmes put it,

> [w]hen the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court.

Georgia v. Tenn. Copper Co, 206 U.S. 230, 237 (1907). *See also Missouri v. Illinois*, 180 U.S. 208, 241 (1901) ("Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy.").

Allowing the airing of grievances before an impartial judiciary in this manner "accord[s] States the dignity that is consistent with their status as

sovereign entities." Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 Stan. L. Rev. 1921, 1923 (2003) (quoting *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002)); *see also Alden v. Maine*, 527 U.S. 706, 714 (1999) ("The federal system established by our Constitution . . . reserves to [the States] a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status."). Thus, whether private or governmental, a litigant who invokes the protection of the common law holds a fundamental dignitary interest in having the claim heard. Allowing individuals and states to press grievances in this manner furthers the projects of both liberal individualism and federalism by respecting litigants as agents who can assert rights, make arguments, and demand redress, rather than merely as passive beneficiaries of protective regulations imposed from above. Any contrary approach would require states not only to listen to Congress's every instruction in far-reaching areas of national authority, but also to stand by passively and impotently when their core interests are violated, anxiously awaiting rescue from the federal government. Such a ruling would be an unprecedented diminishment of the meaning of statehood, stripping states of their basic quasi-sovereign right to pursue legal redress and upsetting central aspects of the constitutional system of divided and stratified governmental power. *Cf.* Richard A. Epstein, *Federal Preemption, and Federal Common Law, in Nuisance Cases*, 102 Nw. U. L. Rev. 551, 578 (2008) ("Our highest constitutional ideals are in fact preserved by the articulation of a federal common law of nuisance for interstate

disputes that survives quite nicely the administrative controls of the modern welfare state.").

II. LAYERING THE "PRIVATE-LAW MODEL OF PUBLIC LAW" LITIGATION ONTO THE COMMON LAW ITSELF THROUGH STANDING AND POLITICAL QUESTION DOCTRINES IS CONFUSING AND UNNECESSARY

The modern development of standing and political question doctrines occurred in response to very specific problems unique to public administrative and constitutional law. Analogizing to various limitations on recovery traditionally imposed on private parties in the common law context, this Court developed what has been called a "private-law model of public law" litigation in order to ensure that parties challenging action by the federal government fulfill the case or controversy requirement of Article III. Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 Colum. L. Rev. 1432, 1436 (1988). Petitioners now demand that these public law doctrines migrate without justification or precedent to a private law context in which they are wholly inappropriate. In essence, Petitioners and their supporters seek to layer the "private-law model of public law" back onto the common law itself, a confusing and wholly unnecessary exercise.

Modern standing jurisprudence developed in response to the wave of public interest lawsuits triggered by widespread Congressional authorization of "citizen suits" in the late 1960's and 1970's. *See*

Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 194 (1992). Within this context, the Court began to articulate standards to limit the capacity of citizens to subject executive agencies to review. *See Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). The aim was to minimize what the Court reasoned to be an "amorphous general supervision of the operations of government." *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring). Jurisdictional limits were important in this public law setting as a mechanism to prevent the courts from reaching any and all actions of the federal government, and exercising plenary power over policy making and implementation. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (noting that standing doctrine is necessary to avoid allowing "Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed'").

The central concern of modern constitutional standing doctrine is, thus, to prevent the overreach of the judiciary into areas constitutionally committed to other branches of government. Petitioners now ask the Court to apply this doctrine, with its emphasis on injury, causation, and redressability, in a context radically different to the one in which it originated. *See* Charles A. Wright & Mary Kay Kane, *Law of Federal Courts* 69 (6th ed. 2002) ("The law of standing is almost exclusively concerned with public-law questions involving determinations of constitutionality."). They offer no justification as to why restrictive standing rules should apply to private suits, which do not involve the federal

government as a challenged party. Indeed, questions of harm, causation, and remedy go precisely to the *merits* of a common law tort case, the burdens that Respondents must meet through conventional means of litigation to ultimately prevail. Yet Petitioners now ask that judges use a *presumption* of climate change's complexity as a policy problem to dismiss Respondents' claim, without hearing any of the evidence that would allow them to properly adduce the extent of that complexity and the way in which it interacts with principles of common law recovery.

In truth, Petitioners and their supporters seize on the *Lujan* factors as a way of raising Respondents' burden even higher than the legal standards that govern their underlying claim. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (rejecting such an attempt "to raise the standing hurdle higher than the necessary showing for success on the merits"). The "traceability" requirement, for instance, becomes a strict but-for causation test in the hands of some amici, *see, e.g.*, Brief for Pacific Legal Foundation as Amicus Curiae in Support of Petitioners at 4 ("Pacific Brief"), without acknowledgement that the common law does in appropriate circumstances consider defendant's conduct a factual cause even if it was neither necessary nor sufficient to bring about plaintiff's harm. *See* Jane Stapleton, *Factual Causation*, 38 Fed. L. Rev. 467, 474-476 (2010). The "redressability" requirement is interpreted by Petitioners and their supporters to mean that courts somehow must be able to "solve" global warming in order for Respondents to have standing. Pacific Brief at 19. This interpretation is absurd: in the private law context, redress occurs—and is complete—when

plaintiffs receive an award against the tortfeasor they have sued. The "injury" to be redressed in the instant suit is not the phenomenon of global climate change itself, but rather the far more narrow and tractable "wrong" that Respondents allege is being committed against them by Petitioners. For purposes of standing analysis, it is hard to fathom how redressability could require anything more than an inquiry into whether the court holds the power to award the specific relief sought, at least not without drastically confusing and distorting what it means to adjudicate a common law claim.

Moreover, the Court in *Massachusetts v. EPA*, 549 U.S. 497, 526 (2007) already granted standing to litigants in a climate change suit that challenged misfeasance by the Environmental Protection Agency, a classic public law standing case. The Court reasoned that the "special solicitude" owed to states and the fact that automobile emissions contributed to the harm suffered by Massachusetts were enough to meet Article III standing requirements. *Id.* at 520. Petitioners oddly argue that the standing analysis should be stricter in this case than in *Massachusetts* because Respondents are not bringing a statutory claim. Brief of Petitioner at 13. Their reasoning completely reverses the traditional role of standing doctrine, which aims to limit challenges to actions by the political branches rather than invocations of core judicial functions. No reason exists why litigants seeking to hold an executive agency accountable for failing to regulate third parties should be granted *more* access to the federal courts than litigants seeking to hold those third parties themselves directly accountable for

alleged harms under traditional federal common law principles.

Recognizing how anomalous it would be to dismiss Respondents' complaint on Article III standing grounds, given the holding in *Massachusetts*, the Acting Solicitor General urges this Court to dismiss instead on prudential standing grounds, including especially the principle that courts should refrain from adjudicating "generalized grievances more appropriately addressed in the representative branches." TVA Brief at 21 (citing *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984))). Prudential standing doctrine, however, is an inappropriate vehicle for vindicating such concerns in the common law context. It cannot be the case that "other governmental institutions may be more competent to address the questions" raised in a common law tort suit, *id.* at 12 (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)), because the very question raised in such a suit is whether an aggrieved party has a viable claim *at common law*. No other governmental institution is empowered to answer this question, as courts are the exclusive custodians of the body of tort law that is held out to parties as a venue for pursuing civil recourse. Likewise, one cannot know whether "judicial intervention may be unnecessary to protect individual rights," *id.*, until one has addressed the underlying tort law question of whether the plaintiff in fact holds a right of protection against the challenged conduct. Invoking prudential standing in this context is nothing less than a category mistake.

Petitioners and their supporters also commit a category mistake in their treatment of the political question doctrine. Here Petitioners ask the Court to apply the doctrine to a common law claim, something it has never done in over 200 years.[2] Not only are common law claims *not* constitutionally delegated to another branch of government, the judiciary is the *only* institution with the authority to interpret the common law. Petitioners once again transpose the language of a canonical holding, in this instance *Baker v. Carr*, 369 U.S. 186 (1962), without understanding its deeper meaning. *Baker* stood for judicial restraint in a narrow range of cases that raise separation of powers concerns, *not* judicial abdication in areas that have historically been the sole province of the courts. Indeed, *Baker* was careful to separate "political questions" from "political cases," lest courts too hastily abstain from their obligation to consider and decide actual cases and controversies. *Id.* at 217.

---

[2] *See* Brief of Law Professors as Amici Curiae in Support of Respondents. Extreme scenarios in which the political question doctrine has been applied to a common law suit are the exceptions that prove the rule. In *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007), for instance, plaintiffs pressed a negligent entrustment theory against the manufacturer of demolition equipment that had been used by Israeli Defense Forces to destroy homes in Palestinian Territories. Because the equipment in question had actually been purchased by the U.S. government on Israel's behalf as part of U.S. foreign policy, the court concluded that the suit presented a nonjusticiable political question. Even in that case, however, the court could as easily have held that sponsorship of the sale by the political branches rendered the activity not unreasonable and therefore nontortious as matter of law.

Petitioners and their supporters advance a view that leads to lawlessness. When a court dismisses on political question grounds a case about impeachment, *Nixon v. United States*, 506 U.S. 224 (1993), the training of the National Guard, *Gilligan v. Morgan*, 413 U.S. 1 (1973), or the President's capacity to withdraw from treaties, *Goldwater v. Carter*, 444 U.S. 996, 1003 (1979), a separate branch of government has answered, or will answer, the question at issue. The court in such cases simply refuses to subject that answer to further review—to make itself the ultimate arbiter. However, when the question posed is whether a plaintiff has a remedy at common law for an alleged harm, the question can only be answered by the judiciary. Perhaps this is why "the Supreme Court has never applied the 'lack of judicially manageable standards' prong [of the political question doctrine] to disputes between private parties," *Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676, 684 (E.D. La. 2006), and why leading commentators treat the doctrine as exclusively concerned with constitutional adjudication, *see, e.g.*, Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 Harv. L. Rev. 1274 (2006). If a court rejects a nuisance suit as non-justiciable, the legislature cannot issue a substitute opinion that the plaintiff had a valid claim *at common law*. To be sure, the legislature can create a cause of action for the plaintiff by statute, but doing so will not directly answer the common law question. Because no other branch can truly affirm that plaintiff already had a successful *common law* cause of action, it is wrong to suggest that dismissing climate change cases as non-justiciable political questions merely passes them on to a more suitable

branch. Instead, dismissal constitutes a backdoor rejection of the substance of plaintiff's claim without appropriate consideration of its merits.

This is a perverse result. It appears doubly so when one considers what it would mean for a common law suit to be not yet preempted or displaced, but nevertheless non-justiciable for posing a political question. That a common law cause of action has not been preempted means that the other branches have left it in place—either explicitly, as through a savings clause in legislation, or implicitly, by not speaking directly to the question. Dismissing a common law claim on political question grounds would be nonsensical in such a case because the dismissal would merely redirect the question back to a branch that has already declined or failed to supplant the common law claim. Petitioners' contrary political question logic amounts to an outright rejection of federal common law, even in those areas such as interstate nuisance where its existence has been firmly established in the absence of congressional displacement. Through their justiciability arguments, Petitioners conflate the crucial distinction between whether federal regulation actually exists that might displace the common law and whether, as a theoretical matter, federal regulation might be preferable to the common law as a "policy tool." *Hypothetical* regulation—even hypothetical regulation that might be superior to the common law from the perspective of regulatory efficacy—cannot strip the courts of jurisdiction. Unless and until legislation and implementing regulations actually displace the common law, Respondents are guaranteed access to the federal courts to press their nuisance claim. *See*

City of Milwaukee v. Illinois & Michigan, 451 U.S. 304 (1981).

A similarly radical effect would follow if Petitioners' standing arguments prevailed in the common law context. In essence the plaintiff would be told that he has come to the wrong branch of government, even though no other branch is capable of addressing the crux of his claim: the assertion that he has a grievance actionable *at common law*. In contrast, when a litigant seeks abstract review of the constitutionality of a statutory provision or the legitimacy of agency action but is turned away for lack of standing, there is a strong argument to be made that the issue already has been addressed by at least one branch of government, and the court is simply refusing additional review. The result in the common law context, in contrast, is the creation of a vacuum in which the rule of law has essentially disappeared, given that in the Anglo-American tradition access to a system of civil recourse is one of the essential premises of a rule of law system.

This problem is distinct to the common law context. When courts invoke political question or standing doctrine to prevent common law adjudication, they self-negate in a way that is fundamentally inconsistent with the historical role of tort law as a locus for the airing of grievances. Curiously, they apply the "private-law model of public law" to private law itself, perhaps out of a sense that tort actions may sometimes have effects and implications on the scale of public law. In doing so, however, they substitute a Potemkin version for the law of civil wrongs that they are entrusted to steward, leaving the core of that law at risk of

rotting from neglect. To the extent that the judiciary refuses its traditional duty to identify and reinforce norms of appropriate behavior, uncertainty therefore is not avoided, it is created—by failing to articulate decisively whether greenhouse gas emissions do or do not violate the duty to avoid imposing unreasonable harms on others.

III. THE SUBSTANTIVE LAW OF TORT ADDRESSES PETITIONERS' CONCERNS AND GUARDS AGAINST THE HARMFUL OUTCOMES THAT THIS LITIGATION SUPPOSEDLY THREATENS

It is a commonplace view among legal scholars that justiciability rulings often reflect the opinions of judges on the merits of underlying claims. *See* Richard Fallon, *The Linkage Between Justiciability and Remedies – And Their Connections to Substantive Rights*, 92 Va. L. Rev. 633, 634 (2006) (gathering citations). Whatever the appropriateness of such indirect merits resolution in the public law context, the approach is misplaced in the private law context because ample doctrinal resources exist within the common law itself to grapple with any complex or troublesome features Respondents' claim might hold. Indeed, courts have always addressed the boundaries of acceptable enforcement of common law rights by individuals and states through the construction of common law doctrines themselves, rather than externally through justiciability doctrines. *See* Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 Yale L.J. 425, 441-42 (1974) ("[O]ne cannot transform substantive rules of law, elements of a cause of action, into procedural or

preliminary principles of access to a court. The natural common law method simply reveals that rules of standing are an integral part of a claim for relief."). This ability of common law jurists to identify and craft appropriately adjudicable claims is hardly surprising given that the "private-law model of public law" originates from the substantive rules of the private law itself.

Most fundamentally, any successful tort plaintiff must establish something more than a mere causal connection between the plaintiff's harm and the defendant's conduct. Generally, the plaintiff must demonstrate that the defendant's conduct constituted a wrong in relation to the plaintiff himself. As Justice Cardozo famously wrote, mere "negligence in the air . . . will not do." *Palsgraf v. Long Island Railroad Company*, 162 N.E. 99, 99 (N.Y. 1928) (Cardozo, J.). Even those jurisdictions that follow Judge Andrews's more expansive notion of duty—"Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others," *id.* at 103 (Andrews, J., dissenting)—nevertheless curtail the impact of that expansive obligation through principles of proximate causation, including the all-important touchstone of foreseeability that Cardozo used to more narrowly fix the bounds of duty.

Whether due to the limitation of tort responsibilities under the rubric of duty or to the liability-containing principles of proximate causation, it is simply not the case that tort law aims to be a "ubiquitously useful device[] for making the world a better place." Laurence H. Tribe et al., *Too Hot for Courts to Handle: Fuel Temperatures, Global*

Warming, and the Political Question Doctrine, Wash. Legal Found. Critical Legal Issues Series No. 169 (Jan. 2010), at 2. Instead, tort law aims to address a carefully delineated set of wrongs done between parties, empowering aggrieved individuals to seek redress against their particular wrongdoers. This requirement of a tight nexus between the plaintiff's harm and the defendant's conduct has been aptly described as one of "substantive standing," i.e., a rule that only those owed a particularized duty under tort law principles may demand redress from a wrongdoer. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, *supra* at 16. It features also in the important distinction drawn between "wrongs" (which are relational) and "wrongdoing" (which need not be). Jules Coleman, *Doing Away with Tort Law*, 41 Loy. L.A. L. Rev. 1149, 1155-59 (2008). Only the former give rise to a specific duty of repair under tort law. Thus, if one person owes a duty to another and in breaching that duty, injures a third, the third person generally may not recover unless she identifies an independent duty owed directly to her. *Sinram v. Pa. R.R. Co.*, 61 F.2d 767, 769-71 (2d Cir. 1932) (Hand, J.).

Respondents' complaint seeks to do no more than resolve whether they are entitled to the specific relief sought against the specific parties named for the specific grounds alleged. That the causal mechanism involved is climate change does not somehow transform this suit into a regulatory action that demands judicial forbearance. Indeed, rather than counseling against common law adjudication, the complexity and enormity of the climate change problem counsel in its favor, simply in order that baseline norms of responsibility—whatever their

content—may be more clearly specified as public and private actors embark on what undoubtedly will be a centuries-long struggle to deal with greenhouse gas emissions and their impacts. A central task of tort law is to articulate our responsibilities to avoid certain forms of harm infliction and rights violation, a task that arguably exists logically and normatively prior to the task of repairing wrongs. *See e.g.*, Keating, *supra*. Thus, until the content of tort law's primary duties with respect to harm-causing through greenhouse gas emissions are clearly elucidated, the question of redressability does not even arise. Perhaps this is why tort law does not have—nor need—a separate set of standing requirements.

The fears of calamitous and ubiquitous liability raised by Respondents and their supporters ignore this basic point. Whether any party owes a duty to another with respect to greenhouse gas emissions is an open question, one that demands judicial attention. *See* David Hunter & James Salzman, *Negligence in the Air: The Duty of Care in Climate Litigation*, 155 U. Pa. L. Rev. 1741 (2007). The long history of federal common law adjudication of interstate pollution disputes suggests that contributions to climate change *could* be cognizable as tortious wrongs. *See, e.g., Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) (sewage released into Lake Michigan); *New Jersey v. City of New York*, 283 U.S. 473 (1931) (garbage dumped into Atlantic Ocean); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907) (air pollution emitted across state borders); *Missouri v. Illinois*, 180 U.S. 208 (1901) (sewage discharged into Mississippi River). More generally, the fact that common law courts have used public

and private nuisance doctrine for centuries to assess whether newly emergent forms of harm are actionable suggests at the least that courts are institutionally equipped to consider the climate change context. Petitioners' supporters insist that federal common law only governs claims based on "discrete lines of causation from individual sources to their alleged injuries that unfolded in a specified distance and time," Brief of Law Professors as Amici Curiae in Support of Petitioners, at 34, and that Respondents in turn are seeking the creation of a "new common law action." Chamber Brief, at 4. Their statements, however, only posit the conclusion to a merits analysis, rather than conduct one.

If an actual merits analysis were conducted, one would find numerous ways in which the common law itself addresses the concerns raised by Petitioners and their supporters. Under state tort law, the sheer geographic and temporal scale of harmful activity sometimes leads courts to declare that no duty to avoid the activity exists. *See, e.g., Barasich v. Columbia Gulf Transmission Company*, 467 F. Supp. 2d 676 (E.D. La. 2006) (deciding under Louisiana law that destruction of protective coastal marshland, which exacerbated property damage from Hurricanes Katrina and Rita, did not give rise to trespass or nuisance liability because the duty to avoid harm in Louisiana applies only between closely proximate "neighbors"). One primary reason for such limitations is the basic fairness argument that a defendant should not be held liable unless the plaintiff's harm was reasonably foreseeable such that the defendant could have avoided causing it. *See* Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause*, 44 Wake Forest L. Rev.

1247, 1267 (2009). Whether an activity gives rise to foreseeable pathways of harm in this manner is a case-specific, context-sensitive judgment. In contrast to the *Barasich* court, for instance, the court in *In re Katrina Canal Breaches Consol. Litig.*, 647 F. Supp. 2d 644, 697 (E.D. La. 2009), found that actions by the Army Corps of Engineers over several decades in negligently constructing and maintaining the Mississippi River Gulf Outlet proximately caused a portion of plaintiffs' harm during the Hurricane Katrina disaster. Such particularized holdings are entirely appropriate as tort law continues its traditional role of identifying and enforcing norms of appropriate conduct between parties.

Courts also sometimes curtail tort liability out of the same kinds of judicial manageability concerns that motivate the Petitioners' misplaced desire to apply political question analysis to a judicially-created body of law. In *Strauss v. Belle Realty Co.*, 482 N.E.2d 34 (N.Y. 1985), for instance, the New York Court of Appeals shielded Consolidated Edison from liability to a plaintiff who was injured from a stairway fall during the 1977 electricity blackout in New York City. Despite the acknowledged gross negligence of Consolidated Edison and despite the ready foreseeability of plaintiff and his injury in relation to such conduct, the court nevertheless stressed its "responsibility to define an orbit of duty that places controllable limits on liability." *Id.* at 38. The point here is not to endorse or criticize the holding, but rather simply to emphasize that fears of "crushing exposure to liability," *id.* at 36, can and should be addressed through the substantive law of tort itself, rather than indirectly through doctrines devised for an entirely different legal context.

The requirements for recovery under a public nuisance cause of action further winnow the class of potential plaintiffs, avoiding the specter of universal liability raised by Petitioners and their supporters. It is not the case that Respondents' claims could be pursued "by virtually any landowner, and to an extent, by virtually any person, in the United States (and, indeed, in most of the world)." TVA Brief at 15. Rather, only those parties who "have suffered harm of a kind different from that suffered by other members of the public," or who are authorized to speak for the public may bring a public nuisance claim. Restatement (Second) of Torts § 821C (1979). This longstanding "special injury" rule under public nuisance doctrine represents the principled way in which liability for public nuisances is kept to manageable levels, much as proximate causation principles serve to contain negligence liability. One can readily detect that such requirements developed within the common law precisely out of the kinds of concerns that motivate prudential standing doctrine. As noted above in Part II, however, standing doctrine is an unnecessary and inappropriate vehicle for vindicating such concerns in the instant litigation.

Nor would a court necessarily be dragged into intractable weighing of complex social interests, assuming that a basic duty to avoid contributions to climate change was first identified. To begin with, some jurisdictions hold that a heavily regulated and licensed activity cannot constitute an actionable public nuisance as matter of law. *See id.* at § 821B cmt. f. ("Although it would be a nuisance at common law, conduct that is fully authorized by statute, ordinance or administrative regulation does not

subject the actor to tort liability."). Such a rule was relied upon by the Fourth Circuit Court of Appeals as an alternate ground for dismissing a recent common law suit involving certain strictly regulated air pollutants. *North Carolina ex. rel. Cooper v. TVA*, 615 F.3d 291, 309-10 (4th Cir. 2010). Thus, although the court criticized nuisance law as lacking "any manageable criteria" for addressing complex pollution suits, *id.* at 302, the court nonetheless found a principled doctrine responding precisely to the court's justiciability concerns within the very body of jurisprudence that it otherwise disparaged as "an ill-defined omnibus tort." *Id*; *see also New England Legal Found. v. Costle*, 666 F.2d 30, 33 (2d Cir. 1981) ("Courts traditionally have been reluctant to enjoin as a public nuisance activities which have been considered and specifically authorized by the government."). *Amici* take no position on whether Petitioners could avail themselves of this protective rule, given the relative dearth of regulations directed toward greenhouse gas emissions. The point instead is simply to underscore the sensibility of the common law, notwithstanding vigorous attempts to portray it as otherwise.

Even in those jurisdictions that would not afford complete tort immunity for heavily regulated and licensed activities, the ensuing public nuisance analysis would not inexorably drag a court into "far-reaching technological, economic, scientific, and policy issues." TVA Brief at 19. Petitioners and their supporters quote selectively from the Restatement (Second) of Torts (1979) to suggest that in the climate change nuisance context "the court is acting without an established and recognized standard." Brief for American Chemistry Council et al. in

Support of Petitioners at 20 ("ACC Brief") (quoting Restatement (Second) of Torts § 821B cmt. e (1979)). Immediately after the quoted Restatement text, however, Dean Prosser went on to emphasize that in the absence of criminal or legislative standards of culpability, "[t]he analysis set forth in §§ 826-831 [of the Second Restatement] then becomes more significant," as those sections provide the relevant standards of liability. Restatement (Second) of Torts § 821B cmt. e (1979).

Critically, not all of those Restatement standards require courts to engage in a far-reaching weighing of social costs and benefits. In a damages action, for instance, liability may be premised on the more manageable basis that "the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible." *Id.* at § 826(b) (1979). The general rules for public nuisance likewise focus on factors such as "[w]hether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience," or "whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right." *Id.* at § 821B(2). The kind of analysis suggested by these Restatement sections is quintessentially judicial in nature: it pertains not to the construction of an ideal greenhouse gas emissions regulatory scheme, but rather to the specification and enforcement of rights grounded in fairness and held by particular parties before the court.

Finally, Petitioners and their supporters question why any individual defendant or group of defendants might be singled out for liability, given the pervasiveness of greenhouse gas emissions. *See, e.g.*, Brief of Business Roundtable as Amicus Curiae in Support of Petitioners at 16. Although this concern is not without justification, the common law of tort itself addresses the problem and, in fact, provides through its actual and proximate causation doctrines much of the analytical foundation for the "traceability" prong of modern standing principles. For purposes of standing analysis, where barriers of injury, causation, and redressability should not be raised higher than the underlying cause of action itself, the court below appropriately referenced "a federal common law of nuisance case[s] involving air pollution, where the ambient air contains pollution from multiple sources and where liability is joint and several." *Connecticut v. American Elec. Power Co.*, 582 F.3d 309, 349 (2d Cir. 2009).

When the actual merits are addressed, however, the court will need to consider more fully whether the rule of joint and several liability applies for harms that follow from climate change. To begin with, it is certainly the case that Petitioners' actions can be considered a factual cause of Respondents' injuries even if they only contribute to a harmful phenomenon rather than constitute its but-for cause, and even if Respondents' injuries might still have occurred in the absence of Petitioners' actions. *See, e.g.*, Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 27 ill. 3 (2009); *see also* Stapleton, *supra*, at 475 (noting that "[t]his is typically the situation in pollution cases"). Extensive caselaw in the pollution context supports this

proposition, particularly when the relief sought is equitable rather than monetary in nature. *See, e.g.*, *Illinois ex rel. Scott v. City of Milwaukee*, No. 72 C 1253, 1973 U.S. Dist. LEXIS 15607, at *20–*22 (N.D. Ill. Nov. 1, 1973) ("The correct rule would seem to be that any discharger who contributes an aliquot of a total combined discharge which causes a nuisance may be enjoined from continuing his discharge. Either that is true or it is impossible to enjoin point dischargers."), *aff'd in relevant part and rev'd in part sub nom.*, *Illinois v. City of Milwaukee*, 599 F.2d 151, 177 (7th Cir. 1979), *vacated on other grounds*, 451 U.S. 304, 332 (1981); Restatement (Second) of Torts § 840E (1965) (stating with respect to both private and public nuisance that "the fact that other persons contribute to a nuisance is not a bar to the defendant's liability for his own contribution"); *Cox v. City of Dallas*, 256 F.3d 281, 292 n.19 (5th Cir. 2001) (gathering sources). As Judge Posner wrote for the Seventh Circuit Court of Appeals, "[i]n all these cases the requirement of proving causation is relaxed because otherwise there would be a wrong and an injury but no remedy because the court would be unable to determine which wrongdoer inflicted the injury." *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 697 (7th Cir. 2008) (*en banc*).

On the other hand, the peculiar nature of climate change makes it possible for parties to seek to quantify any individual defendant's contribution to the overall climate change phenomenon and, by extension, plaintiff's injuries. In a damages action—which is *not* the case before the Court—judges might well use such evidence to conclude that the defendant's activities represent such a small

contribution to the overall phenomenon of climate change that they no longer should form a basis for liability. *Cf.* Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 36 (2005) ("When an actor's negligent conduct constitutes only a trivial contribution to a causal set that is a factual cause of harm" there is no liability); Restatement (Second) of Torts § 834 cmt. d (1979) (noting with respect to public and private nuisance that "[w]hen a person is only one of several persons participating in carrying on an activity, his participation must be substantial before he can be held liable for the harm resulting from it").

Although these doctrines do not bear directly on a suit for injunctive relief, similar considerations do sometimes enter into the calculus of whether and how to issue an injunction. *See* Restatement (Second) of Torts § 941 (outlining various equitable factors that go into assessing the "relative hardships" to plaintiff and defendant that would flow from injunctive relief); *Illinois ex rel. Scott*, 1973 U.S. Dist. LEXIS 15607 at *22 (observing, in dicta, that "[t]here may be a discharge so small that, as a practical matter, it can be regarded as *de minimis*, even though as a logical matter it is still part of the whole"); *Harley v. Merrill Brick Co.*, 48 N.W. 1000, 1002 (Iowa 1891) (noting, in dicta, that "there might be a contribution to [a pollution nuisance] so slight and inconsequential that the law would not take notice of it"). The point is not to state whether or how these various caveats should apply to climate change tort suits, including especially the instant one. Rather the point simply is to note that the common law is quite cognizant of the multiple causation problem raised by Petitioners and their

supporters. Again, the common law of tort hardly appears as the unprincipled and underequipped body of law Petitioners and their supporters make it out to be.

In sum, critics of climate change lawsuits misconstrue the aim and structure of tort law, arguing that the inability of courts to bind all relevant greenhouse gas emitters "automatically makes them institutionally ill-suited to entertain lawsuits concerning problems this irreducibly global and interconnected in scope." Tribe et al., *supra*, at 21. Such a view ignores the fact that courts are well-suited—indeed *uniquely* suited—to address the narrow, manageable, and traditional issues of right and responsibility that are raised by the instant litigation. Moreover, even if the critics' view was valid, it would not support the invocation of standing and political question doctrines to guard against potential judicial overreaching, as courts have ample means of addressing any such concerns within the law of tort itself. There is no reason why preliminary justiciability filters are necessary or desirable as an additional gatekeeper against unmanageable, would-be common law claims, above and beyond the quite significant power of courts to manage the requirements of legal sufficiency within the common law framework itself.

The sky is warming, but it is not falling.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

DOUGLAS A. KYSAR
Counsel of Record and Amicus
Yale Law School
127 Wall Street
New Haven, CT 06511
(203) 436-8970

MARCH 18, 2011

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
MAR 18 2011
OFFICE OF THE CLERK

No. 10-174

In the Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY, INC., ET AL.,
Petitioners,

v.

STATE OF CONNECTICUT, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* UNITARIAN UNIVERSALIST MINISTRY FOR EARTH; THE UNITARIAN UNIVERSALIST ASSOCIATION; THE SHALOM CENTER; THE PROVINCE OF THE IMMACULATE CONCEPTION OF THE CONGREGATION OF THE MISSIONARY SISTERS OF THE IMMACULATE CONCEPTION; THE NEW EVANGELICAL PARTNERSHIP FOR THE COMMON GOOD; THE NATIONAL CATHOLIC RURAL LIFE CONFERENCE; THE MISSIONARY OBLATES OF MARY IMMACULATE; MARYKNOLL OFFICE FOR GLOBAL CONCERNS; THE JEWISH RECONSTRUCTIONIST FEDERATION; INTERFAITH POWER AND LIGHT; GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST; THE FRANCISCAN ACTION NETWORK; THE COLUMBAN CENTER FOR ADVOCACY AND OUTREACH; AND CHURCH WORLD SERVICE IN SUPPORT OF RESPONDENTS AND URGING AFFIRMANCE OF THE DECISION BELOW

Ned Miltenberg
Counsel of Record
LAW OFFICES OF NED MILTENBERG
1707 N Street, N.W., Suite 200
Washington, D.C. 20036-2830
202/656-4490
NedMiltenberg@gmail.com

March 18, 2011

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

IDENTITY AND INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 10

ARGUMENT 11

I. GLOBAL CLIMATE CHANGE IS A GRAVE AND UNPARALLELED THREAT TO GOD'S CREATION 11

II. JUSTICE AND MORALITY DEMAND AN URGENT RESPONSE TO GLOBAL CLIMATE CHANGE 20

CONCLUSION 24

TABLE OF AUTHORITIES

SCHOLARLY AUTHORITIES

T.R. Knutson, *et al.*, *Tropical cyclones and climate change*, 3 NATURE GEOSCIENCE 157 (2010) . . . 19

OTHER AUTHORITIES

American Association for the Advancement of Science (AAAS), *et al.*, *Statement on Climate Change* (Oct. 21, 2009), *available at* http://www.ucsusa.org/assets/documents/ssi/climate-change-statement-from.pdf 17

The Bible (New Revised Standard trans.) 12

Coalition on the Environment and Jewish Life (COEJL), *Climate Change Programs*, *available at* http://www.coejl.org/~coejlor/climate change/index.php 21

The Evangelical Climate Initiative, *Climate Change: An Evangelical Call to Action* 6 (Jan. 2006), *available at* http://preview.christiansandclimate.org/wp-content/uploads/2008/05/eci-calltoaction-booklet.pdf 21, 23

G8+5 Academies' Joint Statement: Climate Change and the Transformation of Energy Technologies for a Low Carbon Future (May 2009), *available at* http://www.nationalacademies.org/ includes/G8+5energy-climate09.pdf 17

Intergovernmental Panel on Climate Change, FOURTH ASSESSMENT REPORT: *Observed*

Changes in Climate and Their Effects (2007), *available at* http://www.ipcc.ch/publications_and_data/ar4/syr/en/spms1.html. 15, 16, 17

Letter of His Holiness Benedict XVI to the Ecumenical Patriarch of Constantinople on the Occasion of the Seventh Symposium of the Religion, Science and the Environment Movement (September 1, 2007), *available at* http://www.vatican.va/holy_father/benedict_xvi/letters/2007/documents/hf_ben-xvi_let_20070901_symposium-environment_en.html. 13, 21

National Academies of Science, Engineering, and Medicine: Board on Atmospheric Sciences and Climate, *Advancing the Science of Climate Change: Summary* 1 (2010), *available at* http://books.nap.edu/openbook.php?record_id=12782&page=1 16

National Academies of Science, Engineering, and Medicine, *Ecological Impacts of Climate Change* (EICC) (2009), *available at* http://dels-old.nas.edu/dels/rpt_briefs/ecological_impacts.pdf. ..... *passim*

National Academies of Science, Engineering, and Medicine, *Understanding and Responding to Climate Change* (URCC) (2008 ed.), *available at* http://dels-old.nas.edu/dels/rpt_briefs/climate_change_2008_final.pdf 15

National Council of Churches of Christ, *Eco-Justice Programs: Climate Change and Global Warming*, http://nccecojustice.org/climate/ ... 22

National Council of Churches USA and Church World Service, *A Social Creed for the 21st Century* 2 (November 7, 2007), *available at* http://www.ncccusa.org/news/ga2007.socialcreed.html 22

National Religious Partnership on the Environment (NRPE), *The Evangelical Perspectives on Climate and Air, available at* http://www.nrpe.org/issues/i_air/air_evangelical_a02.htm 23

National Religious Partnership on the Environment (NRPE), *Interfaith Perspectives on Climate and Air: Earth's Climate Embraces Us All* (May 2004), *available at* http://www.nrpe.org/issues/i_air/air_interfaith01.htm. 13, 21

National Religious Partnership on the Environment (NRPE), *Why is the Environment a Religious Concern: The Environment in the Jewish and Christian Scriptures, available at* http://nrpe.org/why/scripture01.htm 12

Pew Center on Global Climate Change, *Climate Change 101: Science and Impacts* (January 2011), *available at* http://www.pewclimate.org/docUploads/climate101-science.pdf 19, 20

Pope Benedict XVI, *Message for the Celebration of the World Day of Peace* (Jan. 1, 2008), *available at* http://www.vatican.va/holy_father/benedict_xvi/messages/peace/documents/hf_ben-xvi_mes_20071208_xli-world-day-peace_en.html 22

A Statement of Concern on Climate Change and the Need for Clean Energy, CREATION CARE (Winter 2002) 23

Statement of Senior Religious Leaders on Global Climate Change and Poverty, November 27, 2007, *available at* http://www.nrpe.org/press materials/lettertomemofcongress.pdf 23

Testimony of Mark X. Jacobs, Director of COEJL, to the Subcomm. on Transportation of the Committee on Appropriations, U.S. House of Representatives (Feb. 10, 2000), *available at* http://coejl.org/news/20000210_cafetest.php . 23

U.S. Army Corps of Engineers, *After Action Report: May 2010 Flood Event Cumberland River Basin*, (July 21, 2010), *available at* http://www.lrn.usace.army.mil/LRN_pdf/AAR_May_2010_Flood_Cumberland_Draft_V7_21.Pdf 18

The U.S. Centers for Disease Control and Prevention, *Climate Change and Public Health* 1 (November 29, 2010), *available at* http://www.cdc.gov/climatechange/effects/default.htm 20

United States Conference of Catholic Bishops, *Global Climate Change: A Plea for Dialogue, Prudence, and the Common Good* (2001), *available at* http://www.usccb.org/sdwp/international/globalclimate.shtml 21

IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are fourteen faith-based organizations that are active participants in the ongoing attempt to respond to global climate change and have a strong interest in developing limits on greenhouse gases, which are the primary cause of global climate change.[1]

Amici represent a broad spectrum of Catholic, Protestant, and Jewish communities. Although they differ on many matters of faith and policy, they are united in their concern about threats to the environment. They believe that human beings are stewards of God's Creation and that humans have a moral obligation to prevent and mitigate harm to the planet, to our fellow humans, and to all of God's creatures.

Amici have long been particularly concerned about the perils posed by global climate change. They believe it is a real, measurable, and growing phenomenon, not a hoax. They believe climate change is largely caused by human choices and actions, primarily the burning of fossil fuels, which causes the emission of greenhouse gases. They believe it is exacerbated by human selfishness and neglect, chiefly by the pursuit of profit by some and by the unwillingness of government to make hard choices. They believe that global climate change is an ever-increasing, ever-worsening problem,

---

[1] This brief has been filed with the written consent of the parties, which is on file with the Clerk of Court. Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* and their counsel, make a monetary contribution to the preparation or submission of this brief.

and accept the consensus scientific projections of far more catastrophic effects in the future. *Amici* are also concerned that the effects of global climate change have fallen and will fall on the most vulnerable members of society, who are among the least able to protect themselves. For all these reasons, they believe that reversing global climate change is an imperative moral question for the human family and that prudence and the precautionary principle require urgent action – not more debate, temporizing, and delay.

Amici therefore submit this brief in support of the Plaintiff-Respondents and respectfully urge this Court to affirm the decision below. They believe that the States and the land trusts should be allowed to seek court-ordered limits on emissions of greenhouse gases by the large utilities who are the defendants in this case, particularly in the absence of any actual legal limits on the emissions from the utilities' existing facilities under the Clean Air Act.

The individual *amici curiae* are as follows.

UNITARIAN UNIVERSALIST MINISTRY FOR EARTH is a not-for-profit organization that works alongside the Unitarian Universalist Association and other Unitarian Universalist organizations to connect and inspire an active community of Unitarian Universalists for environmental justice, spiritual renewal, and shared reverence for our Earth home. Unitarian Universalist Ministry for Earth provides resources, encourages coordinated Unitarian Universalist advocacy and action, and helps congregations engage in meaningful environmental

justice partnerships. Climate change and its effects on the least privileged in our world is a high priority.

THE UNITARIAN UNIVERSALIST ASSOCIATION (UUA) is a religious association of more than 1,000 congregations in the United States and North America. It combines two traditions: the Universalists, who organized in 1793, and the Unitarians, who organized in 1825. They consolidated into the UUA in 1961. Through its democratic process, the UUA adopts resolutions consistent with its fundamental principles and purposes. Unitarian Universalism is a liberal religion with Jewish-Christian roots. It has no creed. It affirms the worth of human beings, advocates freedom of belief and the search for advancing truth, and tries to provide a warm, open, supportive community for people who believe that ethical living is the supreme witness of religion. Unitarian Universalist spiritual values call us to act on the personal, local, and national levels to adopt practices that will reverse global warming/climate change, and to do so in ways that are just and equitable.

THE SHALOM CENTER is a religious organization that was established in 1983 and is dedicated to inspiring the Jewish community to greater attention and action on questions of peace and justice for the planet and all who dwell on it -- and as part of this effort, to making common cause with peace and justice advocates of all faiths. Addressing the global climate crisis is one of The Shalom Center's two major program priorities. The Center especially draws on Jewish and other religious teachings about shaping a sustainable society and works on these issues with special concern for those most vulnerable and most hurt as the climate crisis unfolds.

THE PROVINCE OF THE IMMACULATE CONCEPTION OF THE CONGREGATION OF THE MISSIONARY SISTERS OF THE IMMACULATE CONCEPTION is part of an international Franciscan missionary community which was founded in 1910 in Santarem, Brazil, which has a province located in the United States of America, and which lives in contemplative compassionate presence to all, especially the most needy, through creative action in the face of the suffering of God's people and the destruction of creation. Out of our belief that all is created by God, with our interconnection globally as a congregation and through our presence to those in need in Asia, Africa, Europe and North and South America, we recognize the ecological crisis that threatens our planet and that we are part of both the cause and the solution. We network with like-minded groups and movements supporting and participating in actions that transform this situation.

THE NEW EVANGELICAL PARTNERSHIP FOR THE COMMON GOOD (NEP) is a faith-based nonprofit which offers a renewed Christian public witness for the sake of the Gospel and the common good. NEP subscribes and endorses the Evangelical Climate Initiative, including its four principles: (1) human-induced climate change is real; (2) the consequences of climate change will be significant, and will hit the poor the hardest; (3) Christian moral convictions demand our response to the climate change problem; and (4) the need to act now is urgent. Governments, businesses, churches, and individuals all have a role to play in addressing climate change—starting now.

THE NATIONAL CATHOLIC RURAL LIFE CONFERENCE (NCRLC), founded in 1923, is an organization comprised of dedicated bishops, laity and

religious who are joined in a common effort to serve the rural church, rural people and their communities. NCRLC's mission is to apply the teachings of Jesus Christ for the social, economic, and spiritual development of rural America with responsibility for the care of God's creation. By providing spiritual, educational and advocacy assistance, NCRLC helps rural people shape their futures and lead lives of dignity. NCRLC has served as a prophetic voice for rural communities and for care of the land on which they depend. NCRLC believes that globalization and global environmental issues, including climate change, place even greater demands on NCRLC to fulfill its mission of supporting and empowering rural people. Therefore, NCRLC advocates for policies that will protect God's creation and God's children from the threat posed by climate change, which is already affecting the farmers and rural communities with which NCRLC works.

THE MISSIONARY OBLATES OF MARY IMMACULATE is an order founded in 1816 to serve the poor and needy in many different ways. From providing education for children in Haiti to sheltering tsunami victims of all faiths in Sri Lanka, their ministries are a testament to the profound effect God's love has on the communities they serve. Our congregation of more than 4,500 Missionary Oblates reaches out to the poor in the U.S. and 70 other countries worldwide. The Oblates believe climate change is under way already and that the urgency with which we must act becomes clearer with every new scientific study. As part of the religious community, the Oblates have been working hard to re-awaken a religious vision of the world as a living interconnected cosmos guided by the Spirit for the enjoyment and nurture of all creatures. The

Oblates have been active with other faith communities in urging policy makers to be open to that vision, to act quickly and effectively, and to take into consideration the impacts on those least able to cope, both in the United States and abroad.

MARYKNOLL OFFICE FOR GLOBAL CONCERNS was founded in 1997 to represent the Maryknoll Sisters (founded in 1912), the Maryknoll Fathers & Brothers (founded in 1911), and the Maryknoll Lay Missioners (founded in 1994) in educating for social, economic, and environmental justice, peace, and the integrity of creation. It is an extension of the work done by the Fathers and Brothers' Justice and Peace Office (established in 1974) and the Maryknoll Sisters' Office of Social Concerns (established in 1978). Maryknoll also is the popular name of the Catholic Foreign Mission Society of America (priests and brothers) and the Maryknoll Sisters of St. Dominic. Lay people have joined the Maryknoll family to carry out mission activity through the Maryknoll Lay Missioners and the Maryknoll Affiliates. Maryknoll trains, recruits and supports missioners serving in more than thirty countries in Latin America, Asia and the Pacific, Africa and the Middle East. The Office for Global Concerns brings Maryknoll experience into important debates about public policy in the U.S. and other governments, United Nations, World Bank, and International Monetary Fund, and the corporate world. The Office informs advocacy and action for social, economic, and environmental justice, peace, and the integrity of creation.

THE JEWISH RECONSTRUCTIONIST FEDERATION (JRF) was founded in 1955 to represent the Reconstructionist movement nationally and

internationally and serves over 100 congregations and *havurot* across North America. We believe the religious imperative for environmentalism is be rooted in central tenets of Jewish tradition, which include cherishing and protecting the natural environment. JRF is a proud supporter of the Jewish Climate Change initiative, which fosters collaboration between all Jewish movements and Jewish national agencies and environmental organizations, and JRF endorses the JCC Pledge which aims to build a more sustainable global economy, support the creation of green jobs, prioritize protecting vulnerable populations, and ensure that the UN Climate Change Conference creates the strongest possible framework to ameliorate climate change.

INTERFAITH POWER AND LIGHT was created in 1998 and today represents over 10,000 congregations of many faiths across the United States who are concerned about global warming. We believe that global warming is one of the biggest threats facing humanity today. The very existence of life—life that religious people are called to protect—is jeopardized by our continued dependency on fossil fuels for energy. Every mainstream religion has a mandate to care for creation. We were given natural resources to sustain us, but we were also given the responsibility to act as good stewards and preserve life for future generations.

GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST is the representative body of the national setting of the United Church of Christ (UCC) and is composed of delegates chosen by its Conferences, from member churches, voting members of Boards of Directors of Covenanted Ministries who have been elected by General synod as described in the Bylaws of

the UCC, and of ex officio delegates. The UCC was formed in 1957, by the union of the Evangelical and Reformed Church and the General Council of the Congregational Christian Churches of the United States in order to express more fully the oneness in Christ of the churches composing it, to make more effective their common witness in Christ, and to serve God's people in the world. The UCC has 5,600 churches in the United States, with a membership of approximately 1.2 million. The General Synod of the UCC, various settings of the UCC, and its predecessor denominations, have a heritage of concern for the environment and all of God's creation. At its 26th gathering in 2007 and 27th gathering in 2009, the General Synod expressed in part profound concern for the pending environmental, economic, and social tragedies threatened by global warming, to creation, human communities and traditional sacred spaces and, among other things, urged the United States, state and local governments to respond to global warming with great urgency and firm leadership.

THE FRANCISCAN ACTION NETWORK brings a U.S.-based Franciscan perspective of integral social transformation to public discourse and policies arising from Washington, DC. FAN engages Franciscan and Franciscan-hearted persons in the U.S. on issues of peacemaking, care for creation, poverty, and human rights. The Network believes that global climate change is an issue for people of faith because honoring creation is another way to honor God who created all that is, and that the human contribution to climate change represents one of the clearest examples of how human activity can be damaging to God's creation.

THE COLUMBAN CENTER FOR ADVOCACY AND OUTREACH (CCAO) promotes the social justice priorities of the U.S. region of the Missionary Society of St. Columban (*a.k.a.*, St. Columban's Foreign Mission Society, *a.k.a.*, Columban Fathers). The CCAO represents Columban missionaries: Catholic men and women who work with and serve those who are poor in fifteen countries worldwide, as well as communities in the United States. Through advocacy, solidarity, and education, the CCAO is dedicated to raising the peace, social justice and ecological concerns of Columban missionaries and the people with whom they live and serve. Although the CCAO recognizes the wide variety of social justice and economic ills facing our global community, the organization focuses primarily on climate change, migration and immigration, economic justice, and peace and reconciliation. We also recognize the growing synthesis of our issues (especially climate and migration), and believe human-induced climate change is the most serious and pressing ecological challenge facing the U.S. and the world today. The CCAO is guided by principles of justice, stewardship, sufficiency, and sustainability, recognizes the interconnectedness of all life and the call to share in the act of Creation by responsibly caring for the world, and calls for comprehensive, mandatory, and aggressive reductions in carbon emissions.

CHURCH WORLD SERVICE (CWS), founded in 1946, is a cooperative ministry of 37 Protestant, Orthodox, and Anglican denominations and communions, providing sustainable self-help and development, disaster relief, and refugee assistance around the world. The CWS connection to partners around the world informs and inspires its work in education and advocacy -- both of which are essential components as

for confronting the root causes of hunger. By raising awareness about hunger, poverty, water access, trade, human rights, climate change, peace-building and other issues in our Speak Out alerts, CWS brings the voices and priorities of our partners and constituents into the halls of churches, community groups, and governments. In the area of climate change, for example, CWS is working shoulder-to-shoulder with environmental organizations and other church-related relief and development agencies to promote policies that strive for equitable solutions to the challenges ahead.

INTRODUCTION AND SUMMARY OF ARGUMENT

As a source of actual and potential grievous harm, anthropogenic climate change stands out in the long history of humanity's affronts to our fellow humans and to our environment. A warming climate has caused and will cause or aggravate a host of "natural" disasters, such as shrinking glaciers, rising seas, more frequent and more intense hurricanes, wider and longer droughts, greater floods, increasing food prices and food shortages, disease epidemics, and wildfires. These disasters have consequences for the whole of humanity, and fall with particular unfairness on the poor, the sick, and the elderly.

Humans substantially cause global climate change through the burning of fossil fuels and humans are the only earthly force that can mitigate the swelling climate crisis. Although restraining and ultimately reversing global climate change will require many skills, what is needed most of all is moral vision. Resources of human character and spirit — love of life,

far-sightedness, solidarity — are needed to awaken a sufficient sense of urgency and resolve. Prudence and "the precautionary principle" compel urgent action, including the court-ordered limits on emissions sought by the Plaintiff-Respondents. For these reasons, *amici* urge this Court to affirm the decision below.

ARGUMENT

I. Global Climate Change Is a Grave and Unparalleled Threat to God's Creation

Amici have submitted this brief to help establish that global climate change is an immense and growing problem, that human activity is the major cause, and that its current and future effects are insidious, long lasting, and often catastrophic. These effects include rising sea levels, shrinking glaciers and ice packs, torrential rains, floods, hurricanes, droughts, wildfires and water shortages, rising food prices and growing food shortages, epidemics of old and new diseases, and mass starvation and mass migrations.

Amici's concern about global climate change is not a new position for them or other members of the religious community. Reverence for God's Creation, and concern about human despoliation, date back to the Bible.[2]

---

[2] The National Religious Partnership on the Environment (NRPE) (an umbrella organization to which many of the *amici* belong and which like them urges action on climate change) has helpfully collected passages from "ancient texts that speak to the new responsibilities born of our unprecedented powers over creation. Well-known and well-loved stories — the Creation, the Garden of Eden, Noah's Ark, Job hearing the voice in the whirlwind —

For these reasons, *amici* and many of their co-religionists have long been concerned about the extent, origins, and consequences of global climate change. Seven years ago, more than a dozen of the nation's religious leaders[3] issued a joint statement "shar[ing]"

---

acquire striking new dimensions of relevance to our times." NRPE, *Why is the Environment a Religious Concern: The Environment in the Jewish and Christian Scriptures, available at* http://nrpe.org/why/scripture01.htm . Specifically, NRPE reprises relevant passages from the Old and New Testaments that explicitly or implicitly impart environmental teachings. These include passages on the seven days of creation (Genesis 1:1-2:4a), Noah and the flood (Genesis 6:9a-14, 17-22; 7:11-14, 18-19, 21; 7:23b-8:3; 8:15-19); Adam and Eve in the Garden of Eden (Genesis 2:7-9, 15); God's covenant with the earth (Genesis 9:12-15); the Sabbath commandment and creation (Exodus 20:8-11); against wanton destruction (Deuteronomy 20:19-20); protecting species (Deuteronomy 22:6-7); Precaution (Deuteronomy 22:8); mysteries of creation (Job 38:25-27, 39:1-4); limits to human dominion (Job 39:9-12); the earth is God's (Psalm 24:1-2); let the earth rejoice (Psalm 96:11-13); creation suffers from human sin (Jeremiah 4:23-26, 12:4); God's care for creation (Matthew 6:25-30); Jesus' example of dominion as service (Matthew 20:25-28); The Word in creation and incarnation (John 1:1-14); Creation reveals God (Romans 1:20a); Creation waits for redemption (Romans 8:19-23); Christ and creation (Colossians 1:15-20); God the Creator (Revelation 4:11); destroying those who destroy the earth (Revelation 11:18); and New Heaven and New Earth (Revelation 21:1-2, 22:1-2). *See also* Isaiah 24:4-6 ("The earth dries up and withers, the world languishes and withers; the heavens languish together with the earth. The earth lies polluted under its inhabitants; for they have transgressed laws, violated the statutes, broken the everlasting covenant. Therefore a curse devours the earth, and its inhabitants suffer for their guilt.")(New Revised Standard translation).

[3] Those leaders included the President of the National Council of Churches U.S.A., the Archbishop of Washington, D.C. and Chairman of the Domestic Policy Committee of the United States

their "deep conviction that global climate change presents an unprecedented threat to the integrity of life on Earth" and warning that "[a]mong the predicted consequences of climate change are more frequent occurrences of heat waves, drought, torrential rains, and floods; global sea level rise of between one-half and three feet; increase of tropical diseases in now-temperate regions; significant reduction in biodiversity." National Religious Partnership on the Environment (NRPE), *Interfaith Perspectives on Climate and Air: Earth's Climate Embraces Us All* 1 (May 2004), *available at* http://www.nrpe.org/issues/i_air/air_interfaith01.htm.

Four years ago, Pope Benedict XVI also embraced this scientific consensus: "[p]reservation of the environment, promotion of sustainable development and particular attention to climate change are matters of grave concern," because "[w]ith increasing clarity scientific research demonstrates that the impact of human actions in any one place or region can have worldwide effects." Letter of His Holiness Benedict XVI to the Ecumenical Patriarch of Constantinople on

---

Catholic Conference of Bishops, the General Secretary of the American Baptist Churches in the U.S.A., the Chancellor of the Jewish Theological Seminary of America, the Presiding Bishop of the Evangelical Lutheran Church in America, the Stated Clerk of the Presbyterian Church U.S.A., the Executive Director of Jewish Council for Public Affairs, the Vice President for Governmental Affairs of the National Association of Evangelicals, the Presiding Bishop and Primate of the Episcopal Church, U.S.A., the Interim General Secretary of the Council of Bishops of the United Methodist Church, the Ecumenical Officer of the Greek Orthodox Archdiocese of America, and the President of the Union for Reformed Judaism. The religious leaders were joined by a number of leading American scientists, included two Nobel Prize winners.

the Occasion of the Seventh Symposium of the Religion, Science and the Environment Movement (September 1, 2007), *available at* http://www.vatican.va/holy_father/benedict_xvi/letters/2007/documents/hf_ben-xvi_let_20070901_symposium-environment_en.html.

Even more now than when these statements were made, no reasonable observer can doubt that global climate change is a real, immense, and growing problem and that human behavior is the major cause. The overwhelming scientific evidence is that the Earth has been and is rapidly warming, and this warming is dramatically altering the globe's climate.[4] Natural climate variability alone cannot explain these trends.

Leading scientific institutions in the United States and the world – including the National Academy of Sciences, the National Academy of Engineering, the National Academy of Medicine, and the National Research Council,[5] as well as the prestigious

---

[4] The phrase "climate change" is growing in preferred use to "global warming" because it helps convey that there are changes in addition to rising temperatures.

[5] The National Academies are honorary, nongovernment, and nonprofit organizations that were established to provide independent scientific and technological advice to the U.S. government and nation. The National Research Council (NRC) is the operating arm that conducts the bulk of the Academies' science policy and technical work. The Academies and the NRC enlist committees of the nation's top scientists, engineers, and other experts--all of whom volunteer their time to study specific concerns.

Intergovernmental Panel on Climate Change (IPCC)[6] -- have reached a rare consensus: the overwhelming and unequivocal body of scientific evidence is that the earth is rapidly warming and the climate is dramatically changing. This change is "now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice and rising global average sea level." Intergovernmental Panel on Climate Change, FOURTH ASSESSMENT REPORT: *Observed Changes in Climate and Their Effects* 1 (2007), *available at* http://www.ipcc.ch/publications_and_data/ar4/syr/en/spms1.html. The average global temperature has "already risen 1.4°F since the start of the 20th century – with much of this warming occurring in just the last 30 years – and temperatures will likely rise at least another 2°F, and possibly more that 11°F, over the next 100 years." National Academies of Science, Engineering, and Medicine, *Understanding and Responding to Climate Change* (URCC) 2 (2008 ed.), *available at* http://dels-old.nas.edu/dels/rpt_briefs/climate_change_2008_final.pdf. By comparison, at the depths of the last ice age, 20,000 years ago, the average global temperature of the Earth was only 7°F to 11°F cooler than today. Joint Appendix 83.

In 2007, when the IPCC published its most recent Report, "[e]leven of the last twelve years (1995-2006) rank[ed] among the twelve warmest years in the

---

[6] According to the National Academies, IPCC Reports "are considered the most authoritative source for information on the 'state of the science' on climate change." National Academies of Science, Engineering, and Medicine, *Ecological Impacts of Climate Change* (EICC) 2 (2009), *available at* http://dels-old.nas.edu/dels/rpt_briefs/ ecological_impacts.pdf.

instrumental record of global surface temperature since (1850). . . . The temperature increase is widespread over the globe and is greater at higher northern latitudes" IPCC, FOURTH ASSESSMENT REPORT, *supra*, at 1.

Although the future is impossible to predict with compete certainty, The National Academies and the IPCC report that, under a "business as usual" scenario, "average global surface temperatures will likely rise by an additional 2.0–11 degrees Fahrenheit (1.1–6.4 degrees Celsius) by 2100. This temperature increase will be accompanied by a host of other environmental changes, such as an increase in global sea level of between 0.59 and 1.94 feet (0.18 and 0.59 meters)." National Academies of Science, Engineering, and Medicine, *Ecological Impacts of Climate Change* (EICC) 8 (2009), *available at* http://dels-old.nas.edu/dels/rpt_briefs/ecological_impacts.pdf. The scientific consensus clearly points to human activity as the major cause of climate change. According to the National Academies' most recent report, "there is a strong, credible body of evidence, based on multiple lines of research, documenting . . . that these [climate] changes are in large part caused by human activities." National Academies of Science, Engineering, and Medicine, Board on Atmospheric Sciences and Climate, *Advancing the Science of Climate Change: Summary* 1 (2010), *available at* http://books.nap.edu/openbook.php?record_id=12782&page=1. *See* National Academies, *EICC*, *supra*, at 3. In fact, "it is very likely that most of the observed warming over the past 50 years is the result of increased greenhouse gases

generated by human activities." National Academies, *EICC, supra,* at 5.[7]

The consequences of climate change are numerous and terrifying. These include:

> *Sea level increases.* "Global average sea level has risen since 1961 at an average rate of 1.8 mm/year and since 1993 at 3.1 mm/year, with contributions from thermal expansion, melting glaciers and ice caps, and the polar ice sheets." IPCC, FOURTH ASSESSMENT REPORT, *supra*, at 1. *Id.* Thus, "[s]atellite data since 1978 show that annual average Arctic sea ice extent has shrunk by 2.7% per decade, with larger decreases in summer of 7.4% per decade. Mountain glaciers and snow cover on average have declined in both hemispheres." *Id.* Under

---

[7] In addition, eighteen of the Nation's most prestigious scientific institutions—led by the American Association for the Advancement of Science (AAAS), the American Geophysical Union, and the American Meteorological Society—presented Congress with "the consensus scientific view" that "climate change is occurring and rigorous scientific research demonstrates that the greenhouse gases emitted by human activities are the primary driver." AAAS, *et al.*, *Statement on Climate Change* (Oct. 21, 2009), *available at* http://www.ucsusa.org/assets/documents/ssi/climate-change-statement-from.pdf. The national academies of science of the world's 13 largest and most sophisticated economies also have issued a joint statement reflecting the overwhelming consensus that "[t]he need for urgent action to address climate change is now indisputable," and that "climate change is happening even faster than previously estimated." *G8+5 Academies' Joint Statement: Climate Change and the Transformation of Energy Technologies for a Low Carbon Future* (May 2009), *available at* http://www.nationalacademies.org/includes/G8+5energy-climate09.pdf.

a "business-as-usual" GHG emissions scenario, sea levels could rise two feet or more by 2100 compared to 1990 levels. National Academies, *EICC* at 6.

- *Diminished snowpack*. The ancient seasonal rhythms of streams and rivers have changed as winter precipitation falls increasingly as rain instead of snow, and as earlier spring temperatures cause snow in the mountains to melt earlier and faster. Consequently, some areas experience more days with very heavy rain, while others face more frequent, intense, and long-lasting droughts. Warmer temperatures also mean higher evaporation rates and thirstier plants and people, which increase demands for water. *Id.* In addition, diminished snowpack threatens the water supplies of people who depend on water from the seasonal melting of mountain ice and snow.

- *Extreme temperatures and wildfires*. Average temperatures are rising, but extreme temperatures are rising even more: in recent decades, cold days and nights have grown less frequent and hot days and nights more frequent, with more frequent heat waves and hotter high temperature extremes. *Id.* at 7. In the United States, "[m]any types of extreme weather events, such as heat waves and regional droughts, have become more frequent and intense during the past 40 to 50 years." U.S. Army Corps of Engineers, *After Action Report: May 2010 Flood Event Cumberland River Basin*, (July 21, 2010), *available at* http://www.lrn.usace.army.mil/LRN_pdf/AAR_

May_2010_Flood_Cumberland_Draft_V7_21.Pdf. More severe drought in some areas, combined with other factors, has contributed to larger and more frequent wildfires. National Academies, *EICC* at 7.

- *Storms / hurricanes*. Rising GHG emissions and the accompanying increases in the average temperatures of the earth have caused extreme weather events, such as hurricanes, to increase in frequency and intensity in recent years, and this trend will continue in the future, with serious impacts on human societies and the natural world. T.R. Knutson, *et al., Tropical cyclones and climate change*, 3 NATURE GEOSCIENCE 157, 158 (2010).

- *Salination of drinking water*. Global climate change will affect the quality of drinking water and impact public health. As sea level rises, saltwater will infiltrate coastal freshwater resources. Flooding and heavy rainfall may overwhelm local water infrastructure and increase the level of sediment and contaminants in the water supply. Pew Center on Global Climate Change, *Climate Change 101: Science and Impacts* 6 (January 2011), *available at* http://www.pewclimate.org/docUploads/climate101-science.pdf (citations omitted).

- *Spread of disease*. Scientists expect climate change to affect human health in various other ways as well, both directly—from heat waves, floods, and storms—and indirectly—by increasing smog and ozone in cities, contributing to the spread of infectious diseases,

and reducing the availability and quality of food and water. The U.S. Centers for Disease Control and Prevention (CDC) maintains that global climate change has "the potential to affect human health in several direct and indirect ways, some of them severe." The U.S. Centers for Disease Control and Prevention, *Climate Change and Public Health* 1 (November 29, 2010), *available at* http://www.cdc.gov/climatechange/effects/default.htm.

- *Species loss.* Entire ecosystems are shifting toward the poles and to higher altitudes. Spring events, like the budding of leaves and migration of birds, are occurring earlier in the year. The risks to species will increase with increasing temperatures; scientists say that an additional 2°F of warming will increase the risk of extinction for up to 30 percent of all species. Pew Center, *Climate Change 101: Science and Impacts, supra* at 6.

II. JUSTICE AND MORALITY DEMAND AN URGENT RESPONSE TO GLOBAL CLIMATE CHANGE

The specter of global climate change extends beyond the plants and animals for which we are asked to be stewards. Unchecked climate change promises widespread dislocation and suffering for humanity. These effects are tragedies in the making, and crucially, tragedies of our own making. They are also contrary to basic Judeo-Christian ethics, which preach love of our fellow humans as ourselves, and more particularly, care and compassion for those who are the most vulnerable or needy. It is unfair to impose

these burdens on these innocent but vulnerable populations.[8]

As the National Religious Partnership on the Environment has observed, "protection of the weak" is a "universal value," and makes global warming "a universal moral challenge." NRPE, *Interfaith Perspectives on Climate, supra.* A similar sentiment has been embraced by the United States Conference of Catholic Bishops (USCCB), which has said that climate change "is about the future of God's creation and the one human family." USCCB, *Global Climate Change: A Plea for Dialogue, Prudence, and the Common Good* (2001), *available at* http://www.usccb.org/sdwp/international/globalclimate.shtml. More recently, Pope Benedict XVI has emphasized "the ethical implications" of climate change and other forms of environmental degradation. As the Pope has pointed out, such harms have consequences beyond "an immediate area . . . [and] always harm human coexistence, and thus betray human dignity." Letter of Pope Benedict XVI to the Ecumenical Patriarch of Constantinople, *supra*. Other religious leaders have expressed similar views.[9]

---

[8] *Amici* take no position in this brief on whether any persons other than the Plaintiff-Respondents should have standing to pursue claims based on climate change.

[9] *See, e.g.*, The Evangelical Climate Initiative, *Climate Change: An Evangelical Call to Action* 6 (Jan. 2006), *available at* http://preview.christiansandclimate.org/wp-content/uploads/2008/05/eci-calltoaction-booklet.pdf ("moral convictions demand our response to the climate change problem); Coalition on the Environment and Jewish Life (COEJL), *Climate Change Programs*, *available at* http://www.coejl.org/~coejlor/climatechange/index.php ("[a]ddressing climate change is a clear

Defendant-Petitioners and their *amici* essentially argue that this Court should, as a matter of prudence, wait for other branches of government to address climate change. They misunderstand the concept. The religious *amici*, in line with many other religious leaders, believe that, in these exigent circumstances, prudence imposes a moral duty to *act* – specifically, to act to prevent harm.

This theme has been emphasized by a broad spectrum of religious leaders. For example, Pope Benedict XVI has made it clear that, where "protection of the environment" is concerned, "[p]rudence does not mean failing to accept responsibilities and postponing decisions." Pope Benedict XVI, *Message for the Celebration of the World Day of Peace* (Jan. 1, 2008), *available at* http://www.vatican.va/holy_father/benedict_xvi/messages/peace/documents/hf_ben-xvi_mes_20071208_xli-world-day-peace_en.html (emphasis added). The Pope has also emphasized that it should be morally impossible to "remain indifferent before the problems associated with such realities as climate change." *Id.* Protestant and Jewish leaders have made similar points – emphasizing the latent

---

matter of justice among the various nations of the world and between our and future generations."); National Council of Churches of Christ, *Eco Justice Programs: Climate Change and Global Warming*, http://nccecojustice.org/climate/ ("Climate change is a threat to all people and all of creation."); National Council of Churches USA and Church World Service, *A Social Creed for the 21st Century* 2 (November 7, 2007), *available at* http://www.ncccusa.org/news/ga2007.socialcreed.html (pledging to be "stewards of God's good creation, by working for . . . binding covenants to reduce global warming and protect populations most affected.").

effects of current emissions on future generations, and the importance of acting now, even in the absence of certainty.[10]

What this means is that, as five leading clergymen have put it, moral principles require us "to act now to protect the common good." *Statement of Senior Religious Leaders on Global Climate Change and Poverty*, November 27, 2007, *available at* http://www.nrpe.org/pressmaterials/lettertomemofcongress.pdf.

Amici therefore support the lawsuit the Plaintiffs-Respondents have brought, and reject the notion advanced by Defendants-Petitioners that courts should refuse to undertake direct action to reduce emissions.

---

[10] *See Testimony of Mark X. Jacobs*, Director of COEJL, to the Subcomm. on Transportation of the Committee on Appropriations, U.S. House of Representatives (Feb. 10, 2000), *available at* http://coejl.org/news/20000210_cafetest.php (""The Bible instructs us to cautiously and prudently err in favor of protecting human life and health"; "we must take action to protect others from any object of potential danger," even when the danger "is not imminent or certain."); *A Statement of Concern on Climate Change and the Need for Clean Energy*, CREATION CARE (Winter 2002) (quoted in NRPE, *The Evangelical Perspectives on Climate and Air, available at* http://www.nrpe.org/issues/i_air/air_evangelical_a02.htm) (leading Evangelical scientists state that: "When it comes to environmental problems like global climate change that necessitate government action based on scientific discernment, we agree with the Precautionary Principle. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent the degradation of Christ's creation."); The Evangelical Climate Initiative, *Climate Change*, *supra* at 6 (noting that "the oceans only warm slowly, creating a lag in experiencing the consequences").

Specifically, the Petitioners/Defendants maintain that these lawsuits cannot be prosecuted, regardless of their merit. They say that the plaintiff States and land trusts have not suffered concrete and redressable injuries, and that courts should defer to other branches of government – even though these branches have so far failed to limit Defendants'-Petitioners' emissions of carbon dioxide from the sources at issue in this case. But these arguments are premised on a misunderstanding about the urgency of taking action against global warming. As the foregoing recitation of principles suggest, this misunderstanding is quite grave. To permit continued inaction is to invite catastrophe.

We emphatically urge this Court to err on the side of prudence, to err on the side of action and justice, and to allow this lawsuit to proceed.

CONCLUSION

This Court should affirm the decision below.

Ned Miltenberg
Counsel of Record
LAW OFFICES OF NED MILTENBERG
1707 N Street, N.W., Suite 200
Washington, D.C. 20036-2830
202/656-4490
NedMiltenberg@gmail.com

AMICUS CURIAE BRIEF

No. 10-174

Supreme Court, U.S.
FILED
FEB 7 - 2011
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY INC., *et al.*,
Petitioners,

v.

STATE OF CONNECTICUT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF *AMICI CURIAE* OF REPRESENTATIVE FRED UPTON, REPRESENTATIVE ED WHITFIELD, AND SENATOR JAMES M. INHOFE IN SUPPORT OF PETITIONERS

Of Counsel:

GEORGE Y. SUGIYAMA
COMMITTEE ON ENVIRONMENT & PUBLIC WORKS (MINORITY)
U.S. SENATE
456 Dirksen Senate Office Building
Washington, DC 20510
(202) 224-6176

MARY B. NEUMAYR
Counsel of Record
JAMES D. BARNETTE
COMMITTEE ON ENERGY AND COMMERCE
U.S. HOUSE OF REPRESENTATIVES
2125 Rayburn House Office Building
Washington, DC 20515
(202) 225-2927
mary.neumayr@mail.house.gov

Counsel for Amici Curiae

February 7, 2011

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

198 a (19)

TABLE OF CONTENTS

	Page
TABLES OF AUTHORITIES	ii
INTERESTS OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. CONGRESS AND THE EXECUTIVE BRANCH HAVE BEEN ACTIVELY ADDRESSING CLIMATE CHANGE MATTERS	3
A. Congressional Actions	4
B. Executive Branch Actions	6
II. THE COMPLEXITY OF CLIMATE CHANGE ISSUES CAN ONLY BE RESOLVED AS A MATTER OF PUBLIC POLICY	9
III. THE REGULATION OF CARBON DIOXIDE EMISSIONS AND THE DETERMINATION OF CLIMATE CHANGE POLICY CAN ONLY BE RESOLVED BY THE LEGISLATIVE AND EXECUTIVE BRANCHES	11
CONCLUSION	13

TABLE OF AUTHORITIES

CASES Page

Baker v. Carr, 369 U.S. 186 (1962).....3, 11, 12
Massachusetts v. EPA, 549 U.S. 497 (2007) 7
Vieth v. Jubelirer, 541 U.S. 267 (2004)..... 3, 11

CONSTITUTION

U.S. CONST., art. III 3, 13

STATUTES

American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115. 5
Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (1963)..... 4
Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 4
Clean Air Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 4
Clean Air Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 4
Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, tit. II, 121 Stat. 1844, 2128 4
Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492, 1519 4
Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 4
Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, 1067 4
Global Change Research Act of 1990, Pub. L. No. 101-606, 104 Stat. 3096 4

TABLE OF AUTHORITIES—Continued

Page

Global Climate Protection Act of 1987, Pub. L. No. 100-204, 101 Stat. 1407 (1987) 4, 8
National Climate Program Act, Pub. L. No. 95-367, 92 Stat. 601 (1978) 4

REGULATIONS

74 Fed. Reg. 56,260 (October 30, 2009) 7
74 Fed. Reg. 66,496 (December 15, 2009) 7
75 Fed. Reg. 17,004 (April 2, 2010) 7
75 Fed. Reg. 25,324 (May 7, 2010) 7
75 Fed. Reg. 31,514 (June 3, 2010) 7
75 Fed. Reg. 39,736 (July 12, 2010) 7
75 Fed. Reg. 74,458 (November 30, 2010) ... 7
75 Fed. Reg. 74,774 (December 1, 2010) 7
75 Fed. Reg. 75,060 (December 1, 2010) 7
75 Fed. Reg. 77,698 (December 13, 2010) 7
75 Fed. Reg. 82,246 (December 30, 2010) 7-8
75 Fed. Reg. 82,254 (December 30, 2010) 8
75 Fed. Reg. 82,430, and Proposed Rule, 75 Fed. Reg. 82,365 (December 30, 2010) 8
75 Fed. Reg. 82,536 (December 30, 2010) 8

OTHER AUTHORITIES

The American Clean Energy and Security Act of 2009, Report of the Committee on Energy and Commerce Together with Minority and Additional Views To Accompany H.R. 2454, Rept. 111-137, Part I, June 5, 2009, [*available at* http://democrats.energycommerce.house.gov/Press_111/20090609/hr2454_committeereport.pdf] 5-6, 11

TABLE OF AUTHORITIES—Continued

Page

Clean Energy Jobs and American Power Act, Report of the Committee on Environment and Public Works to Accompany S.1733 together with Additional and Minority Views, United States Senate, Rep. 111-121, February 2, 2010 [*available at* http://www.gpo.gov/fdsys/pkg/ CRPT-111srpt121/html/CRPT-111srpt121.htm] 6

Climate Change: Perspectives of Utility CEOS: Hearing Before the Subcommittee on Energy and Air Quality of the Committee on Energy and Commerce, House of Representatives, One Hundred Tenth Congress, First Session, Serial No. 110-22 (March 20, 2007) [*available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:36921.pdf] 11

Congressional Budget Office Report, *Federal Climate Change Programs: Funding History and Policy Issues* (March 2010) [*available at* http://www.cbo.gov/ftpdocs/112xx/doc11224/03-26-ClimateChange.pdf] 5

CRA International, *Impact on the Economy of the American Clean Energy and Security Act of 2009* (H.R. 2454) [*available at* http://www.crai.com/uploadedFiles/Publications/impact-on-the-economy-of-the-american-clean-energy-and-security-act-of-2009.pdf] 6

H.R. 2454, 111th Cong. (2009) 5

TABLE OF AUTHORITIES—Continued

Page

IPCC, *Climate Change 2007: The Physical Science Basis* (2007) 9, 10

Kyoto Protocol To the United Nations Framework Convention on Climate Change (Dec. 11, 1997) [*available at* http://unfccc.int/resource/docs/convkp/kpeng.pdf)] 8

Report on the Activity of the Committee on Energy and Commerce for the One Hundred Eleventh Congress, 2d Session, Report 111-706 [*available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_reports&docid=f:hr706.pdf] 10

S. Res. 98, 105th Cong. (1997) 8

United States Global Change Research Program, *Program Overview* [http://globalchange.gov/about/overview] 8

U.S. Senate Committee on Environment & Public Works, Hearings, 111th Congress [*available at* http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Home] .. 10

IN THE

Supreme Court of the United States

No. 10-174

AMERICAN ELECTRIC POWER COMPANY INC., *et al.*,
Petitioners,

v.

STATE OF CONNECTICUT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICI CURIAE* OF REPRESENTATIVE FRED UPTON, REPRESENTATIVE ED WHITFIELD, AND SENATOR JAMES M. INHOFE IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICI CURIAE* [1]

Representative Fred Upton is a Member of Congress from the State of Michigan. He is Chairman of the Committee on Energy and Commerce which has jurisdiction in the U.S. House of Repre-

[1] The parties have filed blanket consents to the filing of *amicus* briefs in support of either or neither party in this case. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

sentatives over the generation and marketing of power, national energy policy generally, the regulation of energy resources, and other matters.

Representative Ed Whitfield is a Member of Congress from the State of Kentucky. He is Chairman of the Committee on Energy and Commerce's Subcommittee on Energy and Power which has jurisdiction over national energy policy generally, energy regulation and utilization, utility issues, the Clean Air Act, and other matters.

Senator James M. Inhofe is a Member of Congress from the State of Oklahoma. He is Ranking Member of the Senate Committee on Environment and Public Works which has jurisdiction in the U.S. Senate over air pollution and environmental policy.

These Members of Congress have been actively involved in the legislative process relating to climate change policies and legislation. Each has strong institutional and policy interests in preserving Congress' plenary role in determining climate change policy for the nation.

SUMMARY OF ARGUMENT

The plaintiffs in this case request that a federal court establish carbon dioxide emissions standards for certain electric utilities based on federal common law nuisance claims. *Amici* submit this brief in support of Petitioners in order to address the issue of whether this case presents a non-justiciable political question. *Amici* do not address other issues raised by the parties in this case.

This case involves political and public policy matters that are being resolved by the Legislative and Executive branches of government. These public

policy determinations are necessarily within the purview of the Congress and the Executive branch, not the Judicial branch, because of the complexity and significance of the environmental and economic issues that they raise.

Amici respectfully submit that Article III courts are not equipped to make judgments about the appropriate emissions standards for utilities located throughout the country. Judicial establishment of such standards would violate decades of Supreme Court precedent and unconstitutionally interfere with Congressional and Executive branch efforts to address climate change-related matters.

ARGUMENT

I. CONGRESS AND THE EXECUTIVE BRANCH HAVE BEEN ACTIVELY ADDRESSING CLIMATE CHANGE MATTERS.

This Court has long recognized that there are certain judgments that are reserved for the political branches of government because they involve a "political question." *See Baker v. Carr*, 369 U.S. 186, 217 (1962); *see also Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004). This case presents such a question because it directly addresses exceedingly complex and controversial national and international climate change issues. These issues have been the subject of extensive legislative and regulatory activity by both the Congress and the Executive branch, and have been at the forefront of Congressional environmental debates for the past decade.

A. Congressional Actions.

Congress originally passed the Clean Air Act in 1963 and has been revisiting that statute ever since, including with the enactment of major amendments in 1970, 1977, and 1990.[2] In 2005, Congress passed legislation to amend the Clean Air Act to establish a renewable fuel program to reduce greenhouse gas emissions, and in 2007 Congress further amended the Act to revise these regulations.[3] Congress in 2007 also directed the Environmental Protection Agency (EPA) to require mandatory reporting of greenhouse gases for certain emission thresholds for all sectors of the U.S. economy.[4]

Congress has also passed statutes over the past three decades relating to understanding and identifying the potential long-term risks of climate change, whether from natural or manmade causes, and responses.[5] During the 110th and 111th Congresses,

---

[2] *See* Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (1963); Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676; Clean Air Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685, Clean Air Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399.

[3] Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, 1067; Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492, 1519.

[4] Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, tit. II, 121 Stat. 1844, 2128.

[5] National Climate Program Act, Pub. L. No. 95-367, 92 Stat. 601 (1978), amended by the Global Climate Protection Act of 1987, Pub. L. No. 100-204, 101 Stat. 1407 (1987), and the Global Change Research Act of 1990, Pub. L. No. 101-606, 104 Stat. 3096; *see also* the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776; Energy Policy Act of 2005, Title XVI ("Climate Change"), Pub. L. No. 109-58, 119 Stat. 594 (2005).

the U.S. House of Representatives went so far as to establish a "Select Committee on Energy Independence and Global Warming."

Congress has also appropriated tens of billions of dollars to federal agencies and departments to research and otherwise address climate change-related matters. From 1998 to 2008, total annual appropriations for federal agencies' work related to climate change ranged from $4.0 billion (1998) to $6.4 billion (2008). *See* Congressional Budget Office Report, *Federal Climate Change Programs: Funding History and Policy Issues* (March 2010) at p. 5 [*available at* http://www.cbo.gov/ftpdocs/112xx/doc11224/03-26-ClimateChange.pdf]. In 2009, climate change spending increased to $45 billion, including $37.5 billion appropriated as part of the American Recovery and Reinvestment Act. *Id.* at pp. 1-2; American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

Most recently, in 2009, the U.S. House of Representatives passed the "American Clean Energy and Security Act of 2009" which would have instituted a "cap-and-trade" program to reduce greenhouse gas emissions. H.R. 2454, 111th Cong. (2009). The House only narrowly passed the measure (219-212), and it was never considered by the Senate. In fact, cap-and-trade legislation was never considered in large measure because of the intense political opposition to the increased energy costs and job losses caused by the legislation's mandates. *See, e.g.*, The American Clean Energy and Security Act of 2009, Report of the Committee on Energy and Commerce Together with Minority and Additional Views To Accompany H.R. 2454, Rept. 111-137, Part I, June 5, 2009, at pp. 725-726, 732 [*available at* http://democrats.energy

commerce.house.gov/Press_111/20090609/hr2454_committeereport.pdf]; CRA International, *Impact on the Economy of the American Clean Energy and Security Act of 2009 (H.R. 2454)* [*available at* http://www.crai.com/uploadedFiles/Publications/impact-on-the-economy-of-the-american-clean-energy-and-security-act-of-2009.pdf].

Despite this opposition, the Senate Committee on Environment and Public Works reported the "Clean Energy Jobs and American Power Act" on November 5, 2009. Clean Energy Jobs and American Power Act, Report of the Committee on Environment and Public Works to Accompany S.1733 together with Additional and Minority Views, United States Senate, Rep. 111-121, February 2, 2010 [*available at* http://www.gpo.gov/fdsys/pkg/CRPT-111srpt121/html/CRPT-111srpt121.htm]. Neither H.R. 2454 nor S.1733, however, was put to a vote on the Senate floor, again because of political concerns over impacts on jobs and the economy. *Id.*, Additional Views of Senator Max Baucus (Montana), Senate Rep. 111-121, pp. 90-91.

A. Executive Branch Actions.

No one can seriously question that the Executive branch, acting through the EPA, the Department of State, and various other departments and agencies, has aggressively employed its various statutory authorities in acting on climate change. *Amici* believe strongly that many of these efforts, particularly over the last two years, may well exceed the authorities Congress has vested in the Executive, and are at a minimum extremely misguided. Those kinds of debates, however, firmly establish that the Legislative and Executive branches are aggressively resolving what United States policy on climate change should be.

In just the last two years, the Obama Administration has unleashed a torrent of greenhouse gas regulations designed to address climate change, basing its regulatory assault primarily on the authority of the Clean Air Act and this Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007). EPA's proposed and final regulations in this area will have an effect on virtually every aspect of the American economy. They include everything from greenhouse gas reporting rules[6] to unprecedented permitting requirements.[7] Because of the profound effects of these

---

[6] Mandatory Reporting of Greenhouse Gases; Final Rule, 74 Fed. Reg. 56,260 (October 30, 2009); Mandatory Reporting of Greenhouse Gases From Magnesium Production, Underground Coal Mines, Industrial Wastewater Treatment, and Industrial Waste Landfills, 75 Fed. Reg. 39,736 (July 12, 2010); Mandatory Reporting of Greenhouse Gases: Petroleum and Natural Gas Systems, 75 Fed. Reg. 74,458 (November 30, 2010); Mandatory Reporting of Greenhouse Gases: Additional Sources of Fluorinated GHGs, 75 Fed. Reg. 74,774 (December 1, 2010); Mandatory Reporting of Greenhouse Gases: Injection and Geologic Sequestration of Carbon Dioxide, 75 Fed. Reg. 75,060 (December 1, 2010).

[7] Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed Reg. 66,496 (December 15, 2009); Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (April 2, 2010); Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010); Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010); Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call, 75 Fed. Reg. 77,698 (December 13, 2010); Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration

regulations on the economy, Congress has been and will continue to be engaged in oversight of the EPA as it seeks to implement these regulations under the Clean Air Act.

This frenetic regulatory activity has been preceded by two decades of Congressionally authorized international climate change policy negotiations. *See* Global Climate Protection Act of 1987, 15 U.S.C. 2901. For example, in 1992 the United States became a signatory to the United Nations Framework Convention on Climate Change (UNFCCC). While the President did not submit and the Senate never ratified the Kyoto Protocol that resulted from UNFCCC negotiations (Kyoto Protocol To the United Nations Framework Convention on Climate Change (Dec. 11, 1997)) [*available at* http://unfccc.int/resource/docs/convkp/kpeng.pdf)],[8] the Executive branch under both

---

Program to Sources of Greenhouse Gas Emissions; Federal Implementation Plan, 75 Fed. Reg. 82,246 (December 30, 2010); Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Regarding Texas Prevention of Significant Deterioration Program Interim Final Rule, 75 Fed. Reg. 82,430, and Proposed Rule, 75 Fed. Reg. 82,365 (December 30, 2010); Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting—Sources in State Implementation Plans, 75 Fed. Reg. 82,536 (December 30, 2010); Action To Ensure Authority To Implement Title V Permitting Programs Under the Greenhouse Gas Tailoring Rule, 75 FR 82,254 (December 30, 2010).

[8] As reflected in a bipartisan resolution approved by a vote of 95-0, the Senate opposed the Kyoto Protocol because it excluded major developing countries such as China and India from emissions reduction requirements and because mandating unilateral reductions on carbon dioxide would pose the risk of inflicting serious harm to the United States economy. S. Res. 98, 105th Cong. (1997).

Republican and Democratic administrations has continued to participate in international climate change talks.

Pursuant to other Congressional directives, the Executive branch has undertaken a wide range of climate change research over the past two decades. The U.S. Global Change Research Program (USGCRP), formerly known as the U.S. Climate Change Science Program, coordinates and integrates federal research for *thirteen* federal departments and agencies, including the U.S. Departments of State, Energy, Interior, Agriculture and Transportation, EPA and other departments and agencies. United States Global Change Research Program, *Program Overview* [http://globalchange.gov/about/overview].

II. THE COMPLEXITY OF CLIMATE CHANGE ISSUES CAN ONLY BE RESOLVED AS A MATTER OF PUBLIC POLICY

Climate change issues are extraordinarily complex, both because of the climate science itself and because any proposed solutions to address climate change have enormous domestic, international, and economic implications.

The Intergovernmental Panel on Climate Change (IPCC) has stated "the complexity of the climate system and multiple interactions that determine its behavior impose limitations on our ability to understand fully the future course of Earth's global climate." *See* IPCC, *Climate Change 2007: The Physical Science Basis*, at p. 21 (2007). It has further stated that "[t]here is still an incomplete physical understanding of many components of the climate system and their role in climate change." *Id.*

Assumptions that future climate change can be traced to anthropogenic or manmade emissions raise extremely complex scientific questions given current scientific understanding. The IPCC's own definition of climate change underscores this point, noting that "*[c]limate change* in the IPCC usage refers to any change in climate over time, whether due to natural variability or as a result of human activity." *Id.* at p. 2, n. 1.

As difficult as questions relating to climate science are, calibrating an appropriate response to long-term climate change risks is equally complex. Extensive Congressional hearings have examined the broad range of economic issues associated with proposed "solutions," including their impact on energy prices, markets, household incomes, and American competitiveness, and on specific industries and regions of the country particularly dependent on fossil-fuels, including coal, for electricity generation. Both House[9] and Senate[10] hearings have delved into these

---

[9] Report on the Activity of the Committee on Energy and Commerce for the One Hundred Eleventh Congress, 2d Session, Report 111-706 at p. 94 [*available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_reports&docid=f:hr706.pdf]. For example, eleven hearings were held prior to passage of the cap-and-trade legislation, including hearings on "The Future of Coal Under Climate Legislation" (March 10, 2009), "Consumer Protection Provisions in Climate Legislation (March 12, 2009), "Competitiveness and Climate Policy: Avoiding Leakage of Jobs and Emissions" (March 18, 2009), "The American Clean Energy and Security Act of 2009" (April 21-24, 2009), and "Allowance Allocations Policies in Climate Legislation: Assisting Consumers, Investing in a Clean Energy Future, and Adapting to Climate Change" (June 9, 2009).

[10] *See* U.S. Senate Committee on Environment & Public Works, Hearings, 111th Congress [*available at* http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Home] listing eight hear-

matters. Indeed, one hearing focused directly on concerns about regulations affecting coal-fired generators of electricity, the very industry at issue in the present litigation.[11] House *amici* will be holding yet another hearing in the Energy and Commerce Committee soon after this brief is filed. These economic matters were thoroughly debated in the legislative process on the American Clean Energy and Security Act of 2009.[12]

III. THE REGULATION OF CARBON DIOXIDE EMISSIONS AND THE DETERMINATION OF CLIMATE CHANGE POLICY CAN ONLY BE RESOLVED BY THE LEGISLATIVE AND EXECUTIVE BRANCHES

The Supreme Court has long recognized that there are cases that raise political questions that should be reserved for the political branches of government. *See Baker,* 369 U.S. at 217; *Vieth,* 541 U.S. at 277. This Court has identified a number of tests for such cases, including whether the case would require courts to make "an initial policy determination of a

---

ings held from July through October 2009 relating to climate change and related legislation.

[11] Climate Change: Perspectives of Utility CEOS: Hearing Before the Subcommittee on Energy and Air Quality of the Committee on Energy and Commerce, House of Representatives, One Hundred Tenth Congress, First Session, Serial No. 110-22 (March 20, 2007) [*available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:36921.pdf].

[12] *See, e.g.* The American Clean Energy and Security Act of 2009, Report of the Committee on Energy and Commerce Together with Minority and Additional Views To Accompany H.R. 2454, Rept. 111-137, Part I, June 5, 2009 at pp. 725-726, 732.

kind clearly for nonjudicial discretion," as well as whether there is a lack of "judicially discoverable and manageable standards" for resolving the case. *Baker,* 369 U.S. at 217.

This case calls for determinations that are not appropriate for judicial discretion. The specific relief requested by the plaintiffs here is that federal courts find a federal common law nuisance cause of action for contributing to climate change, and establish carbon dioxide emissions standards for defendant utilities. Plaintiffs contend that the defendants could meet such emissions standards using various "options," including fuel switching, alternative sources of energy such as wind and solar power, and other measures affecting plant operations. Jt. App. 58, 119. These potential "options" however, assuming the courts were to grant the relief requested, would raise fundamental issues of cost and technological feasibility. They also have implications for the production, supply, transmission, reliability and cost of energy in the United States. As such, they raise public policy issues that necessarily should be determined by the Congress and the Executive branch precisely because they are so complex and controversial.

Further, in this case there are not judicially discoverable and manageable standards by which a court could institute any kind of coherent emissions regime. As discussed above, this case addresses matters which have been the subject of intense and ongoing scrutiny by the Congress and the Executive branch, and that involve complex issues with proposed solutions that have significant economic policy implications. If a federal court were to provide the relief requested in this case, it would have to address these issues, including issues relating to

technology, the impacts of carbon dioxide emissions standards on controls of criteria pollutants, the impacts on the price, supply and reliability on electricity generation, international implications and other matters. Moreover, if the Court were to grant the relief requested, Article III judges could not possibly oversee the inevitable flood of ensuing litigation.

The Legislative and Executive branches are doing their jobs in the way that the Constitution envisions. Indeed, *amici* have made the continuation of their activities on these extremely complex, highly charged policy questions a central priority in the 112th Congress. The Court should allow these legislative and Executive branch processes to continue without using the judicial process to resolve what are purely political questions.

CONCLUSION

For the reasons set forth above, the judgment of the Second Circuit Court of Appeals should be reversed.

Respectfully submitted,

Of Counsel:

GEORGE Y. SUGIYAMA
COMMITTEE ON
ENVIRONMENT & PUBLIC
WORKS (MINORITY)
U.S. SENATE
456 Dirksen Senate
Office Building
Washington, DC 20510
(202) 224-6176

MARY B. NEUMAYR
Counsel of Record
JAMES D. BARNETTE
COMMITTEE ON ENERGY
AND COMMERCE
U.S. HOUSE OF
REPRESENTATIVES
2125 Rayburn House
Office Building
Washington, DC 20515
(202) 225-2927
mary.neumayr@
mail.house.gov

Counsel for Amici Curiae

February 7, 2011

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
FEB 7 - 2011
OFFICE OF THE CLERK

No. 10-174

IN THE
Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY, INC., ET AL.,
Petitioners,

v.

STATE OF CONNECTICUT, ET AL.,
Respondents.

**On Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit**

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Daniel J. Popeo
Cory L. Andrews
Counsel of Record
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Ave.,NW
Washington, D.C. 20036
(202) 588-0302
candrews@wlf.org

Douglas M. Halsey
David P. Draigh
WHITE & CASE LLP
200 South Biscayne Blvd.,
Suite 4900
Miami, Florida 33131-2352
(305) 371-2700

WILSON-EPES PRINTING CO., INC – (202) 789-0096 – WASHINGTON, D C. 20002

41698 9 33

QUESTION PRESENTED

Whether States and private parties have standing to seek judicially fashioned caps on greenhouse gas emissions by five utilities for their alleged contribution to damage claimed to arise from global climate change, where there are billions of independent sources of greenhouse gas emissions, which persist in the atmosphere for centuries.

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 5

ARGUMENT 7

I. RESPONDENTS DEMAND THAT PETITIONERS BE HELD JOINTLY AND SEVERALLY LIABLE FOR GLOBAL WARMING, EVEN THOUGH PETITIONERS ALLEGEDLY EMIT ONLY 2.5 PERCENT OF ANNUAL WORLD-WIDE CARBON DIOXIDE EMISSIONS 7

II. THE APPEALS COURT ERRED IN HOLDING THAT RESPONDENTS HAVE STANDING TO ASSERT THEIR CLAIMS 10

A. The Appeals Court Identifies No Principle by Which Petitioners, Among All Global Emitters, Should Be Subject to Potential Liability for

Global Warming Without Respect to Causation 11

B. Contribution Principles Developed in Air and Water Pollution Cases and Under Various Statutes Are Inadequate to Determine Liability for Global Warming 12

C. Courts Have Consistently Articulated Principles for Restricting Liability in Pollution Cases Where, as Here, the Nexus Between Plaintiff and Defendant Is Too Remote 18

D. This Case, and Cases Like It, Present a New and Potentially Limitless Theory of Liability That Requires a New Doctrinal Framework, Just as This Court Has Developed in Response to Antitrust and RICO Claims 20

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

CASES

Alfred L. Snapp & Son, Inc. v. Puerto Rico,
458 U.S. 592 (1982) 10

Anza v. Ideal Steel Supply Corp.,
547 U.S. 451 (2006) 22

Ashley Creek Phosphate Co. v. Norton,
420 F.3d 934 (9th Cir. 2005) 19

Ass'n of Wash. Public Hosp. Dists. v. Philip Morris Inc.,
241 F.3d 696 (9th Cir. 2001) 22

Assoc. General Contractors of California, Inc. v. California State Council of Carpenters,
459 U.S. 519 (1983) 20, 21

Barbour v. Haley,
471 F.3d 1222 (11th Cir. 2006) 14

California v. General Motors Corp.,
No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) 16, 17

Camden Cnty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.,
123 F. Supp. 2d 245 (D.N.J. 2000) 23, 24

Canyon Cnty. v. Syngenta Seeds, Inc.,
519 F.3d 969 (9th Cir. 2008) 23

City of Cleveland v. Ameriquest Mortgage Secs., Inc.,
615 F.3d 496 (6th Cir. 2010) 24

Cox v. City of Dallas,
256 F.3d 281 (5th Cir. 2001) 13

Fla. Audubon Soc'y v. Bentsen,
94 F.3d 658 (D.C. Cir. 1996) 16

Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.,
95 F.3d 358 (5th Cir. 1996) 18

Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.,
204 F.3d 149 (4th Cir. 2000) 13

Friends for Ferrell Parkway, LLC v. Stasko,
282 F.3d 315 (4th Cir. 2002) 19

Hemi Group, LLC v. City of New York,
__ U.S. __, 130 S. Ct. 983 (2010) 22

Holmes v. Sec. Investor Prot. Corp.,
503 U.S. 258 (1992) 21, 22

Illinois v. Milwaukee,
599 F.2d 151 (7th Cir. 1979) 23

Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.,
191 F.3d 229 (2nd Cir. 1999) 22

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 10, 19

Massachusetts v. EPA,
549 U.S. 497 (2005) 1, 10, 11, 17

Nader v. Democratic Nat'l Committee,
555 F. Supp. 2d 137 (D.D.C. 2008) 14

Native Village of Kivalina v. ExxonMobil Corp.,
No. 09-17490 (9th Cir., July 7, 2010; dec. pending) 1

Natural Resources Defense Council, Inc. v. Watkins,
954 F.2d 974 (4th Cir. 1992) 13

Northwest Environmental Defense Center v. Owens Corning Corp.,
434 F. Supp. 2d 957 (D. Ore. 2006) 14

OKI Am., Inc. v. Microtech Int'l, Inc.,
872 F.2d 312 (9th Cir. 1989) (Kozinski, J., concurring) 16

Or. Laborers-Emp'rs Health & Welfare Trust Fund v. Philip Morris, Inc.,
185 F.3d 957 (9th Cir. 1999) 22

Pollack v. D.O.J.,
577 F.3d 736 (7th Cir. 2009) 20

Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc.,
913 F.2d 64 (3d Cir. 1990) 13, 14

Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., Inc., 73 F.3d 546 (5th Cir. 1996) 13, 19

Texas Independent Producers and Royalty Owners Ass'n v. EPA, 410 F.3d 964 (7th Cir. 2005) 18

Wyoming ex. rel. Crank v. United States, 539 F.3d 1236 (10th Cir. 2008) 10

STATUTES AND RULES

Supreme Court Rule 37.6 1

OTHER AUTHORITY

Laurence H. Tribe, Joshua D. Branson, & Tristan L. Duncan, *Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* (WLF Working Paper, January 2010) 2, 16

Peter L. Gray & J. Benjamin Winburn, *Climate Change Tort Suits: Hot or Cold?* (WLF Legal Backgrounder, June 13, 2008) 2

INTEREST OF *AMICUS CURIAE*

Founded in 1977, the Washington Legal Foundation (WLF) is a non-profit, public interest law and policy center based in Washington, D.C. with supporters in all fifty states.[1] WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. To that end, WLF regularly participates as an *amicus curiae* in this Court and lower federal and state courts in cases concerning environmental issues to address the harmful effect that frivolous litigation has on the business community.

In particular, WLF filed an *amicus* brief in *Massachusetts v. EPA*, 549 U.S. 497 (2005), arguing that Congress did not authorize the EPA, under the Clean Air Act, to regulate carbon dioxide emissions for climate-change purposes. Although the Supreme Court held otherwise, its decision—that the Clean Air Act in fact does authorize the EPA to regulate greenhouse gases—actually undermines the appeals court's holding in this case. WLF also filed an amicus brief in *Native Village of Kivalina v. ExxonMobil Corp.*, No. 09-17490 (9th Cir., July 7, 2010; dec. pending), demonstrating that global warming "liability" presents a nonjusticiable political question.

In addition, WLF's Legal Studies Division has published policy papers and conducted seminars

---

[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for either party authored any part of this brief, and that no person or entity, other than WLF and its counsel, provided financial support for the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged in the Court's docket.

critical of the use of common law public nuisance claims to address global warming. *See, e.g.*, Laurence H. Tribe, Joshua D. Branson, & Tristan L. Duncan, *Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* (WLF Working Paper, January 2010); Peter L. Gray & J. Benjamin Winburn, *Climate Change Tort Suits: Hot or Cold?* (WLF Legal Backgrounder, June 13, 2008).

WLF supports each of the arguments made by Petitioners in support of reversal, but writes separately to argue that allowing the injunctive relief sought by Respondents in this lawsuit would not be in the public interest. Granting the relief demanded here would set a precedent that would expose not only Petitioners but virtually all business enterprises to the prospect of limitless liability, and would threaten the viability of entire industrial sectors, even though those industrial sectors admittedly are only minor contributors to global greenhouse gas levels, their emissions of greenhouse gases are entirely lawful, and they undoubtedly provide services of great social utility. Under such circumstances, this lawsuit presents a nonjusticiable political question, the Respondents lack standing to bring their claims in this action, and this Court should reverse the decision of the Second Circuit Court of Appeals.

STATEMENT OF THE CASE

This is a common law action seeking to restrict the greenhouse gas emissions of *certain* enterprises as claimed relief for the effects of global warming,

notwithstanding existing federal legislation and regulation in this field and ongoing legislative and executive actions to address these issues.

Respondents in this case — eight States, three nonprofit land trusts, and a municipality — seek to hold Petitioners "jointly and severally liable for . . . global warming." Pet. App. 178a. Respondents claim that Petitioners emit carbon dioxide, which contributes to elevated atmospheric levels of greenhouse gases, which in turn contributes to climate change, which in turn contributes to a wide range of alleged future risks, including "increase[s] in . . . respiratory problems," "more droughts and floods," "wildfires," and "widespread disruption of ecosystems [and] reduce[d] biodiversity." *Id.* at 11a. Respondents describe climate change as a "public nuisance," purportedly actionable under federal common law, and demand an order "enjoining each of the Petitioners to . . . cap[] its emissions of carbon dioxide and . . . reduc[e] those emissions by a specified percentage each year for at least a decade." *Id.* at 178a. They note that several States have adopted legislative restrictions on emissions of carbon dioxide by facilities within their borders, and claim that, through federal judicial decree, they can force facilities nationwide to reduce their emissions.

The district court dismissed the claims as presenting non-justiciable political questions. *Id.* at 187a. It reasoned that, because climate change is a global phenomenon attributed to global greenhouse gas emissions, a court could not resolve the claims without first determining an acceptable global level of greenhouse gas emissions and then determining which particular sectors and individual industries

should be held responsible for reducing their emissions and by what amounts to achieve that acceptable global level. *Id.* at 183a-185a. These decisions, the district court found, necessarily involve a number of "policy determination[s]" of the type properly reserved for Congress, including "the implications of [emissions reductions] on the United States' ongoing negotiations with other nations concerning global climate change . . . [and] on the United States' energy sufficiency and thus its national security." *Id.* at 182a-184a. In light of this conclusion, the district court found it unnecessary to address whether the Respondents had standing or whether federal common law provided a valid basis for their claims. *Id.* at 180a n.6, 187a.

On appeal, the U.S. Court of Appeals for the Second Circuit reversed. *Id.* at 3a. Characterizing this case as an "ordinary tort suit," it held that courts could rely on the Restatement's "reasonableness" standard to adjudicate the claims and that, because the case involved only "six domestic coal-fired electricity plants," courts would not have to address the broader policy concerns identified by the district court. *Id.* at 26a, 34a, 119a. The panel further held that, in light of the interstate effects of carbon dioxide emissions on climate change, federal common law should supply the rule of decision. *Id.* at 88a. Finally, as to standing, the panel found that Respondents' bald allegation that Petitioners "contribute[d]" to climate change was adequate to satisfy constitutional standing. *Id.* at 67a-73a.

The Second Circuit denied petitions for rehearing or rehearing en banc. *Id.* at 188a-191a.

SUMMARY OF THE ARGUMENT

Respondents demand that Petitioners be held jointly and severally liable for "contributing to an ongoing public nuisance, global warming." J.A. 58-59. But Respondents freely concede that Petitioners are only five of literally countless worldwide contributors to global warming, and that Petitioners' contribution to global anthropengic carbon dioxide emissions in a single year is only approximately 2.5%. And that number does not account for the temporal phenomenon, which Respondents also concede, that "emissions persist in the atmosphere for several centuries, and thus have a lasting effect on climate." *Id.* at 81. Nor is there any allegation that Petitioners' emissions are unlawful or unpermitted. Indeed, the emissions about which Respondents complain are *lawful* emissions made by companies that provide energy services of great social utility, and Petitioners are "power companies" already subject to extensive regulation. Respondents further concede that emissions of greenhouse gases, whether by Petitioners or anyone else, merge into an undifferentiated mass in the atmosphere before causing any alleged harm. Nevertheless, Respondents make the purely conclusory allegation that Petitioners' emissions are the proximate cause of Respondents' alleged present and future global-warming injuries.

Under these circumstances, it was error for the Second Circuit Court of Appeals to rule that Respondents have standing to bring this lawsuit, because they have not alleged and cannot allege facts from which one could conclude that their injuries are fairly traceable to the Petitioners' conduct. To avoid

facing the bedrock standing requirement of causation, the Second Circuit adopts a strict-liability argument that Petitioners face responsibility for *all* of Respondents' alleged present and future harm merely because their lawful emissions "contribute," albeit unquantifiably, to global warming. The appeals court below takes the position that there is a "principled" basis for assessing liability against these Petitioners, but those "principles" are "contribution" principles borrowed from traditional public nuisance law principles, developed (and invariably applied) only where a strong geographic and temporal nexus exists among the area allegedly polluted, the alleged victims of that pollution, and the alleged polluters.

That is not *this* case, where Respondents admittedly seek relief from only a handful of alleged "contributors" to global warming, and where emissions of greenhouse gases from anywhere in the world concededly merge in the atmosphere – where they may linger for centuries – and may travel to, and may allegedly result in damage in, any other part of the world. Under Respondents' theory, therefore, a potentially unlimited number of plaintiffs exist globally – all of which would be able to sue in U.S. courts these same Petitioners or any other randomly chosen handful of emitters for any and all of their alleged harm. The Second Circuit fails to identify any principle that would permit such unbounded liability, untethered to actual fault, nor is there any such principle to be located in the nuisance cases on which the court relies. Indeed, faced with similar lawsuits that may lead to unlimited liability, courts – applying the same principles identified by the circuit court – have refused to find liability where, as here, the nexus among plaintiff, defendant, and pollution is

simply too remote.

ARGUMENT

I. RESPONDENTS DEMAND THAT PETITIONERS BE HELD JOINTLY AND SEVERALLY LIABLE FOR GLOBAL WARMING, EVEN THOUGH PETITIONERS ALLEGEDLY EMIT ONLY 2.5 PERCENT OF ANNUAL WORLD-WIDE CARBON DIOXIDE EMISSIONS

Respondents are eight states, three land trusts, and New York City. J.A. 56-57. They allege that global warming has injured, or may injure in the future, their property or the welfare of their residents, and they "seek[] an order requiring [Petitioners] to reduce their emissions of carbon dioxide, thereby abating their contribution to global warming, a public nuisance." *Id.* at 57.

Respondents seek that relief from only five Petitioners – five "electric power corporations" – alleging that they are "substantial contributors to elevated levels of carbon dioxide and global warming." *Id.* at 56-57, 61-67. But Respondents concede that the five Petitioners are only "*among* the largest [emitters of carbon dioxide] in the world," and only "major emitters" of carbon dioxide. *Id.* at 57, 84 (emphasis supplied).

Indeed, Respondents' own Complaints make clear that "other emitters," are legion, *id.* at 102, and those emitters are not before this Court. Respondents allege that Petitioners "together emit approximately 650 million tons of carbon dioxide each year," but

they also allege that that amount is only "one quarter of the U.S. electric power sector's carbon dioxide emissions," and only "ten percent of all anthropogenic carbon dioxide emissions in the United States." *Id.* at 84. Respondents allege that the entire U.S. electric power sector "constitute[s] . . . approximately ten percent of worldwide carbon dioxide emissions from human activities." *Id.* at 85. Accordingly, Respondents have alleged that Petitioners are responsible for emitting only 2.5 percent of annual worldwide carbon dioxide emissions.

Moreover, those allegations of Petitioners' contribution to carbon dioxide levels for a single year do not take into account a crucial temporal factor. As Respondents themselves concede, "[c]arbon dioxide emissions persist in the atmosphere for several centuries and thus have a lasting effect on climate," and "past and present emissions will remain in the atmosphere for many decades, or even centuries, into the future." *Id.* at 86, 135. Thus, on its face, the Complaints sustained below show that, given existing levels of carbon dioxide in the atmosphere, much of which may have been there for centuries, the impact on global greenhouse gas levels in a single year in the 21st century must be less than a simple percentage calculation for that one year.

On these bare allegations, Respondents sue just five companies that allegedly "contribute" to global warming, seeking an order "holding each of the [Petitioners] jointly and severally liable for contributing to an ongoing public nuisance, global warming." *Id.* at 58-59.

But the Complaints also allege that Petitioners emit greenhouse gases at diverse locations, and that

"[c]arbon dioxide emissions and global warming are inherently interstate in nature. [Petitioners'] emissions of carbon dioxide, from any state where their electric generation operations may be located, rapidly mix in the atmosphere and cause an increase in the atmospheric concentration of carbon dioxide worldwide." *Id.* at 104.

And Respondents' allegations that Petitioners *cause* global warming – or that they caused Respondents' alleged injuries or may cause any such injury in the future – are bald conclusions. For example, Respondents allege that Petitioners' "carbon dioxide emissions are a direct and proximate contributing cause of global warming and of the injuries and threatened injuries to the plaintiffs, their citizens and residents, and their environment, from global warming," *id.*, and that Petitioners "are substantial contributors to global warming and to the injuries and threatened injuries claimed herein." *Id.*

As shown below, those conclusory causation allegations are not sufficient to support the imposition of joint and several liability on this group of Petitioners, who make only a 2.5% alleged "contribution" to aggregate annual carbon dioxide emissions that, according to Respondents' own theory, is but one part of the asserted cause of global warming. These Petitioners were apparently targeted for litigation because they may, in Respondents' view, be amenable to the jurisdiction of the U.S. Courts, or because such a lawsuit against them is likely to generate significant attention from the public and the press, as well as from state legislatures and Congress.

II. THE APPEALS COURT ERRED IN HOLDING THAT RESPONDENTS HAVE STANDING TO ASSERT THEIR CLAIMS

It is well established that Article III standing requires a plaintiff to show (1) a concrete injury; (2) that the injury is "fairly traceable" to defendant's alleged actions; and (3) that the court can redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). And *Lujan* applies here notwithstanding that the Respondents are suing as *parens patriae*, as well as in their proprietary capacity.[2] The seminal cases articulating *parens patriae* standing that are cited in the Second Circuit's opinion – *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982), and its progeny – predate this Court's decision in *Lujan*. And the Second Circuit's opinion acknowledges that *Massachusetts v. EPA*, 549 U.S. 497, 520-26 (2007), "called into question" the "view that states' *parens patriae* standing sufficed for Article III standing." Pet. App. 50a. Indeed, the *Massachusetts* Court – even as it analyzed *parens patriae* standing and held that States were entitled to "special solicitude" in the standing inquiry – nevertheless performed a *Lujan* standing analysis of injury in fact, causation, and redressability. *See Massachusetts*, 549 U.S. at 520-26. As Chief Justice Roberts observed in dissent, "[r]elaxing Article III standing requirements because asserted injuries are pressed by a State . . . has no basis in our

---

[2] There is no question that *Lujan* applies to states suing in their proprietary capacity. *See Wyoming ex. rel. Crank v. United States*, 539 F.3d 1236, 1241 (10th Cir. 2008) (finding that Wyoming had standing in light of "the familiar three-pronged standing analysis").

jurisprudence . . . . Nor does the case law cited by the Court provide any support for the notion that Article III somehow implicitly treats public and private litigants differently . . . . Nothing about a State's ability to sue in [its *parens patriae*] capacity dilutes the bedrock requirement of showing injury, causation, and redressability to satisfy Article III." *Id.* at 536-38 (Roberts, C.J., dissenting).

A. The Appeals Court Identifies No Principle by Which Petitioners, Among All Global Emitters, Should Be Subject to Potential Liability for Global Warming Without Respect to Causation

As shown above, Respondents themselves allege that Petitioners are only some of the people and entities worldwide that emit greenhouse gases, and that they emit only approximately 2.5% of worldwide emissions of but one of the greenhouse gases (carbon dioxide) that are generated from human activity in a single year, emissions that "persist in the atmosphere for several centuries." J.A. 81, 84-85, 102.

Acknowledging that Petitioners' carbon dioxide emissions could not be more than a small part of the source of the harm that Respondents allege, the Second Circuit holds that it is sufficient that Petitioners "contribute" to the alleged nuisance. Pet. App. 68a – 73a. And the Second Circuit also states that "well-settled principles of tort and public nuisance law provide appropriate guidance to the district court in assessing [Respondents'] claims." Pet. App. 34a. It is correct, of course, that the district court must have "appropriate guidance" to adjudicate

Respondents' claims – which are based on the *lawful* emission of greenhouse gases – but the only principles to which the appeals court adverts are "principles of tort and public nuisance law." *Id.* at 34a -35a.

As shown below, however, traditional tort principles of nuisance law, developed in radically different contexts, fall far short of providing principled standards to determine liability for emission of greenhouse gases.

B. Contribution Principles Developed in Air and Water Pollution Cases and Under Various Statutes Are Inadequate to Determine Liability for Global Warming

The Second Circuit rejected Petitioners' arguments that the Respondents could not demonstrate *Lujan*'s causation requirement, holding that Respondents "sufficiently alleged that their injuries are 'fairly traceable' to the actions" of Petitioners whose "continued emissions of carbon dioxide contribute to global warming." *Id.* at 69a. And the appeals court further held that Petitioners' arguments "must be evaluated in accordance with the standard by which a common law public nuisance action imposes liability on contributors to an indivisible harm." *Id.*

But the Second Circuit's own authorities show that such a standard was developed in air and water pollution cases where a clear nexus existed linking the area affected by the pollution, the alleged polluters, and the plaintiffs' alleged injury. In particular, *because of that nexus*, the group of

plaintiffs – *and the group of potential defendants* – were finite and capable of determination.

Indeed, it is not difficult to identify a principled basis for assessing joint and several liability, on a "contribution" basis, where the plaintiffs' residential neighborhoods were adjacent to two illegal dumps, and where the "contributing" defendants were the owners of those dumps and the government agencies that should have been policing them. That is precisely the factual situation in *Cox v. City of Dallas*, 256 F.3d 281 (5th Cir. 2001), the first case the appeals court cites in support of the proposition that "contributors" are liable whether or not all other contributors to the same alleged harm are joined in a particular action. Pet. App. 69a.

And the same pattern appears in case after case cited by the Second Circuit. *See, e.g., Natural Resources Defense Council, Inc. v. Watkins*, 954 F.2d 974, 980 (4th Cir. 1992) (holding that plaintiffs may have standing to assert claim for water pollution in the Savannah River where the alleged contributor was a nuclear reactor located on the Savannah River); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., Inc.*, 73 F.3d 546, 555-58 (5th Cir. 1996) (finding standing where plaintiffs alleged that defendant, whose oil operations were located on Galveston Bay, contributed to the pollution of Galveston Bay); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 150 (4th Cir. 2000) (finding same where plaintiff, "who owns a lake only four miles downstream from Gaston Copper's facility," alleged that Gaston Copper contributed to the pollution of its lake); *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn*

Terminals Inc., 913 F.2d 64, 70-73 (3d Cir. 1990) (finding same where plaintiffs alleged that defendant operating on land adjacent to the Kill van Kull contributed to the pollution of the Kill van Kull).[3]

But that is not *this* case, where Petitioners are but five of innumerable worldwide emitters of greenhouse gases, and where greenhouse gas emissions, wherever they are made, "will remain in the atmosphere for many decades, or even centuries, into the future." J.A. 86. Indeed, the panel opinion observes that "[n]owhere in their complaints do [Respondents] ask the court to fashion a comprehensive and far-reaching solution to global climate change, a task that arguably falls within the purview of the political branches." Pet. App. 25a – 26a. Respondents do not make such a request because it would be impossible; the theory underlying Respondents' claims – that the Petitioners, because they emit greenhouse gases into the undifferentiated world concentration of greenhouse gases in the atmosphere, are liable for any harm caused *anywhere* by that global concentration of greenhouse gases – necessarily means that there are thousands of other plaintiffs just like them, all of whom could sue

---

[3] *Powell Duffryn* is also a case where, unlike here, the plaintiff alleged that the defendant had violated permits for the discharge of pollutants. *Id.* at 68 Inapposite for the same reason is another of the appeals court's cases, *Northwest Environmental Defense Center v. Owens Corning Corp.*, 434 F. Supp. 2d 957 (D. Ore. 2006). Equally inapposite factually are *Barbour v Haley*, 471 F.3d 1222 (11th Cir. 2006), where inmates were held to have standing to make claims based on inadequate counsel, and *Nader v. Democratic Nat'l Committee*, 555 F. Supp 2d 137 (D.D C. 2008), where a presidential candidate had standing to sue defendants for pursuing court actions that distracted and defeated his political aspirations.

Petitioners alleging the same or similar claims.

The panel's opinion sweeps such problems aside with the statement that "federal courts have successfully adjudicated complex common law public nuisance cases for over a century." Pet. App. 28a. But if this lawsuit is allowed to proceed under Respondents' theory of liability – based on common-law nuisance principles derived from the California gold rush, untethered to any principle of proximity or geographic nexus – the result is that thousands of plaintiffs could swamp the American court system with lawsuits against these same five Petitioners and/or others, even on the same claims. In short, Petitioners and countless other greenhouse-gas emitters who are amenable to U.S. jurisdiction could be sued in the American courts by, and may be liable to, virtually any person, place, or entity claiming damage due to global warming.

As Laurence Tribe has observed:

> Unlike traditional pollution cases, where discrete lines of causation can be drawn from individual polluters to their individual victims, climate change results only from the non-linear, collective impact of millions of fungible, climatically indistinguishable, and geographically dispersed emitters. Given this fact, granting a plaintiff relief from the coastline-changing or other adverse consequences of global climate change bears no genuine resemblance to identifying a responsible defendant . . . . To the contrary, worldwide climate change is a systemic phenomenon that is intractable to anything but a systemic political solution, one that the

> adversarial and insulated model of nuisance litigation is structurally incapable of providing.

Laurence H. Tribe, Joshua D. Branson, & Tristan L. Duncan, *Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine*, at 15 (WLF Working Paper, January 2010). The D.C. Circuit, rejecting an environmental claim under the National Environmental Policy Act ("NEPA") for lack of standing, observed that the "federal judiciary is not a back-seat Congress nor some sort of super-agency." *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 672 (D.C. Cir. 1996). And the Ninth Circuit has observed that the "eagerness of judges to expand the horizons of tort liability is symptomatic of a more insidious disease: the novel belief that any problem can be ameliorated if only a court gets involved." *OKI Am., Inc. v. Microtech Int'l, Inc.*, 872 F.2d 312, 316 (9th Cir. 1989) (Kozinski, J., concurring). That is particularly true where, as here, there is "the risk of exotic new causes of action and incalculable damages." *Id.* (citation omitted).

This lack of principled legal standards to determine liability was central to the recent decision in *California v. General Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), a similar global warming case in which the district court held that traditional nuisance cases

> do not provide the Court with [a] legal framework or applicable standards upon which to allocate fault or damages, if any, in this case. The Court is left without guidance in determining what is an unreasonable

> contribution to the sum of carbon dioxide in the Earth's atmosphere, or in determining who should bear the costs associated with the global climate change that admittedly result[s] from multiple sources around the globe.

Id., 2007 WL 2726871, at *15. That lack of principled guidance led the *General Motors* court to hold that the plaintiffs' claims presented a nonjusticiable political question. *Id.* at *16. For similar reasons, the district court below also held, correctly, that Respondents' claims present a nonjusticiable political question, because the "resolution of the issues presented here requires identification and balancing of economic, environmental, foreign policy, and national security interests," which "'uniquely demand [a] single-voiced statement of the Government's views.'" Pet. App. 187a.

Nor can an answer to those intractable problems of allocation be found in *Massachusetts v. EPA*, 549 U.S. 497 (2007), which was not a suit against the private sector for damages or injunctive relief but an attempt to compel the EPA to regulate greenhouse gas emissions. This Court's holding in that case – which discussed at length the national and international attempts to reach a legislative or diplomatic solution to the effects of global warming, *see Massachusetts*, 549 U.S. at 508-09 – in fact supports the proposition that the remedies for Respondents' alleged injuries should be devised at a legislative or diplomatic level, not through traditional models of tort liability. And is aware of no court's holding that, because this Court has determined that greenhouse gases fit within the definition of "air pollutant" under the Clean Air Act, their lawful

emission is nevertheless *per se* tortious, simply based on their theoretical and unquantifiable "contribution" to global warming when combined with the sum of other sources' contributions worldwide. In this case, Respondents are asking this Court to recognize a new cause of action – cloaked in the centuries-old garb of public nuisance doctrine – that would open the door to unlimited liability.

C. Courts Have Consistently Articulated Principles for Restricting Liability in Pollution Cases Where, as Here, the Nexus Between Plaintiff and Defendant Is Too Remote

It is precisely the specter of unlimited liability, unmoored by any principle that would determine liability in proportion to responsibility, that has led numerous courts, applying the same principles on which the Second Circuit relied, to *refuse* to allow cases to go forward where there is insufficient proximity or geographic nexus. Indeed, as the Fifth Circuit has held, "[a]t some point, . . . we can no longer assume that an injury is fairly traceable to a defendant's conduct solely on the basis of the observation that water runs downstream." *Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.*, 95 F.3d 358, 359, 362 (5th Cir. 1996) (holding that plaintiff lacked standing to sue because the alleged harm to a lake "18 miles and three tributaries from the source of unlawful water pollution" was not fairly traceable to the defendant's alleged water discharges). In *Texas Independent Producers and Royalty Owners Ass'n v. EPA*, 410 F.3d 964, 973 (7th Cir. 2005), the Seventh Circuit held that a plaintiff

lacked standing because the alleged environmental injury was not fairly traceable to the alleged pollution, where, as here, the plaintiff made only conclusory allegations of a connection between alleged sources of pollution and particular locations. And even very authority relied on by the court below acknowledged that "some 'waterways' covered by the [Clean Water Act] may be so large that plaintiffs should rightfully demonstrate a more specific geographic or other causative nexus in order to satisfy the 'fairly traceable' element of standing." *Cedar Point Oil Co.*, 73 F.3d at 558 n.24.

Courts have reached similar results in cases under NEPA, requiring a "geographic nexus" between a plaintiff and the alleged source of the environmental impact. *See, e.g., Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 938 (9th Cir. 2005) (finding no standing where the plaintiff, in Utah, "lacks any judicially recognizable nexus to the area that would be affected by mining [in Idaho], . . . approximately 250 miles away"). The Fourth Circuit reached a similar result in another NEPA action, holding that there was no standing because the alleged injury was not fairly traceable to the challenged conduct, in part because – as is the case here, where Petitioners are admittedly just a handful of U.S. and worldwide emitters of greenhouse gases – "'one or more of the essential elements of standing depends on the unfettered choices made by independent actors not before the courts.'" *Friends for Ferrell Parkway, LLC v. Stasko*, 282 F.3d 315, 324 (4th Cir. 2002) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992)).

Indeed, the *Ashley Creek* court recognized – when

it observed that "[u]nder [plaintiff's] theory of liability, any owner of a phosphate mine, whether located in Alaska, Utah, or Florida, would have standing to challenge the EIS. Why stop there?" *Ashley Creek*, 420 F.3d at 939 – there must be some principled basis on which to assign blame for an injury, which means that a theory of liability without any limiting principle, such as the traditional contribution principles applied to Petitioners here, cannot be adopted. The Seventh Circuit made a similar observation in another case presenting a novel theory of liability, *Pollack v. D.O.J.*, 577 F.3d 736, 742 (7th Cir. 2009), in which the plaintiff alleged that he was injured by lead pollution because he drinks water from Lake Michigan, adjacent to which the United States operates a gun range that deposits lead bullets in the lake. The court, however, held that the plaintiff lacked standing, noting that, "[t]aken to its extreme, [plaintiff's] argument would permit any person living on or near Lake Michigan to assert that he has been harmed by the bullets, because the lead could potentially have been carried to every part of the lake." *Id.*

D. This Case, and Cases Like It, Present a New and Potentially Limitless Theory of Liability That Requires a New Doctrinal Framework, Just as This Court Has Done in Response to Antitrust and RICO Claims

In at least two similar areas of the law – antitrust and RICO – where courts were facing a theory of potentially limitless liability, this Court has developed limitation-on-liability doctrines that are

both principled and equitable. For example, in *Assoc. General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 521-23 (1983), an antitrust action seeking $25 million in damages where there were 250 members of the defendant association and 1,000 unidentified co-conspirators, this Court observed that a "literal reading of the [Clayton Act] is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation." *Id.* at 529.

But this Court concluded that "Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages." *Id.* at 535. Accordingly, in cases where the alleged injury was "indirect," this Court turns to traditional "judge-made rules circumscrib[ing] the availability of damages recoveries in both tort and contract litigation – doctrines such as foreseeability and proximate cause," because, "despite the broad wording of [the statute], there is a point beyond which the wrongdoer should not be held liable." *Id.* at 532, 534 (citation and internal quotation marks omitted). And those limitations were particularly appropriate where, as here, "the chain of causation . . . contains several somewhat vaguely defined links," *id.* at 540, and where the claim presented "the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other." *Id.* at 543-44. Accordingly, this Court held that the plaintiffs were without standing to bring their "massive and complex damages litigation." *Id.* at 545.

This Court has applied a similar analysis to

RICO claims, where an "expansive reading" of the statute could lead to similarly unbounded liability. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 266 (1992). Thus, the Court turned to "'proximate cause' to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts," which simply "recogni[zes that] claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries." *Id.* at 268-69 (citations omitted). *See also Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 460 (2006) ("The element of proximate causation recognized in *Holmes* is meant to prevent these types of intricate, uncertain inquiries from overrunning RICO litigation."); *Hemi Group, LLC v. City of New York*, __ U.S. __, 130 S. Ct. 983, 989 (2010) (same).

Following this Court's lead, other courts, including the Second Circuit, have applied these principles to both antitrust and RICO claims. Indeed, to determine whether an alleged injury is "too remote" for RICO or antitrust liability, courts evaluate (1) whether there are more direct victims of the alleged harm; "(2) whether it will be difficult to ascertain the amount of the plaintiff's damages attributable to defendant's wrongful conduct; and (3) whether the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries." *Or. Laborers-Emp'rs Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957, 963 (9th Cir. 1999); *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 235 (2nd Cir. 1999) (holding that "to plead a direct injury is a key element of establishing proximate cause.

Thus, the other traditional rules requiring that defendant's acts were a substantial cause of the injury, and that plaintiffs' injury was reasonably foreseeable, are *additional elements*, not substitutes for alleging (and ultimately showing) a direct injury") (emphasis supplied). *See also Ass'n of Wash. Public Hosp. Dists. v. Philip Morris Inc.*, 241 F.3d 696, 701 (9th Cir. 2001) ("A direct relationship between the injury and the alleged wrongdoing has been one of the 'central elements' of the proximate causation determination.") (citing *Or. Laborers*, 185 F.3d at 963); *Canyon Cnty. v. Syngenta Seeds, Inc.*, 519 F.3d 969, 983 (9th Cir. 2008) (finding no RICO standing where the "causal chain would also be difficult to ascertain because there are numerous alternative causes that might be the actual source or sources of [plaintiffs] alleged harm").

There is no dispute that proximate cause is a required element of Respondents' nuisance claims. *See, e.g., Illinois v. Milwaukee*, 599 F.2d 151, 165 (7th Cir. 1979) (detailing elements under federal nuisance law); J.A. 104-110 (reciting elements under federal and state nuisance law). And those nuisance claims – which are as broad as or broader than any antitrust or RICO claim this Court has ever addressed, and which threaten equally drastic liability even though the alleged causation is, at best, tenuous and uncertain – cry out for the application of principles like the standing principles developed for application to RICO and antitrust actions.

Indeed, a federal court recently addressing a similarly novel claim – a county's action against firearm manufacturers alleging that the manufacturers' negligent marketing policy had

created a public nuisance – expressly looked to *Associated General Contractors* and its principle of antitrust standing to determine whether a principled basis existed for allowing the county's lawsuit to proceed against the manufacturers. *See Camden Cnty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 123 F. Supp. 2d 245, 258 (D.N.J. 2000). The *Camden County* court determined that, as here, "there is a strong likelihood that a trial would involve exceedingly complex apportionment of liability," and held that the plaintiff had no standing to assert its nuisance claim. *Id.* at 264. *See also City of Cleveland v. Ameriquest Mortgage Secs., Inc.*, 615 F.3d 496, 498-99, 502-503 (6th Cir. 2010) (applying *Holmes* standard of proximate causation and affirming grant of motion to dismiss, where plaintiff claimed that defendant financial institutions, as participants in the "subprime lending market," created a "public nuisance," namely the "foreclosure crisis in Cleveland that devastated its neighborhoods and economy").

CONCLUSION

For all of the foregoing reasons, as well as all of the reasons advanced by Petitioners, WLF urges this Court to reverse the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

Daniel J. Popeo
Cory L. Andrews
Counsel of Record
WASHINGTON LEGAL FOUNDATION
2009 Mass. Ave.,NW
Washington, D.C. 20036
(202) 588-0302
candrews@wlf.org

Douglas M. Halsey
David P. Draigh
WHITE & CASE LLP
200 South Biscayne Blvd.,
Suite 4900
Miami, FL 33131-2352
(305) 371-2700

February 7, 2011